UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. HUI FENG and LAW OFFICES OF FENG & ASSOCIATES P.C., Defendants.	Case No. 15-cv-09420-CBM(SSx) **ORDER RE: MOTIONS FOR SUMMARY JUDGMENT**

The matters before the Court are: (1) Plaintiff Securities and Exchange Commission's ("SEC's") Motion For Summary Judgment; and (2) Defendants Hui Feng's ("Feng's") and Law Offices of Feng & Associates P.C.'s ("Law Office's") (collectively, "Defendants'") Motion For Summary Judgment. (Dkt. Nos. 61, 66.)

I. BACKGROUND

The EB-5 Immigrant Investor Program was created by Congress in 1992 to stimulate the U.S. economy with capital investment from foreign investors. Foreign investors who invest $500,000 or $1,000,000 capital in a domestic commercial enterprise may petition the United States Citizenship and Immigration Services ("USCIS") (the "I-526 Petition") and receive conditional permanent

residency status. Many EB-5 investments are administered by entities called "regional centers."

This securities action arises from Defendants' (who are immigration attorneys) receipt of undisclosed commissions from regional centers in connection with Defendants' clients' EB-5 Immigrant Investor Program (the "EB-5 Program") investments. The SEC's Complaint assert the following three causes of action under the Securities Exchange Act ("the Act"): (1) Fraud in the Offer or Sale of Securities, 15 U.S.C. § 77q(a); (2) Fraud in Connection with the Purchase or Sale of Securities, 15 U.S.C. § 78j(b); and (3) Failure to Register as a Broker-Dealer, 15 U.S.C. § 78o(b).

The SEC's first cause of action for Fraud in the Offer or Sale of Securities alleges Defendants violated Section 17(a) of the Act, which provides:

> It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly
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> **(1)** to employ any device, scheme, or artifice to defraud, or
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> **(2)** to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
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> **(3)** to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a).

The SEC's second cause of action for Fraud in Connection with the Purchase or Sale of Securities alleges Defendants violated Section 10(b) of the Act and Rule 10b-5. Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so

> registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

15 U.S.C. § 78j(b). One of the rules promulgated under the Act is Rule 10b-5, which provides: "It shall be unlawful for any person ... [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

The second and third causes of action for securities fraud allege: (1) Defendants failed to disclose to clients that Defendants received commissions from regional centers for referring Defendants' clients to invest in a regional center's EB-5 offerings; and (2) Defendants falsely represented to regional centers that foreign-based persons or a foreign-based entity were responsible for finding EB-5 investors, when in reality Defendant Feng's relatives or an entity controlled by Feng received commissions for referring clients.

The SEC's third cause of action for Failure to Register as a Broker-Dealer alleged Defendants violated Section 15 of the Act, which provides:

> (a) . . . It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) 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 (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section. . . .
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> (b) . . . A broker or dealer may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78o. The third cause of action alleges Defendants failed to register as

brokers under Section 15 in connection with their EB-5 activities.

II. STATEMENT OF LAW

On a motion for summary judgment, the Court must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact. *Simo v. Union of Needletrades, Indus. & Textile Employees*, 322 F.3d 602, 609-10 (9th Cir. 2003); Fed. R. Civ. P. 56. Summary judgment against a party is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law. *Id*. at 248.

The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Rather, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [the nonmovant's] favor." *Anderson*, 477 U.S. at 255. But the non-moving party must come forward with more than "the mere existence of a scintilla of evidence." *Id*. at 252. "Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (citations omitted).

III. DISCUSSION

A. Evidentiary Objections

The Court rules on the parties' evidentiary objections as follows:

The SEC's Request for Evidentiary Rulings On Specified Objections (Dkt. No. 80): The SEC's objection No. 18 is SUSTAINED as to ABCL maintaining offices in China, and otherwise OVERRULED. The SEC's remaining objections are SUSTAINED.

Defendants' Request for Evidentiary Ruling on Specified Objections (Dkt. No. 75-3): Defendants' objections are OVERRULED.

