DONALD W. SEARLES, Cal. Bar No. 135705
Email: searlesd@sec.gov
KRISTIN S. ESCALANTE, Cal. Bar No. 169635
Email: escalantek@sec.gov
MEGAN M. BERGSTROM, Cal. Bar No. 228289
Email: bergstromm@sec.gov

Attorneys for Plaintiff
Securities and Exchange Commission
Michele Wein Layne, Regional Director
John W. Berry, Associate Regional Director
444 S. Flower Street, Suite 900
Los Angeles, California 90071
Telephone: (323) 965-3998
Facsimile: (213) 443-1904

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 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY AGAINST HUI FENG AND LAW OFFICES OF FENG & ASSOCIATES P.C.

Date: February 28, 2017
Time: 10:00 a.m,
Ctrm: 8B, 8th Floor
Judge: Hon. Consuelo B. Marshall

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Securities Exchange Act of 1934

FEDERAL REGULATIONS

FEDERAL RULES OF CIVIL PROCEDURE

COMMISSION RELEASES

NEW YORK RULES OF PROFESSIONAL CONDUCT

I. INTRODUCTION

Plaintiff Securities and Exchange Commission ("SEC") moves for summary judgment as to both liability and remedies on all of its claims against defendant Hui Feng and Law Offices of Feng & Associates, P.C. This case concerns investments offered under the EB-5 Immigrant Investor Program, a federal program which awards permanent residency status to foreign investors who invest at least $500,000 in domestic job-creating projects approved by the United States Citizenship and Immigration Service ("USCIS").

The undisputed evidence establishes Feng's and his law firm's liability on the SEC's third claim for relief, under Section 15(a)(1) of the Securities Exchange Act of 1934 (the "Exchange Act"). Defendants acted as unregistered brokers in soliciting approximately 150 foreign investors, over a period of years, in return for millions of dollars in commissions from the regional centers that administered the EB-5 offerings at issue in this case. Section 15(a) is a strict liability claim – no proof of scienter is required – and there is no dispute that Feng was not registered as a broker, or that he received transaction-based compensation in exchange for recommending various EB-5 investments to his clients.

The undisputed evidence also establishes Feng's and his law firm's liability for the SEC's antifraud claims under Section 17(a) of the Securities Act of 1933 ("Securities Act") (Claim One) and Section 10(b) of the Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder (Claim Two). Feng defrauded his immigration law clients by failing to disclose to them the commissions he received from the EB-5 regional centers, which, in most cases, were more than twice the legal fees that the Feng's clients paid him. As a lawyer, Feng was aware that his receipt of commissions created a conflict of interest, but candidly admits that he did not disclose that compensation to his clients.

Feng also defrauded the EB-5 regional centers whose securities he promoted. The regional centers were aware that it was illegal for non-registered brokers in the United States to receive transaction-based compensation for promoting their securities, so they

refused to pay Feng, a U.S.-based immigration attorney, for those services. But instead of registering with the SEC as a broker, as he was required to do, Feng lied to the regional centers and claimed that the commissions they were paying were going to independent agents in China who were responsible for the referral of investors. In fact, those agents were just Feng's surrogates, including his elderly mother and mother-in-law, who had nothing to do with the solicitation of investors and who simply funneled the commission payments back to Feng. Representatives of the regional centers have unequivocally testified that they would not have dealt with Feng or his clients had they known the truth.

II. STATEMENT OF FACTS[1]

A. The EB-5 Program and the Regional Centers' Security Offerings

The EB-5 Immigrant Investor Program was created by Congress in 1992 to stimulate the U.S. economy with capital investment from foreign investors. SF ¶ 11. 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. SF ¶ 12. Applicable USCIS regulations and interpretive memoranda require that EB-5 investments satisfy three conditions: (1) the immigrant's investment of capital; (2) in a new commercial enterprise; (3) that creates jobs. SF ¶ 17. "To show that the petitioner has invested … the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk *for the purpose of generating a return on the capital placed at risk*." 8 C.F.R. § 204.6(j)(2) (emphasis added); *see also* SF ¶¶ 17, 49, 61.

All of the EB-5 investments at issue in this case satisfied USCIS' regulatory criteria. Investors made capital contribution of $1 million (or $500,000 in the case of a "targeted employment area") to acquire an interest in a limited partnership, and those

[1] The SEC has submitted a separate statement of facts and conclusions of law pursuant to Local Rule 56.1 ("SF"), which sets forth each material fact on which the SEC relies in support of its motion, as well as the evidence in support of the material fact.

contributions were pooled to provide a loan or other financing for a specifically-identified construction project. SF ¶ 19. The investors, as limited partners, had no day-to-day role in the management of the partnership. SF ¶¶ 45-48. The investors received income or profit distributions from the interest paid on the construction loan, which was reported to them on a Schedule K-1 (IRS Form 1065). SF ¶¶ 40, 52. At a specified date, subject to certain risks, the investors receive a return of their capital. SF ¶39.

In addition to the capital contribution, investor were required to pay a separate administrative fee, typically in the range of $45,000 to $65,000, to cover the legal and administrative fees of the partnership. SF ¶ 41. The bulk of these administrative fees went to pay commissions to brokers who referred investors to the regional centers. SF ¶ 44. Those fees were not considered part of the capital contribution, were not pooled to finance any part of the construction projects, and did not earn any interest income. SF ¶ 42. Feng himself stressed that these administrative fees were separate from the investment of capital in filings he made to the USCIS. SF ¶ 43.

B. Defendants Acted as Brokers

As early as 2010, Feng began recommending to his clients offerings associated with certain EB-5 regional centers, in exchange for commissions from the regional centers on successful investments. SF ¶¶ 77, 127-153, 165-166. Defendants' commissions were governed by written referral fee agreements with the EB-5 regional centers. SF ¶¶ 78, 154-164. 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. SF ¶ 168. Since 2010 Feng has represented approximately 150 investors for EB-5 investments with at least eight regional centers, and have received at least $1,268,000 in commissions. SF ¶¶ 10, 18, 171. In addition, Feng directly, or through his nominees, is contractually entitled to receive an additional $3,450,000 in commissions upon the approval of pending I-526 Petitions. SF ¶ 172.

