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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

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

Defendants.

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

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO DEFENDANTS HUI FENG AND LAW OFFICES OF FENG & ASSOCIATES, P.C.'S MOTION FOR JUDGMENT ON THE PLEADINGS

Date: July 26, 2016
Time: 10:00 a.m.
Ctrm: 2
Judge: Hon. Consuelo B. Marshall

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I. INTRODUCTION

Defendants Hui Feng and Law Offices of Feng & Associates, P.C. have moved this Court for judgment on the pleadings, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, seeking a determination that, as a matter of law, the application of the broker registration provisions of Section 15(a)(1) of the Exchange Act are unconstitutionally vague as applied to immigration attorneys involved in the United States Citizenship and Immigration Services ("USCIS") EB-5 Program. Defendants also argue that the SEC's fraud claims fail to satisfy Rule 9(b)'s particularity requirement.

Attempting to graft a *mens rea* and knowledge of the law requirement onto Section 15(a)(1) where there is none, Defendants attempt to portray themselves as part of a large, undifferentiated class of unwitting immigration attorneys, none of whom had any reasonable opportunity to know their receipt of transaction-based compensation from EB-5 promoters might trigger the application of the broker registration provisions. Defendants assume that all EB-5 projects are the same, all immigration attorneys accept commissions from EB-5 promoters, none of those attorneys are registered brokers and, at least until relatively recent SEC enforcement actions, none of them could have anticipated their conduct might violate Section 15(a)(1).

Defendants cast their net too wide. Defendants' vagueness challenge must be confined to the facts of this case, not to the hypothetical practices of other immigration attorneys. On a Rule 12(c) motion, the factual allegations of the complaint must be accepted as true and construed in the light most favorable to the non-moving party. The complaint clearly establishes that the EB-5 investments were "securities" – the offering materials stated as much. From that starting point, it is a short step to the broker registration provisions, particularly where, as here, Feng regularly participated in the securities offerings of multiple EB-5 promoters, facilitated the placement of those securities with over 100 investors, regularly received transaction-based compensation from the issuers that dwarfed the legal fees he charged his clients, handled investors' funds, and used various forms of advertisement and solicitation to

identify potential investors. In virtually all respects, he wore the hat of an EB-5 securities salesman – exactly the type of person the broker registration provisions were designed to capture. If that were not enough, the complaint alleges that as a result of concerns expressed by some EB-5 promoters about the broker registration requirements, Defendants designated various foreign-located friends and relatives to act as nominees for their receipt of commissions for the specific purpose of attempting to avoid the broker registration requirements. In light of all of these facts, as well as the long line of cases putting Defendants on notice as to the type of conduct that may result in someone being considered a "broker," Defendants' void-for-vagueness challenge must be rejected.

Defendants' Rule 9(b) challenge fares no better. In the securities fraud context, a complaint satisfies Rule 9(b) if it identifies the circumstances of the alleged fraud so that the defendant can prepare an adequate answer. Defendants not only answered, they also unsuccessfully moved to transfer venue, in part, for the convenience of the witnesses in this case – the same witnesses they now contend cannot be discerned from the complaint. Defendants also submitted a joint Rule 26(f) report, served the SEC with their initial disclosures, responded to the SEC's discovery requests and propounded their own discovery requests. In light of that lengthy six-month procedural history, as well as the detailed allegations in the complaint regarding the "who" "what" "when" and "where" of the alleged fraud, it is clear that the complaint satisfies Rule 9(b).

II. STATEMENT OF FACTS

A. The SEC's Complaint

The SEC's complaint, filed on December 7, 2015, alleges that Feng and his law firm engaged in a scheme to defraud their immigration law clients by failing to disclose their receipt of transaction-based compensation from the EB-5 promoters whose securities offerings they recommended to their clients, in violation of Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. §240.10b-5. Dkt. No. 1, ¶ 4. In

accepting such transaction-based compensation, Feng and his law firm also acted as unregistered brokers, in violation of Section 15(a)(1) of the Exchange Act. 15 U.S.C. § 78o(a)(1). *Id.* The complaint also alleges that Defendants defrauded certain EB-5 promoters by using overseas nominees to receive their commissions, while falsely representing to the promoters that those foreign-based persons were responsible for finding investors, rather than Feng. *Id.* ¶ 7.

1. The EB-5 Immigrant Investor Program

The EB-5 Immigrant Investor Program was created by Congress in 1992 to stimulate the U.S. economy with capital investment from foreign investors. *Id.*, ¶ 5, 12. Foreign investors who invest capital in a domestic "commercial enterprise" may petition the USCIS (called an "I-526 Petition") and receive conditional permanent residency status. *Id.*, ¶¶ 5, 15. The USCIS defines a "commercial enterprise" as any for-profit activity formed for the ongoing conduct of lawful business. *Id.*, ¶ 15. To qualify for the program, the foreign investor must invest $1 million ($500,000 if in a rural area or area of high unemployment) and thereby create at least ten full-time jobs. *Id.*, ¶ 16. The program requires a showing that the investor "has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk." *Id.*, ¶¶ 5, 17.

2. Defendants' EB-5 Immigration Law Business

In 2010, Feng began promoting EB-5 investments to actual and potential immigration law clients, many of whom were located in China. *Id.*, ¶ 22. Feng primarily worked out his U.S.-based office. *Id.*, ¶ 29. In 2012, Feng & Assocs. began using a Chinese language website, which was written, reviewed and approved by Feng, and hosted in the U.S. through 2013, to advertise the firm's EB-5 services and promote certain EB-5 investments. *Id.*, ¶ 23.

Feng drafted and signed client retainer agreements which required the clients to pay a legal fee of between $10,000 and $15,000 for legal work associated with their EB-5 petitions. *Id.* The retainer agreements touted Feng's purported objectivity in

conscientiously studying, investigating and recommending only the most reliable EB-5 investment projects. *Id*. The retainer agreements did not disclose Defendants' receipt of commissions in connection with the clients' EB-5 investments. *Id*., ¶ 28. *See* SEC Request for Judicial Notice ("SEC RJN"), Ex. 1.

3. The EB-5 Offerings Were "Securities"

Defendants recommended to their clients that they invest in offerings associated with at least five different EB-5 promoters. *Id.*, ¶¶ 30, 31. The offerings required Defendants' clients to invest a capital contribution of either $1 million or $500,000, and pay a separate administrative or management fee, which was used to pay other fees and expenses incurred by the promoters, including the payment of commissions. *Id*., ¶ 32. The promoters pooled the investors' capital contributions, but not the administrative fees, for the purpose of making loans to fund U.S.-based construction projects. *Id.*, ¶ 33. At the end of the loan term, the foreign investors expected to receive a return of their capital contributions. *Id.*, ¶ 34.