Defendants' Request for Evidentiary Ruling on Specified Objections (Dkt. No. 81-3): Defendants' objections Nos. 3, 23, and 24 are SUSTAINED. Defendants' objection No. 28 is SUSTAINED as to Ekins Deposition page 41, line 22 through page 42 line 4, and OVERRULED as to Ekins Deposition page 41, lines 19 to 21. Defendants' remaining objections are OVERRULED.[1]

B. Defendants' Requests for Judicial Notice

Defendants request the Court take judicial notice of various administrative materials and news articles. (*See* Dkt. Nos. 67, 75-2, 81-1.) The Court may only take judicial notice of the existence of the documents, but not the truth of the contents therein. *See* Fed. R. Evid. 402; *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). The Court finds the existence of the documents for which Defendants seek judicial notice is not relevant, and therefore denies Defendants' requests for judicial notice.

C. Whether the EB-5 Investments Are "Securities" Under the Act

Defendants seek summary judgment as to all causes of action on the ground the EB-5 investments are not "securities" covered by the Act. Defendants also oppose the SEC's summary judgment motion on the same basis.

Section 3(a)(10) of the Act defines "security" to include, among other things, an "investment contract." 15 U.S.C. § 78c(a)(10) (emphasis added).[2]

[1] Consistent with the rulings on the objections, the Court did not consider evidence for which an objection was sustained.

[2] Specifically, "security" is defined under the Act as:

[A]ny note, stock, treasury stock, security future, security-based swap,

"Congress' purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called." *S.E.C. v. Edwards*, 540 U.S. 389, 393 (2004) (citation omitted) (emphasis in original). "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 Reves v. Ernst & Young*, 494 U.S. 56, 60 (1990) ("In defining the scope of the market that it wished to regulate [via the federal securities laws], Congress painted with a broad brush."); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("[I]n searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality."); *S.E.C. v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351 (1943) ("Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as 'investment contracts,' or as 'any interest or instrument commonly known as a 'security.'").

In *S.E.C. v. W.J. Howey Co.*, the Supreme Court defined an "investment contract" as "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

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> bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, ***investment contract***, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

15 U.S.C. § 78c(a)(10) (emphasis added). The term "investment contract" is not defined in the Act.

of the promoter or a third party." 328 U.S. 293, 298-99 (1946). The Ninth Circuit has held the definition of "investment contract" set forth in *Howey* created a three-part test requiring: "(1) an investment of money (2) in a common enterprise (3) with an expectation of profits produced by the efforts of others." *Warfield v. Alaniz*, 569 F.3d 1015, 1020 (9th Cir. 2009) (citation omitted). The third prong of this test "involves two distinct concepts: whether a transaction involves any expectation of profit and whether expected profits are the product of the efforts of a person other than the investor." *Id.*

"[W]hile the subjective intent of the purchasers may have some bearing on the issue of whether they entered into investment contracts, [the Court] must focus [its] inquiry on what the purchasers were offered or promised." *Warfield*, 569 F.3d at 1021. Therefore, "[u]nder *Howey*, courts conduct an objective inquiry into the character of the instrument or transaction offered based on what the purchasers were 'led to expect.'" *Id.* (citing *Howey*, 328 U.S. at 298-99); *see also C.M. Joiner Leasing Corp.*, 320 U.S. at 352-53 ("The test [for determining whether an instrument is a security] … is what character the instrument is given in commerce *by the terms of the offer*, the plan of distribution, and the economic inducements held out to the prospect.") (Emphasis added.); *Edwards*, 540 U.S. at 392 (payphone sale and buyback scheme involved investment contracts where promotional materials noted "potential for ongoing revenue generation").

The parties disagree as to whether the third prong of the *Howey* test is met.[3]

Regulations governing the EB-5 Program, which became effective in November 2011, provides: "To show that the petitioner has invested or is actively in the process of investing 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***

[3] Defendants do not contend the first or second prongs of the *Howey* test is not satisfied here.

risk." 8 C.F.R. § 204.6 (emphasis added). Based on the evidence before the Court, there is no genuine issue of material fact that (1) the terms of the EB-5 investments note a potential for profit;[4] (2) many of the private placement memoranda for the EB-5 investments describe the offerings as "securities";[5] and (3) the regional centers' offerings were designed to meet the requirements set forth in 8 C.F.R. § 204.6 that capital must be invested for the purpose of generating a return.[6]