In approximately 2013, Feng began intensifying his efforts to sell EB-5

investments and began providing a list of recommended EB-5 offerings through his law firm's website in an effort to obtain more EB-5 investor clients. SF ¶¶ 111, 127, 173-183. Feng analyzed and recommended certain EB-5 investments over others, and facilitated his clients' investments by obtaining offering documents from the EB-5 regional centers, printing out the signature pages of the documents, preparing instructions explaining what the clients should sign, and transmitting the signed offering documents to the EB-5 regional centers. SF ¶¶ 144-150. Feng interfaced directly with the regional centers and, in most instances, all of the communications and negotiations between the clients and the regional centers were channeled through Feng. SF ¶ 131. On occasion, Feng also received EB-5 investment funds from clients that they transmitted to the regional centers. SF ¶147. Feng described himself to the regional centers 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. SF ¶¶ 130, 151. This required Feng to fill the allocated spots with investors by a certain date or give the spots up. SF ¶152. Feng also negotiated with the regional centers, over the amount of his commissions and the amount of any rebate of the administrative fees to his clients. SF ¶¶ 148, 150, 208-209, 212.

C. Feng Engaged in Fraudulent and Deceptive Conduct

As an attorney, Feng owed a fiduciary duty to his clients to disclose his receipt of commissions from the EB-5 regional centers and the conflicts of interest such compensation created. SF ¶¶ 193-241. There is no dispute that Feng failed to disclose that information. SF ¶ 196. Feng freely admits that he stood to make more money by not disclosing the commissions. SF ¶ 202. Feng also admits that if his clients had known about the commissions, then they likely would have demanded a share of them. SF ¶ 201. The record also establishes that if Feng's receipt of commissions had been disclosed to his clients, his clients would have considered Feng's advice in a different light. SF ¶ 241.

But Feng's fraud was not limited to his clients; he also lied to the regional

centers about the role and identity of the persons they were paying commissions to. In or about May 2013, some of the EB-5 regional centers informed Feng that they would not wire commissions to U.S.-based bank accounts to avoid running afoul of the broker registration requirements. SF ¶¶ 245-248. To get around this restriction, Feng began using various surrogates to execute referral fee agreements and receive commissions on his behalf, including his mother and mother-in-law. SF ¶¶ 249-250. Feng represented to the regional centers that these surrogates were the ones soliciting and referring investors to the regional centers, when, in fact, it was Feng or his employees. SF ¶¶ 251-252. To further that deception, Feng formed Atlantic Business Consulting Limited ("ABCL"), a Hong Kong entity, for the purpose of receiving referral fee payments through a Hong Kong bank account that Feng controlled. SF ¶ 254. Feng also had his relatives execute referral fee agreements with some of the regional centers, purportedly on behalf of ABCL, even though the relatives had no role with ABCL. SF ¶¶ 91-92, 113-115. Feng's representations and omissions were material to the regional centers' decision to pay commissions to Feng's nominees, and they would not have done business with Feng had they known the truth. SF ¶¶ 250-269.

III. ARGUMENT

A. Standard of Review

A party is entitled to summary judgment if "there is no genuine issue as to any material fact and … the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A plaintiff moving for summary judgment meets its burden by establishing for each element of the claim that no reasonable trier of fact could find for the opposing party. *See Celotex*, 477 U.S. at 323; *SEC v. Schooler*, 106 F. Supp. 3d 1157, 1161 & n.1 (S.D. Cal. 2015). Once the moving party has met its burden, the "nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis in original). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude

the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 248 (1986).

B. The EB-5 Offerings Are "Securities" Subject to U.S. Securities Laws

In both their answer and in their unsuccessful motion for judgment on the pleadings, Defendants argue that "the instruments as issue are not 'securities'" because they claim the primary reason someone invests in an EB-5 project is to obtain a visa. Dkt. No. 9, ¶ 1; Dkt. No. 40, pp. 14-15. The SEC anticipates that Defendants will continue to make the same argument in opposition to this motion. The resolution of this issue should not detain the Court for long. Indeed, this district has already found that EB-5 investments, such are at issue in this action, are securities. *SEC v. Liu*, No. 8:16-cv-00974-CJC-AGR, 2016 U.S. Dist. LEXIS 181536, *12 (C.D. Cal. Aug. 17, 2016) ("the question is not whether some combination of EB-5 shares and fees are profitable securities, but whether the shares themselves – promoted by the POM [private offering memorandum] – qualify as investment contracts.")

"Congress' purpose in enacting the securities laws was to regulate investments, in whatever form they are made and by whatever name they are called." *SEC v. Edwards*, 540 U.S. 389, 393 (2004) (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990)). "To that end, it enacted a broad definition of 'security', sufficient to encompass virtually any instrument that might be sold as an investment." *Id.*, *see also* Dkt. No. 54 at 7 ("The Court finds the term "security" is not so vague that an ordinary immigration attorney such as Defendants would not reasonably suspect the EB-5 investments could be construed as securities under the Act.").

The record establishes that the EB-5 investments that Feng recommended to his clients were "securities" as that term is defined in the Securities and Exchange Acts. Indeed, the offering materials themselves prominently referred to the investments either as a "security" or as an offering that was being made pursuant to certain registration exemptions under the federal securities laws. SF ¶¶ 21-34. The offering materials also provided that the immigrant investor's ownership interests or units were "restricted

securities" that could not be sold or transferred except as permitted by the Securities Act or the Exchange Act. SF ¶¶ 28, 32. In addition, the offering documents typically required the immigrant investor to declare he or she was an "accredited investor" to qualify for the registration exemption available under Rule 506 of Regulation D. SF ¶ 34.[2]

In fact, the offerings were securities, just as they claimed to be. Both the Securities and Exchange Acts define a "security" as, among other things, "any … investment contract." 15 U.S.C. §§ 77b(a)(1), 78c(a)(10). Courts have defined investment contract as "(1) an investment of money (2) in a common enterprise (3) with an expectation of profits produced by the efforts of others." *SEC v. R.G. Reynolds Enters., Inc.*, 952 F.2d 1125, 1130 (9th Cir. 1991); *see also SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