Defendants circulated private placement memoranda and other offering documents to their clients for the offerings they recommended. *Id*., ¶ 40. Those documents described the terms of the investment and how the profits would be allocated to the investors. *Id.*, ¶¶41-44. The offering documents also stated that the investments were being offered pursuant to exemptions from the registration requirements of the federal securities laws. *Id*., ¶¶ 47-48. *See* SEC RJN, Ex. 2. Depending on the stage of the construction project, Defendants' clients received Schedule K-1s that reflected the interest (*i.e.*, profits) they had earned on their capital contributions. *Id.*, ¶ 46.

4. Defendants Acted as Brokers

As early as 2010, Feng began recommending to his clients offerings associated with certain promoters as investments, in exchange for commissions on successful sales. *Id.*, ¶ 49. In approximately 2013, Feng began intensifying his efforts to sell EB-5 investments and began providing a list of recommended EB-5 offerings through the Feng

& Assocs. website in an effort to obtain more EB-5 investor clients. *Id*., ¶¶ 49, 50.

Defendants' commissions were governed by written referral fee agreements with the promoters. *Id.*, ¶ 61. *See* SEC RJN, Ex. 3. The agreements were executed by Feng on behalf of Feng & Assocs., or by Feng's nominees, which made payment of the commissions contingent on (1) an investor making the required capital contribution and (2) the USCIS approving the investor's I-526 Petition. *Id.* Defendants or their nominees received commission payments, ranging from $15,000 to $70,000 per transaction from at least five promoters for referring their clients to those promoters' EB-5 offerings. *Id.*, ¶¶ 57, 58, 59.

Feng facilitated his clients' investments in the EB-5 offerings by obtaining offering documents from the promoters, printing out the signature pages of the documents, preparing instructions explaining what the clients should sign, and transmitting the signed offering documents to the promoters. *Id.*, ¶ 51. Feng interfaced directly with the promoters and, in most instances, all of the communications and negotiations between the clients and the promoters were channeled through Feng. *Id*., ¶¶ 52, 53. Feng or Feng & Assocs. also received EB-5 investment funds from clients that they transmitted to one of the promoters. *Id*., ¶ 54. Feng described himself to the promoters as "marketing" or "promoting" the EB-5 investments and on at least two occasions requested allocations of spots in EB-5 offerings that he could sell to his clients. *Id*., ¶¶ 55, 56. This required Feng to fill the allocated spots with investors by a certain date or give the spots up. Feng ultimately sold one of those offerings to seven of his clients. *Id.*, ¶ 56.

In total, Feng and his nominees have represented over 100 investors for EB-5 investments with at least five promoters, and have received at least $1,168,000 in commissions. *Id.*, ¶ 90. In addition, Defendants directly, or through their nominees, are contractually entitled to receive an additional $3,100,000 in commissions upon the approval of pending I-526 Petitions. *Id*., ¶ 92.

5. Defendants Engaged in Fraudulent and Deceptive Conduct

As attorneys, Defendants owed fiduciary, legal and ethical duties to their clients to disclose their receipt of commissions from the EB-5 promoters and the conflicts of interest such compensation created. *Id.*, ¶¶ 6, 64. The complaint alleges that Defendants failed to disclose that information for the purpose of maximizing their own monetary compensation and to avoid having to negotiate with their clients to share or refund the commissions to them. *Id.*, ¶¶ 65, 66, 71-74. The complaint also alleges that Defendants' receipt of commissions, had it been disclosed, would have material information to his clients' investment decisions, as it would have affected their assessment of Feng's claimed objectivity and due diligence in recommending certain promoters over others, their belief and understanding that Feng was free of undisclosed conflicts of interest, and their understanding of the overall terms, conditions, risks and costs associated with their EB-5 investments. Dkt. No. 1, ¶¶ 68-70.

The complaint also alleges that in or about May 2013, Feng began using nominees to execute referral fee agreements and receive commissions on his behalf because some of the promoters informed Feng that they would not wire commissions to U.S.-based bank accounts as part of an apparent effort to avoid running afoul of the broker registration requirements. *Id.*, ¶ 76-79. In communications with some promoters, Feng represented that these "nominees" or "surrogates" were the ones soliciting and referring investors to the promoters, when, in fact, it was Feng or his employees. *Id.*, ¶¶ 78-80, 83-85. To further that deception, Feng formed ABCL, a Hong Kong entity for the purpose of receiving referral fee payments through a Hong Kong bank account that he controlled. *Id.*, ¶ 86. Feng had his relatives execute referral fee agreements with some of the promoters, on behalf of ABCL, even though the relatives had no role with ABCL. *Id.*, ¶¶ 87, 88. The complaint also alleges how Defendants' representations and omissions would have been material to the promoters' decision to pay commissions to Defendants' nominees, had they known the true state of affairs. *Id.*, ¶ 81.

B. Defendants' Answer

Although Defendants' answer takes issue with the SEC's position that the EB-5 investments were securities and that Defendants acted as brokers in marketing those securities, they do not dispute the key underlying factual allegations in the SEC's complaint. For example, on the issue of whether the EB-5 investments were securities, Defendants agree that the EB-5 program requires applicants to put their capital at risk by investing in a commercial enterprise for the purpose of generating a return. Dkt. No. 9, ¶¶ 12-17. Defendants further admit that a "majority" of their clients invested in regional center investment vehicles, and acknowledge that those investments were typically offered as limited partnership interests or limited liability companies units, which are managed by a person or entity other than the foreign investor, who acts as a general partner or managing member of the investment vehicle. *Id*., ¶¶ 20, 21. Defendants further concede that while their clients "primary motive" or "main purpose" may have been to obtain a green card, it was not their only motivation or purpose; indeed, as Defendants admit, USCIS requires that the investor "has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk." *Id*., ¶¶ 17, 40, 45, 44, 50, 55; *see also* SEC RJN, Ex. 4.

Defendants also do not dispute that the promoters pooled the investors' capital contributions for the purpose of making loans to U.S.-based commercial projects, and that at the end of the loan term the investors expected to receive a return of their capital contributions. *Id*., ¶ 33, 34. Defendants concede that they provided "immigration project documents" *i.e.,* private placement memoranda, to their clients, which explained the terms of the investment and the expected rates of return. *Id*., ¶¶ 40, 44. Defendants also admit that some of their clients received Schedule K-1s that reflected the interest they had earned on their capital contributions. *Id.*, ¶¶ 46. Defendants also concede that the offering documents stated the investments were being offered pursuant to exemptions from the registration requirements of the federal securities laws. *Id*., ¶ 47.

With respect to their broker activities, Defendants admit that starting in 2010 Feng & Assocs. began using a Chinese language website, hosted in the U.S. through 2013, and written or reviewed and approved by Feng, to advertise the firm's immigration services and to promote certain EB-5 investments. *Id.*, ¶¶ 23, 24.