Defendants nevertheless argue the third prong re: expectation of profits is

[4] *See, e.g.*, Escalante Decl. Ex. 151 at p.1282 ("However, investment in the Partnership also offers investors an opportunity for a non-guaranteed annual return as described in the Offering Memorandum. With essential investment elements of risk and return incorporated in the Offering Memorandum, the Partnership complies with the terms of the program regulations."), Ex. 156 at p.1317 (same), Ex. 164 at p.1699 ("In the case of Lam Group's Pearl Street Project, the EB-5 investment is indeed generating a 1.5% return on the investment, however, the language did not specify that the 1.5% interest would be distributed to the individual investors; rather the return is maintained at the level of the new commercial enterprise. To remedy the ambiguity, the Regional Center has amended its offering documents to reflect that the EB-5 investors would individually be earning an interest payment."); Feng Decl. Ex. 2 (0.5% annual return on investment), Ex. 3 (4.25% annual interest income), Ex. 4 (up to 4% annual interest income), Ex. 82 at p.3 (6% annual return on investment); Ex. 7 (0.5% annual return on investment), Ex. 8 (0.5% annual return on investment), Ex. 80 (up to 5% annual interest income), Ex. 81 (up to 4.5% annual interest income), Ex. 82 (5% annual interest income), Ex. 83 (6.25% annual interest rate of return).)

[5] *See* evidence cited in support of SEC Statement of Fact Nos. 21-22, 27-28, 30-32; *see also* Feng Decl. Ex. 2 at p.6 ("THE UNITS ARE RESTRICTED SECURITIES UNDER THE SECURITIES ACT."), Ex. 3 at p.i ("THE SECURITIES OFFERED HEREBY CANNOT BE OFFERED OR SOLD IN THE UNITED STATES OR TO "U.S. PERSONS" (AS SUCH TERM IS DEFINED IN REGULATIONS, PROMULGATED UNDER THE SECURITIES ACT) UNLESS THE SECURITIES ARE REGISTERED UNDER THE SECURITIES ACT, OR AN EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT IS AVAILABLE."), Ex. 4 at p.i (same), Ex. 80 at p.i (same), Ex. 81 at p.i (same), Ex. 82 at p.i (same), Ex. 83 at p.i (same).) *See SEC v. United Ben. Life Ins. Co.*, 387 U.S. 202, 211 (1967) ("In the enforcement of an act such as this it is not inappropriate that promoters' offering be judged as being what they were represented to be."); *Warfield*, 569 F.3d at 1021 ("[C]ourts have frequently examined the promotional materials associated with an instrument or transaction in determining whether an investment contract is present.").

[6] *See* evidence cited in support of SEC Statement of Fact No. 50. *See also* Escalante Decl. Ex. 187 (filing with USCIS wherein Feng represented that "Investor's investment entitles her to a share of profits and cash flows generated by the business of CMB Group IV.").

not satisfied here because: (1) the EB-5 investments were motivated by Defendants' clients' desire for permanent resident status in the U.S.;[7] and (2) the terms of the EB-5 investments demonstrate Defendants' clients had no expectation of profits because EB-5 clients were required to pay mandatory administrative fees to regional centers[8] which cost more than the actual profit made by their EB-5 investments.[9]

First, the expectation of profits prong can be satisfied even where investments are made primarily for other reasons in addition to profit. Defendants argue the EB-5 investments were not solely made for profits, and therefore are not investment contracts, relying on dicta in *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975). In *Forman*, the Supreme Court noted in dicta:

> [T]he basic test for distinguishing the transaction [involving a security] from other commercial dealings is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. By profits, the Court has meant either capital appreciation resulting from the development of the initial investment ([e.g.,] sale of oil leases conditioned on promoters' agreement to drill exploratory well), or a participation in earnings resulting from the use of investors' funds, ([e.g.,] dividends on the investment based on savings and loan association's profits). In

[7] It is undisputed representatives of regional centers acknowledge EB-5 investors hope to obtain green cards. (*See* evidence cited in support of Defendants' Statement of Fact No. 34.)

[8] Defendants submit offering documents for EB-5 investments between regional centers and Defendants' clients demonstrating clients were required to pay administrative fees ranging from $30,000 to $65,000. (*See* Feng Decl. Exs. 3, 4, 7, 8, 80, 81, 82, 83, 110.)