Each of these elements is easily met here. Each offering requires an investment of money, specifically a $500,000 or $1 million capital contribution. SF ¶¶ 14, 35. *SEC v. Global Express Capital Real Estate Inv. Fund I, LLC*, No. 2;03-cv-01515-KJD-LRL, 2006 U.S. Dist. LEXIS 96477, *45 (D. Nev. Mar. 28, 2006) (mere solicitation of investment money is sufficient to meet the "investment of money" prong). The capital contributions were pooled and used to fund construction loans or other financing for specifically identified projects. SF ¶¶ 36. 63; *R.G. Reynolds Enterprise, Inc.*, 952 F.2d at 1134 (common enterprise element is met when investor funds are pooled to finance a construction project). And the investors were promised, subject to certain risks, a return on their capital contribution investment of 0.5% to 5%, for which they depended on the efforts of others to generate, specifically, the efforts of the general partners to extend the loans and to supervise the projects. SF ¶¶ 19, 37, 46; *R.G. Reynolds Ent. Inc.*, 952 F.2d at 1130 ("efforts of others" prong satisfied where the managerial efforts of those other than the investor as the undeniably significant ones). Courts have

[2] Courts can and should consider the description and naming of the investments in the offering materials when determining whether they are securities. *See, e.g., Landreth Timber Co. v. Landreth*, 471 U.S. 681, 690 (1985).

routinely found that limited partnership interests similar to the ones here meet these criteria. *See, e.g., SEC v. Spyglass Equity Systems, Inc.*, No., 2:11-cv-02371-JAK-MAN, 2012 U.S. Dist. LEXIS 189621, *3 (C.D. Cal. Apr. 5, 2012); *see also* 17 C.F.R. § 240.3a-11 (defining "equity security" to include limited partnership interests).

Relying on *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975), Defendants will likely argue, as they have in their prior filings, that the offerings were not securities because their clients' "primary purpose" in making the investment was to obtain a visa. In *Forman*, the Court found that shares of stock in a *non-profit* housing cooperative were not investment contracts because the investors were solely interested in acquiring housing 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*…." SF ¶ 61. 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). Feng has represented to USCIS that his clients have met this requirement. SF ¶ 52. 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, even assuming that some of Feng's clients were solely interested in obtaining a visa from USCIS, and did not care that they earned interest income on their capital contributions to the EB-5 projects, their subjective intent is simply irrelevant where the marketing materials and offering documents describe the offerings as investments with income or 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). Any other rule would make the SEC's jurisdiction over the capital markets depend on the subjective investment whims of individual investors, and whether a single instrument constituted a security could vary from investor to investor.

Defendants are also likely to argue, as they have in their prior filings, that the amount of the administrative fee that the investor must pay will exceed the amount of interest income that is likely to be paid on the investor's capital contribution and, hence, the investor has no expectation of profit. But the "profits" the Supreme Court was speaking of in *Howey* is whether there is income or a return on the investment. *SEC v. Edwards*, 540 U.S. at 394; *Warfield v. Alaniz*, 569 F.3d at 1023-24; *see also Howey*, 328 U.S. at 298 ("[a]n investment contract thus came to mean a contract or scheme of 'placing capital or laying out of money in a way intended to secure income or profit from its employment.' [citation omitted]"). Here, there can be no dispute that the immigrant investors were entitled to receive – *and many did receive* – income or a return on their investment. Indeed, that income was reported to them in Schedule K-1's. As such, there can be no legal or factual dispute as to whether the EB-5 offerings at issue were securities.[3]

[3] Although Feng's understanding of the terms of the investment at issue are not relevant to the determination of whether the EB-5 offerings were securities, he has conceded that those offerings satisfy all three elements of the *Howey* test, and has made representations to the USCIS that his clients invested for the purpose of obtaining a return. SF ¶¶ 51-53, 55-59, 63-65.

Finally, even though many (but not all) of the investors were outside the United States at the time they were solicited to invest, the offering and sale of these securities are subject to U.S. securities laws. In 2010, Congress enacted Section 929P(b) of the Dodd-Frank Act, which extended the territorial reach of the antifraud provisions of the securities laws to all violations that involved *either* to (1) "conduct within the United States that constitutes significant steps in furtherance of the violation"; *or* (2) "conduct occurring outside the United States that has a foreseeable substantial effect within the United States." 15 U.S.C. §§ 78aa, 77v. This test is easily satisfied here; Feng communicated with investors and regional centers from his law offices in Queens, and those communications constituted at least "significant steps" in the furtherance of the violations that the SEC alleges here. And the transactions themselves – the EB-5 investments that Feng recommended to his clients, were all consummated in the U.S. Indeed, the SEC has filed a number of actions involving frauds against foreign EB-5 investors. *See, e.g., SEC v. Francisco,* No. SACV 16-02257-CJC (DFMx), Dkt. No. 16 (C.D. Cal. Jan. 5, 2017) (granting TRO to enjoin fraudulent EB-5 offering); *SEC v. Liu*, No. 8:16-cv-00974-CJC-AGR, 2016 U.S. Dist. LEXIS 181536, *12 (C.D. Cal. Aug. 17, 2016); *SEC v. Path America, LLC*, No. C15-1350JLR, 2016 U.S. Dist. LEXIS 53075 (W.D. Wash. Apr. 20, 2016); *SEC v. Chicago Convention Center, LLC*, 961 F. Supp. 2d 905 (N.D. Ill. 2013).[4]