Defendants also admit they facilitated their clients' investments by providing them with "administrative assistance in helping them with paper work," they "interfaced directly" with the regional centers regarding their clients' investments, and they used their own bank accounts to help clients transfer funds to the regional centers. *Id.*, ¶¶ 51-54. Defendants also admit they entered into fee agreements with the regional centers, and received "contingency fees," *i.e.*, commissions, from the promoters when their clients' I-526 applications were approved by the USCIS. *Id.*, ¶ 57.

With respect to the complaint's allegations that Defendants defrauded their clients by failing to disclose their receipt of commissions from the promoters, Defendants admit that Feng drafted and signed the retainer agreements with their clients, and that those agreements did not disclose the "contingency fee" *i.e.*, commission, that Defendants would receive from the EB-5 promoters when their clients' immigration applications were approved. *Id.*, ¶ 28. Feng also admits that he was primarily responsible for communicating with his clients. *Id.*, ¶ 29.

Finally, Defendants do not challenge the allegation that in May 2013 some promoters expressed concerns that payment of commissions to Defendants' U.S.-based bank accounts may trigger the broker registration requirements. As Defendants admit, "in or about May 2013, some regional centers told [Feng] they could not wire contingency fees to U.S.-based bank accounts." *Id.*, ¶ 76. In response to the promoters' concerns, Feng admits that he "provided some relatives' names and bank accounts to enter agreements with the regional centers and help the regional centers wire those contingency fees to overseas accounts." *Id.*, ¶ 77.

C. Other Recent Motion and Discovery Practice

On February 22, 2016, Defendants moved to transfer venue to the Eastern

District of New York, pursuant to 28 U.S.C. § 1404(a). Dkt. No. 13. In his motion, Feng argued that venue in that district would be more convenient to him, as well as to the witnesses in this case. As for himself, Feng admitted that his law office has just five employees and that he is the "main" attorney for his "small law office." *Id.*, p. 6; *see also* Dkt. No. 13-1, ¶ 10. With respect to the convenience of the witnesses, Feng acknowledged that he knows which regional centers he worked with over the past five years and where they are located. *Id.*, p. 9, *see also* Dkt. No. 13-1, ¶¶ 9, 17-18. Feng also acknowledged that he knows the identity and location of each of his EB-5 clients. *Id.*, *see also* Dkt. No. 13-1, ¶ 12. His venue motion also displays a clear understanding of the SEC's claims and the principal legal and factual issues in dispute. For example, Feng admits he did not disclose his contingency fees from promoters in his retainer agreements with his clients, and that he asked his overseas relatives to sign business contracts with some regional centers for receiving contingency fee payments on behalf of his overseas offices. *Id.*, p. 2. He also acknowledges that he signed agreements with regional centers "on behalf of his law office," and that he personally signed all of his retainer agreements with his clients. *Id.*, p. 4; *see also* Dkt. No. 13-1, ¶ 9.

Defendants' have also submitted a joint Rule 26(f) report (Dkt. No. 36), served the SEC with their initial disclosures, responded to the SEC's discovery requests, and have propounded their own discovery requests. SEC RJN, Exs. 5-10.

III. ARGUMENT

A. Standard of Review Under Fed. R. Civ. P. 12(c)

Nowhere in their motion do Defendants discuss the applicable standard of review under Rule 12(c), which is fatal to their motion. "Judgment on the pleadings is properly granted when there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). Unlike a Rule 12(b)(6) motion, a Rule 12(c) motion implicates the pleadings as a whole, and not merely the complaint. *Gross v. Housing Authority of Law Vegas*, No. 2:11-CV-1602 JCM (CWH), 2014 U.S. Dist. LEXIS 72605, *3 (D.

Nev. May 27, 2014). In analyzing such a motion, "the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 986 F.2d 1542, 1550 (9th Cir. 1990). A court may also consider evidence on which the complaint necessarily relies if the complaint refers to the document, the document is central to the plaintiff's claim, and no party questions the authenticity of the document. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). A judgment on the pleadings is warranted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Deveraturda v. Globe Aviation Sec. Servs.*, 454 F.3d 1043, 1046 (9th Cir. 2006) (internal citations and quotation marks omitted); *accord Baja Ins. Servs. v. Shanze Enters.*, No. 2:14-CV-02423-KJM-AC, 2016 U.S. Dist. LEXIS 43994, *6 (E.D. Cal. Mar. 31, 2016); *kSolo, Inc. v. Catona*, No. CV 07-5213-CAS (AGRx), 2008 U.S. Dist. LEXIS 95107, *14 (C.D. Cal. Nov. 10, 2008).

B. The Exchange Act's Definition of a Broker Is Not Vague

Defendants argue that the Exchange Act's definition of the word "broker" is vague as applied to immigration attorneys involved in the EB-5 Program. Mot. at 9-20. Specifically, Defendants contend that, prior to the SEC's relatively recent enforcement actions in the EB-5 context, they lacked sufficient notice that EB-5 investments could be considered "securities" or that their conduct in receiving transaction-based compensation from promoters could trigger the broker registration requirements. Mot. at 16. Needless to say, Defendants fail to cite to a single case holding that the term "broker" is unconstitutionally vague in any context, as there are none.

"A statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes…" *United States v. Doremus*, 888 F.2d 630, 634 (9th Cir. 1989). Vagueness challenges to statutes that do not involve First Amendment freedoms must be examined in light of the facts of the

case at hand. *United States v. Mazurie*, 419 U.S. 544, 550 (1975). When faced with an "as applied" challenge, courts engage in a two-part inquiry: whether the statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited, and whether the law provides explicit standards for those who apply it. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The degree of vagueness that the Constitution tolerates depends on the nature of the enactment. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). "In the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). In addition, less strict vagueness analysis is appropriate to economic regulation since "the regulated entity may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Hoffman Estates*, 455 U.S. at 498. Greater tolerance is also allowed for enactments with civil rather than criminal penalties. *Id*., *accord SEC v Gemstar-TV Guide Intern., Inc.*, 401 F.3d 1031, 1048 (9th Cir. 2005). Courts must also bear in mind that Congress is "condemned to the use of words" in drafting statutes, and that it is unreasonable to expect "mathematical certainty from our language. *Grayned*, 408 U.S. at 110. "A court may not invalidate application of a statute under the void-for-vagueness doctrine simply because there is some degree of ambiguity in the provisions of the statute," *United States v. Ortiz*, 738 F. Supp. 1394, 1397 (S.D. Fla. 1990), or "because the parties interpret it differently." *United States v. Triumph Capital Group, Inc*., 260 F. Supp. 2d 470, 475 (D. Conn. 2003).