[9] Defendants also contend the SEC has "historically conceded that an EB-5 investment without an expectation of profit is not a security," and request that the Court take judicial notice of a January 18, 2002 No Action Letter issued by the SEC. (*See* Dkt. No. 67.) The Court can only take judicial notice of the existence of the SEC's no action letter, and not the truth of the contents of therein. (*See supra* at p.5 (denying Defendants' requests for judicial notice).) *See* Fed. R. Evid. 402; *Lee*, 250 F.3d at 690. Moreover, the SEC's no action letter is based on "the facts presented" before the SEC in an unrelated matter, and is not binding on this Court. *See Aventa Learning, Inc. v. K12 Inc.*, 2011 WL 13100748, at *4 (W.D. Wash. Mar. 28, 2011); *Holmes v. Bartlett*, 2004 WL 793190, at *3 (D. Or. Mar. 30, 2004), *report and recommendation adopted*, 2004 WL 1173138 (D. Or. May 21, 2004).

> such cases the investor is ***attracted solely by the prospects of a return*** on his investment. By contrast, when a purchaser is motivated by a desire to use or consume the item purchased—to occupy the land or to develop it themselves. . . —the securities laws do not apply.

421 U.S. at 852-53 (emphasis added) (internal quotations and citations omitted). The Ninth Circuit and Second Circuit, however, have both held post-*Forman* that investments promoted primarily for tax benefits nevertheless satisfied the expectation of profits prong under the *Howey* test. *See S.E.C. v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 463-64 (9th Cir. 1985); *S.E.C. v. Aqua-Sonic Prods. Corp.*, 687 F.2d 577 (2d Cir. 1982), *cert. denied*, 459 U.S. 1086 (1982). Therefore, evidence demonstrating Defendants' clients were also motivated to make EB-5 investments to obtain permanent residency in the United States does not preclude a determination that the EB-5 investments involved an expectation of profits and are therefore securities. *See S.E.C. v. Liu*, 2016 U.S. Dist. LEXIS 181536, at *9-12 (C.D. Cal. Aug. 17, 2016) (finding EB-5 investments were securities under the Act despite defendants' contention investors' did not have a "primary profit motive," reasoning although "nobody would dispute that EB-5 investors are motivated in significant part by obtaining lawful permanent residency in the United States[,] . . . the fact that the acquisition of EB-5 shares comes with unrelated benefits does not somehow convert the shares from securities into something else").

Second, Defendants cite to no authority in support of the proposition there can be no "expectation of profits" where clients are required to pay fees greater than their actual profits. The district court's opinion in *S.E.C. v. Liu* is persuasive on this point:

> The fact that [EB-5] investors paid a significant fee to invest . . .—a fee larger than the projected profits—does not alter this conclusion [that the instruments are securities under the Act]. Defendants have produced no legal authority for the proposition that the size of an investment fee can alter the nature of an investment contract itself. An [EB-5] investor who pays a fee to purchase securities has nonetheless purchased securities***. The question here is not whether some combination of EB-5 shares and fees are profitable securities, but whether the shares themselves . . . qualify as investment***

> ***contracts. . . . Conflating fees paid to administer an offering with the proceeds of the offering itself makes little sense when determining whether the proceeds of the offering were expected to be profitable.***

2016 U.S. Dist. LEXIS 181536, at *12 (emphasis added). Moreover, the issue is not whether investors actually received a profit, but whether there was an expectation of profit based on the objective terms of the offerings. *See Warfield*, 569 F.3d at 1020. Therefore, evidence Defendants' clients were required to pay administrative fees for their EB-5 investments is irrelevant in determining whether there was an "expectation of profits" under the *Howey* test.

Here, although it is undisputed EB-5 investors are also motivated to make investments to obtain permanent residency in the United States, the EB-5 regulations require, and the terms of the EB-5 investments demonstrate capital contributions were made by Defendants' clients for the purpose of generating a return. Accordingly, the Court finds the EB-5 investments are investment contracts and therefore securities governed by federal securities laws and regulations.[10]

D. Whether Defendants Acted As "Brokers" Covered By the Act

Section 3(a)(4) of the Act defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank." 15 U.S.C. § 78c(a)(4). The purpose of Section 15(a)'s broker registration requirement is to ensure that "securities are [only] sold by a salesman who understands and appreciates both the nature of the securities he sells and his responsibilities to the investor to whom he sells." *Roth v. S.E.C.*, 22 F.3d 1108, 1109 (D.C. Cir. 1994). *See also Edwards*, 549 U.S. at 393 ("Congress' purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called.").[11]

[10] *See S.E.C. v. Liu*, 2016 U.S. Dist. LEXIS 181536, at *9-12; *see also Edwards*, 540 U.S. at 392; *Warfield*, 569 F.3d at 1021; *S.E.C. v. U.S. Reservation Bank & Trust*, 289 F. App'x 228, 230-31 (9th Cir. 2008).