[4] By enacting Section 929P(b), Congress effectively overruled *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). In *Morrison*, the Court had held that Section 10(b) applied only to "domestic" transactions, and subsequent cases had applied this rule to claims under Section 15(a). *See, e.g.*, *SEC v. Benger*, 934 F. Supp. 2d (N.D. Ill. 2013). Even if this standard still applies, it is easily met here. A transaction is "domestic" when either the purchaser or seller of a security "incurred irrevocable liability" within the United States, or when title is transferred in the United States. *Absolute Activist Value Master Fund Ltd. v. Ficeto,* 677 F.3d 60, 67 (2d Cir. 2012). Here, the sellers were the regional centers, all of which were located in the United States. SF ¶66. Under the terms of the offering documents, the sellers did not become "irrevocably bound" until they accepted and signed the investors' subscription agreements – acts which occurred in the United States. SF ¶¶ 67-76. Further, investors' funds were not released from escrow – and title in the securities did not pass – until the investors' I-526 petitions were approved by USCIS in the United States. SF ¶73-75. These and other facts (*see* SF ¶¶ 66-75) are sufficient to show that these are

C. Defendants Violated Section 15(a) of the Exchange Act

The SEC's third claim is brought under Section 15(a) of the Exchange Act, which makes it unlawful for a broker or dealer "to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security" unless the broker or dealer is registered with the SEC in accordance with Section 15(b). Section 15(a) is strict liability statute; neither scienter nor negligence is required to prove its violation. *Celsion Corp. v. Stearns Mgtm. Corp*., 157 F. Supp. 2d 942, 947 (N.D. Ill. 2001); *SEC v. Interlink Data Network*, No. 93 3073 R, 1993 U.S. Dist. LEXIS 20163, *46 (C.D. Cal. Nov. 15, 1993).

Section 3(a)(4)(A) of the Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A); *see also* 15 U.S.C. § 78c(a)(9) (defining "person" to include a company). 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 Exchange Act Release, No. 22172, 33 SEC Docket 685, 686 (June 27, 1985)).

The law is clear that attorneys who act as brokers are subject to the registration requirements. *See* 15 U.S.C. § 78c(4)(A); *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-based compensation from various issuers of Regulation S securities); *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

---

domestic transactions, even for those investors in China. *See SEC v. Chicago Convention Center, LLC*, 961 F. Supp. 2d 905 (N.D. Ill. 2013) (EB-5 case).

receive transaction-based compensation, these persons are engaging in the business of effecting transactions securities for the accounts of others. Accordingly, these persons should register as broker-dealers.").

Although the Exchange Act does not define what constitutes "being engaged in the business," courts interpreting that phrase 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." *SEC v. Collyard*, 174 F. Supp. 3d 781, 789 (D. Minn. 2015); *accord Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, No. 8:04CV586, 2006 U.S. Dist. LEXIS 68959, *20 (D. Neb. Sept. 12, 2006).

In addition to transaction-based compensation, many courts employ the so-called *Hansen* factors: "whether the person 1) is an employee of the issuer; 2) received commissions as opposed to a salary; 3) is selling, or previously sold, the securities of other issuers; 4) is involved in negotiations between the issuer and the investor; 5) makes valuations as the merits of the investment or gives advice; and 6) is an active rather than a passive finder of investors." *SEC v. Hansen*, No. 83 Civ. 3692 (LPG), 1984 U.S. Dist. Lexis 17835, *25 (S.D.N.Y. Apr. 6, 1984); *see also SEC v. Arcturus Corp.*, 171 F. Supp. 3d 512, 531 (N.D. Tex. 2016) (regularity of participation in securities transactions strong indicator of "being engaged in the business"); *SEC v. Small Bus. Capital Corp.*, No. 5:12-CV-3237 EJD, 2013 U.S. Dist. LEXIS 116607, *51 (N.D. Cal. Aug. 16, 2013) (adopting *Hansen* factors) *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) ("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. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12-13 (D.D.C. 1998) (relevant factors include dollar amount of securities sold and the extent to which

advertisement and investor solicitation were used). 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. *SEC v. Collyard*, 154 F. Supp. 3d at 789; *SEC v. Benger*, 697 F. Supp. 2d at 945 (the inquiry focuses on whether the alleged broker facilitated the consummation of securities sales).

Here, the *Hansen* factors overwhelmingly support the conclusion that Feng and his law firm were acting as brokers. Most significantly, in accordance with written marketing agreements that Feng entered into with the regional centers, Feng received transaction-based compensation, in the form of commissions, for procuring investors. SF ¶¶ 165-172. Further, Feng was not a salaried employee of the EB-5 regional centers; rather, he acted as their sales agent. SF ¶ 78. Feng was also frequently involved in negotiations between the regional centers and the immigrant investors on the amount of the administrative fees the immigrant investor would be required to pay, in addition to the $500,000 capital contribution. SF ¶ 148. Feng also "facilitated" contracts between certain regional centers and his clients for a rebate of a portion of the management fee. SF ¶ 149. Feng also negotiated with the regional centers over the amount of his commissions. SF ¶ 150. Feng also negotiated with the some of regional centers for allocations of spots in their offerings, which required Feng to fill the allocated spots with investors by a certain date or give the spots up. SF ¶¶ 151-152.

Feng also recommended certain EB-5 investments over others and facilitated his clients' investments in the offerings he recommended by obtaining offering documents from the regional centers, transmitting them to his clients along with Mandarin-translated summaries of the key terms of the offerings, and providing instructions on what to sign and what information to provide. SF ¶¶ 154-164. On at least three occasions, Feng or Feng & Assoc. also received EB-5 investment funds from clients that they transmitted to one of the regional centers. SF ¶ 147.

Feng also acknowledged that there are over 800 USCIS-approved regional centers, but only did business with 10 to 20 of them. SF ¶ 128. Feng analyzed

approximately 100 different regional center offerings and selected only a handful of them to recommend to his clients based on his analysis of their likely ability to satisfy the USCIS's job creation criteria. SF ¶ 129. Feng considered himself particularly qualified to conduct that analysis based on his MBA degree from Dartmouth's Tuck School of Business. SF ¶ 136. Feng also actively solicited and advertised for investors through his U.S. and China-based websites, where he published his list of recommended EB-5 investments. SF ¶¶173-178. Feng also acknowledged that he had placed approximately 150 clients in various EB-5 investments since 2009. SF ¶ 10.[5]

In short, the undisputed evidence establishes the Feng and his law firm violated Section 15(a) of the Exchange Act.