Section 3(a)(4)(A) of the Exchange Act generally defines a "broker" as any person "engaged in the business of effecting transactions in securities for the accounts of others." 15 U.S.C. § 78c(a)(4)(A). The definition of broker "should be construed broadly and … exemptions from registration requirements that flow from [Section 3(a)(4)] should be 'narrowly drawn in order to promote both investor protection and the integrity of the brokerage community.'" *In the Matter of Frederick W. Wall*, Exchange

Act Release No. 52467, 2005 SEC LEXIS 2380, *8 (Sept. 19. 2005) (Comm. Op.) (quoting *Persons Deemed Not to Be Brokers*, Exchange Act Release, No. 22172, 33 SEC Docket 685, 686 (June 27, 1985)). Moreover, the SEC is not required to prove *scienter* when alleging a violation of Section 15(a)(1). *SEC v. Interlink Data Network*, No. 93 3073 R, 1993 U.S. Dist. LEXIS 20163, *46 (C.D. Cal. Nov. 15, 1993).

The Exchange Act does not define what constitutes "being engaged in the business," but courts have held that "activities that indicate a person may be a 'broker' are: (1) solicitation of investors to purchase securities, (2) involvement in negotiations between the issuer and the investor, and (3) receipt of transaction-related compensation." *SEC v. Earthly Minerals Solutions, Inc*., No. 2:07-CV-1057 JCM (LRL), 2011 U.S. Dist. LEXIS 36767, *8 (D. Nev. Mar. 23, 2011). Courts have emphasized that "[t]ransaction-based compensation, or commissions are one of the hallmarks of being a broker-dealer," because such compensation "represents a potential incentive for abusive sales practices that registration is intended to regulate and prevent. *Id*.; *accord Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, No. 8:04CV586, 2006 U.S. Dist. LEXIS 68959, *20 (D. Neb. Sept. 12, 2006). Other factors for consideration include the regularity of participation in securities transactions, handling of customer funds, the extent to which advertisement and investor solicitation were used, and making recommendations on investments. *See, e.g., SEC v. Collyard*, No. 11-CV-3656 (JNE/JJK), 2015 U.S. Dist. LEXIS 165011, *8-15 (D. Minn. Dec. 9, 2015) (collecting cases). No one factor is dispositive, nor is the SEC required to establish the existence of all of the various factors cited in the case law. *Id.*, at *14.

a. Defendants Were on Notice that the Offerings Were Securities

Although they do not seek a judgment on the pleadings on the issue of whether the EB-5 offerings were securities, Defendants contend that they had no reason to believe that they were, and, hence, had no reason to believe they were acting as

brokers in receiving transaction-based compensation from the issuers in exchange for recommending the offerings to their clients. Mot. at 14. Defendants' position strains credulity. The offering documents stated the investments were being made pursuant to exemptions from the registration requirements pursuant Section 4(2) of the Securities Act and by Regulation S and Regulation D promulgated thereunder. *See, e.g.*, SEC RJN 2; *see also* Dkt. No. 15-6, Ex. 5. Other offering documents stated that the units are "restricted securities" under the Securities Act and may not be sold in the absence of an effective registration statement. *See, e.g.*, SEC RJN, Ex. 11; *see also* Dkt. No. 15-12, Ex. 10; 15-13, Ex. 11; *see generally* Dkt. No. 1, ¶¶ 47, 48 (alleging offering documents stated they were securities, exempt from registration requirements). Clearly, those disclosures put Defendants on notice that the offerings were securities.[1]

Relying on *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975), however, Defendants argue that the offerings were not securities because the "primary purpose" of their clients in making the investment was to obtain a visa. In *Forman*, the Court found that shares or stock in a *non-profit* housing cooperative were not investment contracts because the investors were *solely* interested in acquiring housing

[1] Apart from those explicit disclosures, the complaint also alleges all of the underlying facts necessary to establish that the offerings were "investment contracts" and, hence, securities under the *Howey* test. *See SEC v. W. J. Howey Co.*, 328 U.S. 293, 298-99 (1946) ("an investment contract for the purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party")). *See, e.g.*, Dkt. No. 1, ¶¶ 30-48. In answering paragraph 20 of the complaint, and in an apparent effort to suggest that the EB-5 offerings fail to meet the *Howey* test, Defendants selectively quote from the USCIS' EB-5 Adjudications Policy Memorandum, which provides, in part, that investors are required to be "engaged in the management of the new commercial enterprise, either through the exercise of day-to-day control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment." Dkt. No.9, ¶ 35. Defendants, however, omit the pertinent language of that memorandum that pertains to partnerships, such as are at issue here: "[i]f the petitioner is a limited partner and the limited partnership agreement provides the immigrant investor with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the immigrant investor will be considered sufficiently engaged in the management of the new commercial enterprise." 8 C.F.R. § 204.6(j)(5)(i)-(iii). *See also* SEC RJN, Ex. 4, at IV.B.6.

rather than making a profit. *Id.* at 482. In contrast, the very purpose of the EB-5 program is to "attract individuals from other countries who are willing to put their capital at risk, *with the hope of a return on their investment*…." *See* SEC RJN, Ex. 4, at IV.A.2 (emphasis added)). Regulations associated with the EB-5 Program specifically require a showing that "the petitioner has placed the required amount of capital *at risk for the purpose of generating a return on the capital placed at risk*." 8 C.F.R. § 204.6(j)(2) (emphasis added). Thus, the fact that Feng's clients may have had dual motivations does not take the investments outside the scope of the definition of an "investment contract." *See, e.g., SEC v. Goldfield Deep Mines Co.of Nevada*, 758 F.2d 459, 463-64 (9th Cir. 1985) (holding that tax benefits as an inducement to a transaction did not take it outside the definition of an investment contract); *Stowell v. Ted S. Finkel Servs., Inc.*, 489 F. Supp. 1209, 1221 (S.D. Fla. 1980) (same). Furthermore, the purported subjective intent of Feng's clients is not relevant where the marketing materials and offering documents describe the offerings as investments with profit potential. *See, e.g., Warfield v. Alaniz*, 569 F.3d 1015, 1021 (9th Cir. 2009) ("while the subjective intent of the purchasers may have some bearing on the issue of whether they entered into investment contracts, we must focus our inquiry on the what the purchasers were offered or promised"); *Teague v. Bakker*, 35 F.3d 978, 988-89 (4th Cir. 1994) (timeshare offerings were securities where promoters' offering materials emphasized potential for profit); *Crocker Nat'l Bank v. Rockwell International Corp.*, No. C-81-4099 SC, 1982 U.S. Dist. LEXIS 16557, *10 (N.D. Cal. Nov. 19, 1992) (subjective intent of the parties is not relevant; rather, the key test is whether the capital was invested subject to the efforts of others).[2]