D. Defendants Violated the Antifraud Provisions

The SEC's first claim is brought under Section 17(a) of the Securities Act, which prohibits fraud in the offer or sale of securities. 15 U.S.C. § 77q(a). The SEC's second claim is brought under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibits fraud in connection with the purchase or sale of any security. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; *SEC v. GLT Dain Rauscher, Inc.*,

[5] Although scienter or knowledge of the law is not required to establish a violation of Section 15(a), Feng acknowledged in his deposition that because of concerns about the applicability of the federal securities laws to his conduct, he had considered registering as a broker, or becoming a registered representative of a broker-dealer firm, but decided not to due, in large part, to the costs involved. SF ¶ 191. Feng was also aware of prior SEC's enforcement actions in the EB-5 context from which he could have concluded that the SEC considered such investments to be securities, and was aware that other attorneys in the EB-5 legal community, including the attorney that represented him during the SEC's investigation and attended his investigative testimony, had recommended that U.S.-based attorneys involved in EB-5 investments become registered brokers. SF ¶¶ 187-192. Feng was also told by one or more regional centers that they would deal with him directly in the United States, provided they did not pay him a marketing or finder's fee so as not to trigger the broker registration requirements. SF ¶¶ 221-222, 345 . In those instances, in lieu of paying a marketing fee, the regional centers would give a $15,000 discount to the investor on the management or administrative fee they were otherwise required to pay. *Id*. Rather than opting for that course of action, which would have financially benefitted his clients, Feng falsely represented to a number of Regional Centers that he had agents in China who were responsible for locating investors and to whom marketing fees should be paid. SF ¶ 223.

254 F.3d 852, 855 (9th Cir. 2001). These provisions prohibit both the making and use of misstatements and omissions, and engaging in fraudulent schemes. These provisions also encompass both fraud on investors, as well as fraud upon the issuers of securities (such as the EB-5 regional centers). *See. e.g., In re Stat-Tech Sec. Litig*., 905 F. Supp. 1416, 1422 (D. Colo. 1995) (either "purchaser" or "seller" of securities has standing to bring a claim under Rule 10b-5).

1. Defendants made material misrepresentations and omissions

The SEC's antifraud claims concerns Feng's false statements to both his clients and to the regional centers, in violation of Section 17(a)(2) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder. To establish a violation of Section 17(a)(2), the SEC must prove, in the offer or sale of a security, that the defendant, at least negligently, obtained money or property by means of a material false statement or omission, through interstate commerce. *See, e.g., GLT Dain Rauscher, Inc.*, 254 F.3d at 856. To establish a violation of Section 10(b) and Rule 10b-5(b), the SEC must show that a defendant, with scienter and in connection with the purchase or sale of a security, made an untrue statement or omitted to state a material fact, through interstate commerce. *See* 17 C.F.R. § 240.10b-5(b); *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1092 (9th Cir. 2010); *see also SEC v. Rana Research, Inc*., 8 F.3d 1358, 1364 (9th Cir. 1993).

Under both provisions, the misstatements and omissions must concern material facts. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. *See TSC Indus. v. Northway*, 426 U.S. 438, 449 (1976); *SEC v. Platforms Wireless*, 617 F.2d at 1092. Liability arises not only from affirmative representations but also from failures to disclose material information. *SEC v. GLT Dain Rauscher*, 254 F.3d at 855-56. The antifraud provisions impose "'a duty to disclose material facts that are necessary to make disclosed statements, whether mandatory or volunteered, not misleading.'" *SEC v. Fehn*, 97 F.3d 1276, 1290 n.12 (9th

Cir. 1996) (citation omitted). Moreover, a statement or omission is material as a matter of law where it is so obviously important to an investor that reasonable minds cannot differ on the question of materiality. *See. e.g.*, *SEC v. Alliance Leasing Corp.*, 28 Fed. Appx. 648, 652 (9th Cir. 2002) (failure to disclose 30% commissions material as a matter of law); *SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980) ("surely the materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge").

a. Defendants failed to disclose material facts to their clients that they were under ethical duties to disclose

Defendants committed fraud upon their clients by failing to disclose to them their receipt of commissions from the regional centers. A failure to disclose is actionable where "one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relationship of trust and confidence between them.'" *Chiarella v. United States*, 445 U.S. 222, 228 (1980); *United States v. Laurienti*, 611 F.3d 530, 541 (9th Cir. 2010) (holding that if a broker and client have a fiduciary relationship, then the broker has an obligation to disclose all facts material to that relationship). A duty to disclose may be present if either a federal statute or state statutory or common law recognizes a fiduciary or similar relationship of trust and confidence giving rise to such a duty. *See SEC v. Cochran*, 214 F.3d 1261, 1265 (10th Cir. 2000). The attorney-client relationship creates a fiduciary duty that may form the basis for a fraud charge. *See, e.g., United States v. O'Hagan*, 521 U.S. 642, 652-54 (1997) (attorney violated Section 10(b) and Rule 10b-5 by misappropriating and trading on confidential information in breach of his fiduciary duty to his law firm and client); *see also United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (some relationships, including the attorney-client relationship, are "inherently fiduciary").

Courts have held that the failure to disclose information in breach of an attorney's fiduciary duties can constitute fraud. For example, in *United States v.*

Hausmann, 345 F. 3d 952 (7th Cir. 2003), the Seventh Circuit affirmed the convictions of a personal injury attorney and a chiropractor for conspiracy to commit mail and wire fraud. The attorney routinely referred clients to the chiropractor, for chiropractic services paid from insurance settlement proceeds. The chiropractor reciprocated by paying twenty percent of the fees to third-party recipients that the attorney told him to pay. This kickback arrangement was not disclosed to the attorney's clients. The Court held that, by alleging that this kickback arrangement was concealed from the clients in violation of the professional rules of conduct, the indictment had "clearly allege[d] [the attorney's] misuse of the fiduciary relationship." *Id*., at 956. The Court also quickly rejected the defendants' contention that the attorney's clients were not harmed as they had no right to the settlement funds paid to the chiropractor. As the Court observed,

> This reasoning ignores the reality that [the attorney's] clients were deprived of their right to know the truth about his compensation…. It is no consequence … that [the chiropractor's fees] (absent the discount) were competitive or that the clients received the same net benefit as they would have absent the kickback scheme. The scheme itself converted [the attorney's] representations to his clients into misrepresentations, and [the attorney] illegally profited at the expense of his clients, who were entitled to his honest services as well as their contractually bargained-for portion of [the chiropractor's] discount.