[2] In challenging that the EB-5 investments were securities, Defendants suggest 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." Mot. at 5. Defendants support that assertion by quoting from another immigration attorney who claimed that his clients' attitude was "if I lose my money, I lose my money, but I don't want to lose my green card." *Id., see also* Defendants' Request for Judicial Notice, Ex. V. Defendants' assertion that investors are perfectly happy to lose their $500,000 or $1 million

b. Defendants Were on Notice They Were Acting as Brokers

Defendants also contend that they lacked notice that their conduct might trigger the broker registration requirements, at least until relatively recent SEC enforcement actions in the EB-5 context. Mot. at 14. [3] The lack of prior SEC enforcement actions in the EB-5 context provides no safe haven for Defendants' conduct. The SEC, as an administrative agency, may properly proceed by adjudication, rather than by further rule making, to apply a rule to a particular factual situation, whether or not such situations have previously been held to be within the rule. *SEC v. Chenery Corp*., 332 U.S. 194, 202-03 (1947) (agency may proceed through rulemaking or adjudication); *see also Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."); *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 294 (1974) (agency "is not precluded from announcing new principles in an adjudicative proceeding."); *United States v. Kinzler*, 55 F.3d 70, 74 (2d Cir. 1995) ("The claimed

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investments is directly contradicted by the complaint, which specifically states that at the end of the loan term the investors expected to receive a return of their capital contributions (Dkt. No. 1, ¶ 34), a point that Defendants' concede in their answer. Dkt. No. 9,¶ 34. Furthermore, the Court may not properly take judicial notice of the out-or-court statements of another immigration attorney for the truth of the matter asserted. *See Spy Optic, Inc. v. Alibaba.com, Inc.*, No. CV 15-00659-BRO (JCx), 2015 U.S. Dist. LEXIS 158600, *9 (C.D. Cal. Sept. 28, 2015).

[3] Defendants assert that the SEC issued no guidance on whether EB-5 investments could be securities, or whether sellers must be registered as brokers, until it released an investor alert on October 1, 2013. Mot. at 1; Def. RNJ, Ex. G. In fact, the SEC had brought a number of enforcement actions in the EB-5 context prior to that date. *See, e.g., SEC v. Chicago Convention Center*, No. 13CV982 (N.D. Ill. Feb. 6, 2013); *SEC v. Ramirez*, No. 7:13-cv-00531 (S.D. Tex. Sept.30, 2013); SEC RJN Exs. 12, 13. The SEC had also issued guidance, long ago, on the type of conduct that would indicate whether someone is acting as a broker. *See, e.g., Persons Deemed Not to Be Brokers*, Exchange Act Release No. 22172, 50 Fed. Reg. 27940 (1985) "[i]nsofar as [attorneys] … are retained by an issuer specifically for the purpose of selling securities to the public and receive transaction based compensation, these persons are engaging in the business of effecting transactions securities for the accounts of others" …. and "should register as broker-dealers."); *Guide to Broker-Dealer Registration* https://www.sec.gov/divisions/marketreg/bdguide.htm (April 2008) .

novelty of this prosecution does not help [defendant's vagueness challenge], for it is immaterial that 'there has been no litigated fact pattern precisely in point…'") (citation omitted); *SEC v. Baker*, No. A-12-CA-285-SS, 2012 U.S. Dist. LEXIS 16174, *7 (W.D. Tex. Nov. 13, 2012) ("However, a sword does not cease to be a sword, even though it may languish in the scabbard, and likewise, federal agencies have discretion in when and how to carry out regulatory enforcement actions"); *In the Matter of the Application of G.K. Scott & Co.*, 51 S.E.C. 961, 966 n. 21 (1994) ("A regulatory authority's failure to take early action neither operates as an estoppel against later action nor cures a violation."); *cf.* 15 U.S.C. § 78z ("No action or failure to act by the Commission … in the administration of this chapter shall be construed to mean that the particular authority has in any way passed upon the merits of, or given approval to, any security or any transaction or transactions therein ….").[4]

Furthermore, Section 15(a)(1) was passed decades ago, and has been enforced thousands of times in the interim. As a result, there is a rich body of case law delineating the factors courts and regulators analyze in determining whether someone is a broker. *See. e.g.*, *SEC v. Hansen*, No 83 Civ. 3692, 1984 U.S. Dist. LEXIS 17835, *26 (S.D.N.Y. Apr. 6, 1984) (identifying six common factors); *see also J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 368 (5th Cir. 1998) (rejecting void-for-vagueness challenge, noting "plethora of opinions" over past 25 years interpreting the words "serious literary, artistic, scientific or political value"). The SEC has also made clear that the statute may apply to the conduct of attorneys. *See, e.g.*, *SEC v. Benger*, 697 F. Supp. 2d 932, 945 (N.D. Ill. 2010) (denying defendant-attorney's 12(b)(6) motion to dismiss Section 15(a)(1) claim, where attorney received transaction-

[4] Defendants argue that for the first 23 years of the EB-5 program's existence, the SEC took no interest in it. Mot, at 1. But, as Defendants acknowledge in their answer, "in or about 2013, Chinese interest in EB-5 immigrant visas surged." Dkt. No. 9, ¶ 49; *see also* SEC RJN, Ex. 16 (USCIS report for the period 1991-2013, showing significant increase in I-526 applications beginning in 2008). The number of regional centers also increased dramatically during that period of time, from 11 at the end of 2007 to 838 in 2016. *Id.*, Ex. 17.

based compensation from various issuers of Regulation S securities); *Brumberg, Mackey & Wall, P.L.C.*, SEC No-Action Letter, 2010 SEC No-Act. LEXIS 406 (May 17, 2010) (denying no-action request under Section 15(a)(1) to law firm that expected to receive transaction-based compensation in connection with introducing other persons to entity offering investments in equity or debt instruments). Although "ignorance of the law will not excuse any person, either civilly or criminally" (*Jerman v. Carlisle, McNellie, Rini, Kramer, & Ulrich, LPA*, 559 U.S. 573, 581 (2010)), of all people, Feng, as a practicing attorney, should have been aware of these precedents and that his receipt of transaction-based compensation was one of the hallmarks of being a broker.[5]

In addition, as alleged in the complaint, and not disputed by Feng in his answer, several promotors refused to send his commissions to U.S.-based bank accounts for fear of violating Section 15(a)(1). *See* Dkt. No. 1, ¶ 76; Dkt. No. 9, ¶ 76. That, in and of itself, should have provided Feng with all the notice he could have possibly required. Moreover, on a Rule 12(c) motion for judgment on the pleadings, the question is whether the SEC is able to present any set of facts consistent with the allegations in the complaint. *Deveraturda.*, 454 F.3d at 1046 In that regard, the promoters' fee agreements stated the offerings were being made under Regulation S, Regulation D and Section 4(2) of the Securities Act, and required the finder to represent he was not required to maintain any licenses or registrations under federal or state securities laws. Dkt. No. 15-9, Ex. 7.[6] Feng could have also availed himself of

[5] John Roth, an immigration attorney and a registered broker since 2010, who represented Feng during the SEC's investigation, commented in a March 2012 blog that "you won't find a securities attorney in the entire U.S. who'd say that a firm 1) soliciting EB-5 clients in the U.S., and 2) providing investment advice about which center to select, and 3) accepting finder's fees from the issuer (regional centers) may do so lawfully without first obtaining a series 7 or Series 79 license and becoming registered as a broker-dealer, or a representative of a broker-dealer firm." SEC RJN, Ex. 18.

[6] At trial, the SEC expects to present portions of Feng's investigative testimony, in which he stated that in 2013 he searched the Internet for regulations on the broker-dealer issue and looked at SEC "no-action" letters but claimed he could not find anything "directly relevant." SEC RJN, Ex. 19, pp. 317-18. Feng further testified that he did not consult any securities attorneys at the time because his firm's earnings from the EB-5 program

the SEC's No-Action letter process, where he could have sought, at no cost to himself, the advice of the agency responsible for enforcing the broker registration provisions. *See* https://www.sec.gov/answers/noaction.htm. Feng could also have called or e-mailed the SEC's Division of Trading and Markets, Office of Interpretation and Guidance, if he had questions (e-mail tradingandmarkets@sec.gov).

The fact that Feng had ample warning that his conduct violated the broker registration provisions, and could have sought clarification of those provisions by contacting the SEC, dooms his vagueness challenge. *Hoffman Estates*, 455 U.S. at 498 (economic regulation subject to less strict vagueness test because regulated entities may have ability to clarify meaning of regulation by its own inquiry, or by resort to administrative process); *accord SEC v. Gemstar-TV Guide Int'l, Inc.*, 401 F.3d at 1048; *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1236 (9th Cir. 1994). "Nor is it unfair to require one who deliberately goes perilously close to an area of proscribed conduct shall take the risk the he may cross the line." *United States v. Kay*, 513 F.3d 432, 444 (5th Cir. 2007) (quoting *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952)); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) (one "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.") (citations and quotation marks omitted).

Defendants attempt to rely on *SEC v. M&A West, Inc.*, No. C-01-3376 VRW, 2005 U.S. Dist. LEXIS 22452 (N.D. Cal. 2005) and *SEC v. Kramer*, 778 F. Supp. 2d

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were not sufficient to engage a securities attorney for professional advice (id.), even though "he had heard about this industry talking about looking at this practice, whether it's legal or not legal, whether we need a broker-dealer registration and stuff…." Id., pp. 69-70. During his investigative testimony, Feng's counsel stated that awareness of the application of the federal securities laws in the EB-5 context started in late 2009 based on an article by Jennifer Moseley, Angelo Paparelli, Ladd Mark and Carolyn Lee. *Id.*, p. 404. That article states, in part, "a third party who receives any transaction-based compensation in connection with a securities transaction will also be deemed a broker-dealer." *See* SEC RJN, Ex. 20 (Moseley, et al, *The Relevance of U.S. Securities Laws to Immigrant Investors, EB-5 Regional Centers and Their Advisors*).

1320 (M.D. Fla. 2011) to suggest that they were merely acting as "finders" and not brokers. Neither case addressed a vague-as-applied challenge to Section 15(a)(1), and both involved entirely distinct factual scenarios and different procedural postures. In *M&A West*, the district court granted summary judgment on the SEC's Section 15(a)(1) claim to a defendant who brought public shell companies and private operating companies together to effect reverse mergers in four discrete transactions. *Kramer* involved a *post-trial* motion for judgment on partial findings. Like the defendant in *M&A West*, Kramer was involved in identifying and bringing together potential merger and acquisition candidates. Kramer received transaction-based compensation in just two instances: one, where he arranged a meeting between a registered broker and the issuer and received a payment from the issuer for the success on the introduction; and two, where he received some of the issuer's shares from a business partner, in exchange for recommending the issuer's shares to some of his intimate friends and family members. *Kramer*, 778 F. Supp. 2d at 1338-40. On those *post-trial* facts, the court found Kramer was not "engaged in the business of effecting transactions in securities for accounts of others." *Id*., at 1341; *see also*, *id*., at 1344 & n. 48 (emphasizing "regularity of participation" as most important factor in determining whether someone is a "broker).

In contrast, Feng's conduct went far beyond making a few isolated introductions. He participated in over 100 securities transactions, used various forms of advertisement and solicitation to identify potential investors, handled investors' funds, and received transaction-based compensation from the issuers.[7] In short, Section 15(a)(1) is not vague as applied to his conduct.

[7] In any event, there is no "finder exemption" in the Exchange Act. *In re Havanich*, Initial Decision Rel. No. 935, 2016 SEC LEXIS 4, * 22 (Jan. 4, 2016) ("the concept of a finder exempt from the Exchange Act's registration requirement does not exist in any decision of the Commission, the Supreme Court or any federal court of appeal.").

C. The SEC's Fraud Claims Satisfy Fed. R. Civ. P. 9(b)

Rule 9(b) requires a plaintiff to state with particularity the circumstances constituting fraud or mistake. While fraud must be pled with particularity, the allegations must be as short, plain and concise as is reasonable under the circumstances. Fed. R. Civ. P. 8(a); *Wenger v. Lumisys, Inc.*, 2 F. Supp. 2d 1231, 1239 (N.D. Cal. 1998) ("[t]he heightened pleading standard of Rule 9(b) is not an invitation to disregard the requirement of simplicity, directness and clarity of Rule Fed. R. Civ. P. 8.") (citing *McHenry v. Renne*, 84 F. 3d 1172, 1178 (9th Cir. 1996)). "In a securities fraud action, a pleading is sufficient under Rule 9(b) if it identifies the circumstances of the alleged fraud so that the defendant can prepare an adequate answer." *Fecht v. Price Co.*, 70 F.3d 1078, 1082 (9th Cir. 1995) (quoting *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994)). "Additionally, while some cases hold that a plaintiff must identify the "who, what, when, where and how" of the alleged fraud, these cases do not articulate a rigid checklist." *Dreamstone Entm't v. Maysalward Inc.*, No. 2:14-cv-02063-CAS(SSx), 2014 U.S. Dist. LEXIS 116977, *8-9 (C.D. Cal. June 11, 2014) (citing *U.S. ex. rel Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009) ("the time, place, contends and identity standard is not a straightjacket for Rule 9(b)."). "Rather, the rule is context specific and flexible…." *Id.*