Id., at 957; *see also In re Hager*, 812 A.2d 904, 914 (D.C. 2002) ("[t]he conflict of interest rules do not permit a lawyer to be the judge of whether a … client should be kept in the dark about information that could compromise the lawyer's goal in pursuing the client's interests.").

In the present case, Feng and his law firm violated numerous ethical rules in failing to disclose their receipt of transaction-based compensation from the regional centers whose offerings they recommended to their clients, including New York Rules of Professional Conduct ("NYS Rule") 1.7(a)(2) (duty to disclose conflicts), NYS Rule 1.4(a)(1) (duty to communicate), NYS Rule 1.8(a) (duty to disclose business relationships), and NYS Rule 1.8(f) (duty to disclose third party payment of attorney's fees). Wendel Decl., ¶¶ 10-28; *see, e.g., Elacqua v. Physicians'*

Reciprocal Insurers, 52 A.D.3d 886, 889 (N.Y. 2008); *Ulico Casualty Company v. Wilson, Elser, Moskowitz, Edelman & Dicker, et al.*, 56 A.D.3d 1, 8-9 (N.Y. 2008).

Feng's failure to disclose his receipt of compensation from the regional centers, in breach of his fiduciary obligations, was material as a matter of law. *See, e.g.*, *O'Hagan*, 521 U.S. 642; *United States v. Hausmann*, 345 F. 3d 952; *Cf.*, *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 201 (1963) (noting that an investment advisor must "fully and fairly reveal [ ] his personal interests in [his] recommendations to his clients."); *SEC v. Vernazza*, 327 F.3d 851, 859 (9th Cir. 2003) ("[i]t is indisputable that potential conflicts of interest are 'material' facts with respect to clients and the Commission."); *United States v. Laurienti*, 611 F.3d at 541-42 ("[w]hether, and in what circumstances, a broker's failure to disclose bonus commissions can give rise to criminal liability, is a pure question of law.")

In any event, the testimonial evidence establishes that the undisclosed information concerning Defendants' compensation from the regional centers would have been material to their clients had it been disclosed. It was certainly material to Feng, as he intentionally withheld that information from his clients to maximize his own financial position. As Feng had to admit at his recent deposition, his clients obviously would have preferred to pay a $35,000 management fee as opposed to a $50,000 management fee. SF ¶ 225. Several of Feng's clients have also testified that they would have wanted to know this information to properly evaluate Feng's claimed objectivity in recommending certain EB-5 offerings over others. SF ¶ 241. Nor was this information otherwise disclosed, either in the offering documents themselves, or in Feng's retainer agreements with his clients. SF ¶¶ 196, 198[6]

[6] In approximately February 2015, after Feng had testified before the SEC during the investigative phase of this case, where he was questioned about his failure to disclose his receipt of marketing fees to his clients, Feng consulted with the New York City Bar Association who provided him with a 2013 ethics opinion holding that a lawyer entering into a finder's fee arrangement with a third party for introducing client-investors to the third party must disclose the arrangement and obtain the informed written consent of his clients. As a result of receiving that advice, Feng amended his

b. Defendants' false representations and omissions to the regional centers

Feng and his law firm also defrauded the EB-5 regional centers by making materially false statements or misleading omissions to them. Starting in approximately 2013, Feng told some of the regional centers that he had "agents" in China who were responsible for finding immigrant investors in the EB-5 projects. SF ¶¶ 245-269. In reality, those "agents" were Feng's mother and mother-in-law who had no role in finding investors. SF ¶¶ 250-253. Later, in 2014, Feng created ABCL, which he represented to the regional centers to be an independent business entity that was responsible for finding investors in the EB-5 projects. SF ¶¶ 254-255. In reality, Feng controlled ABCL, continued to determine what offerings ABCL's employees would recommend to investors, and had sole authority over ABCL's Hong Kong bank account. SF ¶¶ 85-112, 349.

All of this was materially misleading because the EB-5 regional centers believed that the referral fees associated with investments by Feng's clients were paid to the overseas individuals responsible for finding the investors. Had the regional centers known that Feng's agents were fictitious, and that he controlled ABCL, they would not have done business with him out of fear they would be violating, or would be contributing to a violation of Section 15(a) of the Exchange Act. SF ¶¶ 253, 256, 269, 279, 282, 285, 304, 306.[7]

---

standard retainer agreement to disclose that an "overseas consulting company (beneficially owned by the attorney)" may be paid certain marketing referral fees upon the completion of the client's investment. SF ¶ 242. Even this language, however, failed to adequately disclose Feng's financial conflict of interest, and that he was the ultimate recipient of those fees. Wendel Decl., ¶¶ 23-24. The bulk of the SEC's claims concern Feng's failure to disclose before February 2015.

[7] There is also no question that Feng and his firm "obtained money" as a result of this fraud in violation of Section 17(a)(2). By not disclosing the commissions to his clients and lying to the regional centers about the "surrogates" they were unwittingly paying those commissions to, Feng reaped millions of dollars in commissions. *See, e.g.*, *Liu*, 2016 U.S. Dist. LEXIS 181536; *SEC v. Tambone*, 550 F.3d 106, 127 (1st Cir. 2008), *reh'g en banc granted, opinion withdrawn*, 573 F.3d 54 (1st Cir. 2009);