1. Defendants Have Answered the Complaint

Rule 9(b) serves no purpose where, as here, a defendant has already demonstrated that he is capable of answering the claims, providing initial disclosures, participating in the formulation of a discovery plan, and litigating a change of venue motion based, in large part, on the convenience of witnesses – the same witnesses that Defendants now complain are not adequately identified in the complaint. For this reason alone, Defendants' Rule 9(b) challenge should be rejected. *See, e.g., Unified Container, LLC v. Mazuma Capital Corp.*, 280 F.R.D. 632, 636 (D. Utah. 2012) (denying Rule 9(b) motion where defendant had answered and provided initial disclosures); *Constitution Bank v. Dimarco*, 155 B.R. 913, 919 (E.D. Pa. 1993) (fact that defendants were able to

answer the complaint is element to be considered in ruling on defendant's specificity argument); *Nicholas v. Green*, No. L89010017 CA, 1989 U.S. Dist. LEXIS 16986, * 18 (W.D. Mich. Nov. 9, 1989) (defendant's answer demonstrates he had adequate notice of claims against him); *cf. Brooks v. Caswell*, No. 3:14-cv-01232-AC, 2016 U.S. Dist. LEXIS 26832, *14 (D. Or. Mar. 2, 2016) (denying Rule 12(e) motion for more definite statement where defendant had answered).

2. Feng's Victims Are Adequately Identified

In any event, Feng's particularity arguments are meritless. Feng contends that the complaint fails to identify by name each of his clients to whom he failed to disclose his receipt of commissions from the EB-5 promoters, or the name of each of the promoters he deceived. Mot. at 21. That argument fails for several reasons. First, the particularity requirement is relaxed where, as here, the information at issue is peculiarly within the defendant's knowledge. *See, e.g., Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993); *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir 1987), *overruled on other grounds by Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990); *Haddock v. Countrywide Bank, N.A.*, No. CV 14-6452 PSG (FFMx), 2015 U.S. Dist. LEXIS 146291, * 15 (C.D. Cal. Oct. 27, 2015); *Dreamstone Entm't v. Maysalward Inc.*, 2014 U.S. Dist. LEXIS 116977, *10; *SEC v. Druffner*, 353 F. Supp. 2d 141, 149 (D. Mass. 2005); *SEC v. Blackwell*, 292 F. Supp. 2d 673, 686 (S.D. Ohio 2003). Feng admits that he knows the identity and location of each of his EB-5 clients and which ones he failed to disclose his receipt of commissions to. Dkt. Nos. 13, p. 9; 13-1, ¶¶ 9, 17-18. Nor does he dispute that conduct. In his answer Feng concedes that his retainer agreements with his clients did not disclose his receipt of commissions from the promoters. Dkt. No. 9, ¶ 28. He also appears to acknowledge that he had a duty to disclose his financial conflicts of interest to his clients, but suggests that duty should be resolved under New York state law, as opposed to federal

securities law. *Id*., ¶ 64.[8] In any event, Feng knows which clients he defrauded, and there is no requirement for the SEC to publicly name each of his victims in its complaint.

Similarly, Feng knows which regional centers we worked with, as he identified the location of some them in his venue motion. Dkt. No. 13-1, ¶ 17. The complaint also identifies that two of the promoters are located in the Central District of California—one in El Segundo and one in Irvine. Dkt. No. 1, ¶ 31. In addition, in answering the complaint, Defendants readily admitted that "some regional centers told him they could not wire contingency fees to U.S. based bank accounts," while "[a]nother regional center that [he] worked with continued to pay contingency fees based on clients' immigration success to Mr. Feng and Law Office's US based bank accounts." Dkt. No. 9, ¶ 76. As such, it is clear that Feng knows which promoters are at issue, and which ones refused to continue to transfer his commissions to U.S-based bank accounts. [9]

Second, since the SEC is not required to prove reliance, it is not required under Rule 9(b) to plead which particular investors or promoters were defrauded or injured by their reliance on a misrepresentation or omission. *SEC v. Medical Capital Holdings, Inc.*, No. SACV 09-0818 DOC (RNBx), 2010 U.S. Dist. LEXIS 29601, *7-8 (C.D. Cal. Feb. 24, 2010); *see also*, *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 680 n. 9 (6th Cir. 1988) (plaintiff not required to plead names of borrowers who received subprime loans).

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[8] The attorney-client relationship creates a fiduciary duty that may form the basis of a fraud charge. *See*, *e.g., United States v. O'Hagen*, 521 U.S. 642, 652-54 (1997).

[9] In addition, in opposing his venue motion, the SEC submitted a spreadsheet Feng produced during the investigation of this case, that identified by name all of Feng's clients. Dkt. No. 15-1, ¶ 5, Ex. 2. From that spreadsheet the SEC created an excerpt identifying Feng's clients that invested in the offerings by the five regional centers at issue. *Id*., ¶ 6 , Ex. 3. The SEC also identified by name each of those five regional centers. *Id*. There is no reason to require the SEC to file an amended complaint simply to provide the detail that is reflected in other pleadings in this case. This is particularly true when the information contained in those pleadings came from information provided by Feng himself.

Third, the identity of the specific clients and promoters at issue may be obtained in discovery. *Pruco Life Ins. Co. v. Brasner*, No. 10-80804-CIV-COHN/SELTZER, 2011 U.S. Dist. LEXIS 72752, *16 (S.D. Fla. July 7, 2011) (denying Rule 9(b) challenge, finding identity of clients may be obtained in discovery). Indeed, Rule 9(b) does not require the pleading of evidence, and the rule is not intended to supplant the need to conduct discovery. *See United States ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457, 467 (5th Cir. 2015); *Heartland Payment Sys. v. Mercury Payment Sys. LLC*, No. 14-cv-00437-CW (MEJ), 2015 U.S. Dist. LEXIS 145799, *10 (N.D. Cal. Oct. 27, 2015); *SEC v. Levin*, 232 F.R.D. 619 (C.D. Cal. 2005); *SEC v. Blackwell*, 292 F. Supp. 2d at 686.[10]

3. Feng's Misrepresentations and Omissions Are Identified

Since his fraud on his clients involved a failure to disclose, *i.e.*, an omission, Rule 9(b)'s particularity requirements are relaxed. *See, e.g., Corral v. Carter's Inc.*, No. 1:13-cv-0262 AWI SKO, 2014 U.S. Dist. LEXIS 5880, *10 (E.D. Cal. Jan. 16, 2014); *Pyramid Publ'g & Prods. v. Baker & Taylor*, No. 98 C 1993, 1998 U.S. Dist. LEXIS 14193, *10 (N.D. Ill. Sept. 2, 1998). In an omissions case, a plaintiff is only required to identify with particularity the facts not disclosed and the source of the duty to speak. *Republic Prop. Trust v. Republic Props. Corp.*, 540 F. Supp. 2d 144, 153 (D.D.C. 2008).