2. Defendants also engaged in scheme to defraud

The record also establishes the Feng and his law firm engaged in a fraudulent scheme in violation of Sections 17(a)(1) and (3) of the Securities Act and Rules 10b-5(a) and (c) of the Exchange Act. Those provisions make it unlawful for any person to engage in a scheme to defraud or to engage in a course of business which operates as a fraud. 15 U.S.C. §§ 77q(a)(1), (3), 17 C.F.R. § 240.10b-5(a), (c). To be liable for a scheme to defraud, a defendant must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme. *See Simpson v. AOL Time Warner, Inc*., 452 F.3d 1040, 1048 (9th Cir. 2006), *vacated on other grounds sub nom., Avis Budget Group Inc. v. Cal. State Teachers' Ret. System*, 552 U.S. 1162 (2008); *SEC v. Zouvas*, No 3:16-cv-0998-CAB-(DHB), 2016 U.S. Dist. LEXIS 161255 (S.D. Cal. Nov. 21, 2016); *see also SEC v. Sells*, No. C-11-4941, 2012 WL 3242551, *7 (N.D. Cal. Aug. 10, 2012); *Middlesex Retirement Sys. v. Quest Software Inc.*, 527 F. Supp. 2d 1164, 1191 (C.D. Cal. 2007). A defendant can be held liable for engaging in a fraudulent scheme under these provisions if she "'committed a manipulative or deceptive act in furtherance of a scheme,'" which is an act that "create[s] the false appearance of fact." *Simpson*, 452 F.3d at 1048 (*quoting Cooper v. Pickett*, 137 F.3d 616 (9th Cir. 1997)).

In addition to their numerous false statements and omissions to their legal clients and to the regional centers, all of which furthered their scheme, Defendants' conduct went beyond their false statements and omissions. With respect to their legal clients, Defendants undertook various affirmative steps to create a false appearance of fact. Specifically, in order to avoid disclosing to their clients their receipt of commissions from the regional centers, Feng requested the regional centers to be the party to make any rebate of the administrative fee to the client, even if the rebate was

---

SEC v. Stoker, 865 F. Supp. 2d 457, 465 (S.D.N.Y. 2012).

being funded, in whole or in part, by Defendants' commissions, so as to conceal from their clients that they were paid commissions by the regional centers. SF ¶¶ 210-213. On other occasions, Defendants entered into legal services agreements with the regional centers which, for all intents and purposes were simply marketing fee agreements, evidently for the purpose of being able to deny to their clients that they had a marketing fee agreement with the regional centers. SF ¶ 226. Feng also recommended using this "legal services" subterfuge with another regional center "as a better and safer way to explain the finder's fees for attorneys." SF ¶ 227. The regional center to whom Feng proposed that idea rejected it "as trying to mask something which then makes the concept really dangerous." *Id.*

Defendants also deceived the regional centers regarding the role of Feng's so-called "agents" in China, as well ABCL, by having his mother and mother-in-law sign marketing agreements with the regional centers, in which they falsely represented they were responsible for finding investors, and by having them sign tax documents in which they falsely represented they were the beneficial owners of ABCL. SF ¶¶ 321, 327, 342. Feng also provided wire transfer instructions to the regional centers for the wiring of the marketing fees to their "agents" accounts in China, without disclosing that he directly or indirectly controlled those accounts. SF ¶¶ 117-118, 266-267, 303-304, 308-311, 314, 332-334, 341, 350. Feng also recently created a new off-shore entity, called Kilogram, and a new law firm, called HC Law, without disclosing his connection to those entities, because various regional centers refused to do business with ABCL and Feng & Assoc. because of the SEC's action. SF ¶¶ 120-126.[8]

[8] Defendants' fraud upon both their clients and the regional centers was also "in connection with the purchase or sale of securities." That phrase 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. Zouvas*, No. 3:16-cv-0998-CAB-(DHB), 2016 U.S. Dist. LEXIS 161255, *22 (S.D. Cal. Nov. 21, 2016) ("[a] fraud that touches the intrinsic value of a securities and the means of accomplishing the

3. Defendants' acted with scienter, or at least negligently

Violations of Section 17(a)(1) and Section 10(b) and Rule 10b-5 thereunder require a showing of scienter, while violations of Section 17(a)(2)-(3) may be established by a showing of simple negligence. *Aaron v. SEC*, 446 U.S. 680 (1980). Scienter is defined as a "mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). In the Ninth Circuit, scienter may be established by a showing of either actual knowledge or recklessness. *Gebhart v. SEC*, 595 F.3d 1034, 1040 (9th Cir. 2010). Negligence, by contrast, is the absence of "reasonable prudence." *Dain Rauscher, Inc.*, 254 F.3d at 856-57; *SEC v. Hughes Capital Corp*., 124 F.3d 449, 453-54 (3d Cir.1997).

Feng and his firm clearly acted knowingly. Feng openly admits he did not tell his clients about the commissions he was being paid by the regional centers because he wanted to avoid having to negotiate with his clients about rebating portions of the commissions, so that he could keep as much of it as possible. SF ¶¶ 193-227. Feng also admits that his various surrogates, including his mother and mother-in-law, who signed marketing agreements with the several EB-5 regional centers, had no role in soliciting investors, and that he controlled ABCL, as well as its Hong Kong bank account. All of this knowing, or at least reckless, conduct is imputed to Feng's law firm. *See, e.g., SEC v. Platforms Wireless Int'l. Corp.*, 559 F. Supp. 2d 1091, 1096 (S.D. Cal. 2008), *aff'd*., 617 F.3d 1072 (9th Cir. 2010), *citing SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1089 n.3 (2d Cir. 1972) (since corporation acts through its officers, culpability of entity's principals is imputed to corporation). Moreover, at a minimum, Feng and his firm were negligent when they withheld information about the commissions from their clients and failed to disclose to the regional centers who

---

purchase of securities is sufficiently connected to a securities transaction to bring the fraud with Section 10(b)."); *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.").

was really locating investors and receiving commissions.

As such, the undisputed evidence establishes that the SEC is entitled to summary judgment on its antifraud claims.

E. The Court Should Issue Permanent Injunctions

Section 20(b) of the Securities Act, 15 U.S.C. § 77t(b), and Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d), provide that when the evidence establishes a reasonable likelihood of a future violation of the securities laws, a permanent injunction shall be granted in enforcement actions brought by the SEC. *SEC v. Murphy*, 626 F.2d at 633; *SEC v. Koracorp Indus., Inc.*, 575 F.2d 692 (9th Cir. 1978); *SEC v. Fehn*, 97 F.3d at 1295-96. Factors to be considered include the degree of scienter involved; the isolated or recurrent nature of the infractions; the defendant's recognition of the wrongful nature of his conduct; the likelihood that, based on the defendant's occupation, future violations might occur; and the sincerity of the defendant's assurances against future violations. *Id.* Here, all of those factors weigh in favor of a permanent injunction.

F. Defendants Should Pay Disgorgement and Prejudgment Interest

It is well settled that the SEC may seek, and courts may order, disgorgement of ill-gotten gains. *See SEC v. First Pac. Bancorp*, 142 F.3d at 1191; *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995). Disgorgement usually includes prejudgment interest, which courts order to ensure that the wrongdoer does not profit from the illegal activity. *See SEC v. Manor Nursing Centers, Inc.*, 458 F.2d at 1105; *SEC v. CMKM Diamonds, Inc.*, 635 F. Supp. 2d 1185, 1190 (D. Nev. 2006).

The SEC need only present evidence of a "reasonable approximation" of the defendant's ill-gotten gains. *See Platforms Wireless*, 617 F.3d at 1096; *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113-14 (9th Cir. 2006). Once such evidence has been presented by the SEC, the burden shifts to the defendant to "demonstrate that the disgorgement figure was not a reasonable approximation." *Platforms Wireless*, 617 F.3d at 1096 (citation omitted).

Here, the SEC has calculated a reasonable approximation of the amount of ill-gotten gains obtained by Feng and Feng & Assocs. In his recent deposition, Feng admitted the amount of commissions he has been paid, and is entitled to paid, equal $4,718,000 (consisting of $1,268,000 in marketing fees he has received, and an additional $3,450,000 in fees he is entitled to receive upon approval of his clients' I-526 petitions. SF ¶¶ 171-172. Based on his admissions, Feng and Feng & Assocs. should be ordered to pay, jointly and severally, disgorgement of $4,718,000. Joint and several liability is appropriate when co-defendants "collaborate or have a close relationship in engaging in the violations of the securities laws." *Platforms Wireless*, 617 F.3d at 1098; *First Pac. Bancorp*, 142 F.3d at 1191-92.

Feng and Feng & Assocs. should also be ordered to pay prejudgment interest from January 1, 2014 to January 17, 2017 the date of filing of the SEC's summary judgment motion.[9] Prejudgment interest on $4,718,000 for this period is $468,012. Declaration of Kristin Escalante ("Escalante Decl.") ¶¶ 108-109, Ex. 215. Thus, the total amount of disgorgement and prejudgment interest owed by Defendants is $5,186,012. *Id*.

G. The Court Should Impose a Civil Penalty against Defendants

Civil penalties are meant to punish the individual wrongdoer and to deter him and others from future securities law violations. *SEC v. Lyndon*, 39 F. Supp. 3d 1113, 1123 (D. Haw. 2014); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d at 17. Because civil penalties, like a permanent injunction, are imposed to deter the wrongdoer from similar conduct in the future, in assessing civil penalties, courts frequently apply the factors set forth in *SEC v. Murphy*, 626 F.2d 633, which courts consider in determining the appropriateness of injunctive relief. *See Lyndon*, 39 F. Supp. 3d at 1123-24; *CMKM*

[9] As explained in the declaration of Kristin Escalante, this prejudgment interest calculation is based on a time weighted average, as Feng received undisclosed commissions beginning in 2010 and continuing through 2015. Rather than calculate prejudgment interest based on the date of receipt of each of Feng's 150 commissions, the SEC ran its calculation based on the total amount of his commission payments from January 1, 2014. Escalante Decl., ¶ 109.

Diamonds, 635 F. Supp. 2d at 1192, citing *SEC v. Alpha Telcom, Inc.*, 187 F. Supp. 2d 1250, 1263 (D. Or. 2002). Those factors are: the degree of scienter involved; the isolated or recurrent nature of the infraction; the defendant's recognition of the wrongful nature of his conduct; the likelihood, because of the defendant's professional occupation, that future violations might occur; and the sincerity of the defendants' assurances, if any, against future violations. *Murphy*, 626 F.2d at 655.

The Securities and Exchange Acts provide that penalties shall be assessed according to a three-tier system. 15 U.S.C. §§ 77t(d)(2), 78u(d)(3)(B). Here, Feng's violations were egregious, recurrent, and involved a high degree of scienter. Nor has Feng expressed remorse or given any assurance against future violations. Accordingly, the SEC submits that a substantial penalty should be imposed against Feng and Feng & Assocs.[10]

IV. CONCLUSION

For the foregoing reasons, the SEC respectfully requests that the Court grant its motion for summary judgment.

Dated: January 17, 2017

Respectfully submitted,

/s/ Donald W. Searles

DONALD W. SEARLES
KRISTIN S. ESCALANTE
MEGAN M. BERGSTROM
Attorneys for Plaintiff
Securities and Exchange Commission

[10] SEC counsel cannot seek specific penalty amounts without approval from the SEC Commissioners on each case. SEC counsel has submitted a penalty recommendation for approval by the Commissioners but we expect the Commissioners will not be able to act on our recommendation until the end of January 2017 given its present schedule. SEC counsel expects to propose specific penalty amounts for Feng and Feng & Assoc. in subsequent briefing, subject to approval by the Court, before the due date for the filing of Defendants' opposition to the SEC's motion for summary judgment.

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 January 17, 2017, I caused to be served the document entitled **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY AGAINST HUI FENG AND LAW OFFICES OF FENG & ASSOCIATES P.C.** 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: January 17, 2017

/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

SERVICE LIST

Andrew B. Holmes, Esq. **(served by CM/ECF only)**
Matthew D. Taylor, Esq. **(served by CM/ECF only)**
Holmes, Taylor & Jones LLP
617 S. Olive Street, Suite 1200
Los Angeles, CA 90014
Email: abholmes@htjlaw.com
Email: matthew.taylor@htjlaw.com
Attorney for Defendants Hui Feng and Feng & Associates P.C.