The complaint specifically identifies what Feng should have disclosed to his clients but did not: his receipt of commissions from the promoters. Dkt. No. 1, ¶¶ 64-74. It also identifies Feng's duty to speak, namely, his fiduciary, legal and ethical duties to his clients as a licensed attorney to disclose all financial conflicts of interest.

[10] The SEC has asked Feng, both in its request for production of documents and in its interrogatories, for the identity of each client he failed to disclose his receipt of commissions, and to the extent he asserts he did disclose that information to some of his clients, to identify those clients, and the manner and means by which he made such disclosures. In his response to those discovery requests, Feng asserts that he has previously provided that information to the SEC, and to the extent he has not, will do so, subject to the entry of a protective order. SEC RJN, Exs. 6-7.

Id., ¶ 64. Furthermore, although the particularity requirement as to "time" is relaxed where the fraud occurred over a period of time (*see, e.g.*, *United States v. Clarkson*, No. 8:05-2734-HMH-BHH, 2006 U.S. Dist. LEXIS 74149, *5 (D.S.C. Aug. 2, 2006)), the complaint nonetheless identifies the "when" and "where" of Feng's failure to disclose, that is, in Feng's retainer agreements with his clients. *Id.*, ¶ 28.

Contrary to Feng's assertion that the complaint fails to allege how his non-disclosure of receipt of commissions from the promoters, had it been disclosed, would have been material to his clients' investment decisions (*see* Feng Mot. 21, n. 18), the complaint also specifically addresses the element of materiality (Dkt. No. 1, ¶¶ 68-70), which allegations must be accepted as true under Rule 12(c). Furthermore, materiality determinations are ordinarily left to the trier of fact, and "[q]uestions of materiality are only appropriately determined at the pleadings stage when 'reasonable minds could not disagree' as to whether the alleged misstatements or omissions are misleading.'" *SEC v. City of Victorville*, ED CV13-00776 JAK (DTBx), 2013 U.S. Dist. LEXIS 164530, *19 (C.D. Cal. Nov. 14, 2013); *see, e.g.*, *Swack v. Credit Suisse First Boston*, 383 F. Supp. 2d 223, 237 (D. Mass) (holding that allegation that stock analyst failed to disclose his positive rating was the result of a *quid pro quo* agreement with the rated company was a material misrepresentation or omission); *Cyber Media Grp., Inc. v. Island Mortgage Network, Inc.*, 183 F. Supp. 2d 559, 572-73 (E.D.N.Y. 2002) (finding that allegations that a company was a "double your money back stock" without disclosing the analyst's conflict of interest were sufficient to plead materiality).

Similarly, the complaint adequately identifies Feng's misrepresentations and omissions to the promoters. As alleged therein, in response to concerns expressed by certain promoters that wiring Feng's commissions to his U.S.-based bank accounts could trigger the broker registration requirements, Feng had his relatives and friends as "nominees" or "surrogates" to execute referral fee agreements with the promoters and to receive commissions on Defendants' behalf. Dkt. No. 1, ¶ 77. The complaint also alleges that Feng falsely represented to the promotors that those individuals were

"partners" or "agents" who were responsible for soliciting and referring investors to the promoters, when, in fact it was Feng or his employees. Dkt. No. 1, ¶¶ 78, 80, 82-85. [11]

The complaint also identifies the speaker who made these representations – ***Feng***. Dkt. No. 1, ¶¶ 78, 80, 84. And while the complaint also references Feng's relatives, friends and employees – *all of whom acted at Feng's direction* – their identity and precise roles need not be alleged in the complaint, where such information is peculiarly within Feng's knowledge and can be illuminated through discovery. *See Malmen v. World Sav. Inc.*, CV 10-9009 AHM (JEMx), 2011 U.S. Dist. LEXIS 44076, *12 (C.D. Cal. Apr. 18, 2011) (Rule 9(b) does not require plaintiff to name individual employees, "discovery is the means to obtain that information."). Nor is there any requirement for the complaint to differentiate between Feng and his small personal corporation: for all intents and purposes, they are one and the same. *See, e.g., Smith v. Jenkins*, 626 F. Supp. 2d 155, 165 (D. Mass. 2009) (investors adequately stated fraud claims under Rule 9(b) against law offices based on attorney's conduct and the doctrine of *respondeat superior*). For all these reasons, Defendants' Rule 9(b) challenge to the SEC's fraud claims should be rejected.

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[11] Defendants argue that any discussions with the regional centers concerning overseas payments and overseas agents occurred "long after the alleged securities offerings" and, hence, those discussions could not have been material to the promoters' decision to pay commissions to Defendants' nominees. Mot. at 23. Defendants' argument is wrong both on the law and the facts. The phrase "in connection with the purchase or sale of any security" is broadly construed, and captures a broker's conduct in misappropriating client funds derived from the sales of securities, or accepting payment for securities that are never delivered. *SEC v. Zanford*, 535 U.S. 813 (2002); *see also SEC v. Desai*, Civ. No. 11-5597 (WJM), 2015 U.S. Dist. LEXIS 150089, *12 (D.N.J. Nov. 5, 2015) (broker committed securities fraud by misrepresenting to investors that "he had a securities license."). Moreover, in the context of the transactions at issue in this case, the point at which the investor incurred irrevocable liability to take and pay for the security, and when the promoter incurred liability to pay Defendants their commissions, occurred at the same time: upon the USCIS's approval of the investors I-526 petition. *See, e.g., Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 ("purchase" and "sale" take place when the parties are bound to effectuate the transaction); *see also* SEC RJN, Ex. 2 (investor retains right to rescind investment prior to USCIS' approval of I-526 petition); Ex. 3 (promoter's obligation to pay finder's fee contingent upon USCIS's approval of investor's I-526 petition).

IV. CONCLUSION

For the foregoing reasons, the SEC respectfully requests that Defendants' Rule 12(c) motion be denied.

Dated: June 28, 2016

Respectfully submitted,

/s/ Donald W. Searles

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PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

U.S. SECURITIES AND EXCHANGE COMMISSION,
444 S. Flower Street, Suite 900, Los Angeles, California 90071
Telephone No. (323) 965-3998; Facsimile No. (213) 443-1904.

On June 28, 2016, I caused to be served the document entitled **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO DEFENDANTS HUI FENG AND LAW OFFICES OF FENG & ASSOCIATES, P.C.'S MOTION FOR JUDGMENT ON THE PLEADINGS** on all the parties to this action addressed as stated on the attached service list:

☐ **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

☐ **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

☐ **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

☐ **HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

☐ **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

☐ **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

☒ **E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

☐ **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

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

Date: June 28, 2016

/s/ Donald W. Searles

Donald W. Searles

SEC v. Hui Feng, et al.
United States District Court—Central District of California
Case No. 2:15-cv-09420-CBM-SS

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