[11] Whether a security is exempt from registration and therefore not sold on an exchange facility is irrelevant to the issue of whether Defendants acted as brokers

(1) Exemptions from Broker Registration

Defendants argue they should be exempt from the Act's broker-registration requirements as a matter of public policy since attorneys already have heightened fiduciary duties owed to their clients. Defendants rely on 11 U.S.C. §80b-2(a)(11) of the Investment Advisers Act of 1940, which defines an "investment advisor" as "any person who… engages in the business of advising others…as to the value of securities or as to the advisability of investing in, purchasing, or selling securities…," but expressly excludes lawyers from this definition so long as their "performance of such services [are] solely incidental to the practice of [their] profession." No attorney exemption, however, is set forth in Section 15 of the Act.[12] Accordingly, the Court declines to adopt an exemption for attorneys from broker registration requirements under the Act based on public policy grounds.

Defendants also argue they are exempt from registering as brokers because it is undisputed Defendants' clients' EB-5 investments were not traded on a national securities exchange. Section 15(a) provides:

> It shall be unlawful for any broker or dealer... (***other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange***) 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 other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

15 U.S.C. § 78o(a)(1) (emphasis added). The plain language of Section 15(a)

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and were required to register as brokers under the Act. *See Eastside Church of Christ v. Nat'l Plan, Inc.*, 391 F.2d 357, 361 (5th Cir. 1968) (the fact that securities at issue may be exempt from registration under the Act "does not relate to the antifraud or broker-dealer registration provisions" of the Act).

[12] Under general principles of statutory interpretation, where the legislature expressly excluded attorneys from the definition of investment advisor under the Investment Advisors Act, but did not exclude attorneys from the definition of investment advisors in the Securities Exchange Act, this demonstrates the legislature did not intend to exclude attorneys from broker registration requirements under the Securities Exchange Act. *See, e.g., F.T.C. v. Sun Oil Co.*, 371 U.S. 505, 514-15 (1963).

requires both exclusive intrastate business and non-use of any facility of a national securities exchange to be exempt from the Act's broker registration requirements. *Id.* Here, however, the undisputed evidence demonstrates Defendants' business was not "exclusively intrastate." Accordingly, Section 15(a)'s limited exclusion for non-registration does not apply to Defendants.[13]

(2) *Hansen* Factors

Courts in the Ninth Circuit have considered the *Hansen* factors[14] in determining whether an individual qualifies as a "broker" covered by the Act, including whether the individual:

(1) is an employee of the issuer of the security;[15]
(2) received transaction-based income such as commissions rather than a salary;
(3) sells or sold securities from other issuers;
(4) was involved in negotiations between issuers and investors;
(5) advertising for clients;
(6) gave advice or made valuations regarding the investment;
(7) was an active finder of investors; and
(8) regularly participates in securities transactions.

See S.E.C. v. Braslau, 2014 WL 6473378, at *5 (C.D. Cal. Nov. 17, 2014); *S.E.C. v. Holcom*, 2015 WL 11233426, at *4, *6 (S.D. Cal. Jan. 8, 2015) (citing *Hansen*, 1984 WL 2413, at *10); *S.E.C. v. Small Bus. Capital Corp.*, 2013 WL 4455850, at

[13] In arguing they were not required to register as brokers because the EB-5 investments were not traded using exchange facilities, Defendants rely on the heading for Section 15(a) of the Act, which does not reference intrastate business and simply states: "Registration of all persons ***utilizing exchange facilities*** to effect transactions; exemptions." 15 U.S.C. § 78o(a)(1)(emphasis added). Defendants, however, cannot rely on the heading of Section 15(a) rather than the plain language of the statute, for purposes of determining whether they were required to register as brokers under Section 15(a). *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998); *Bhd. of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29 (1947).

[14] *See S.E.C. v. Hansen*, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984).

[15] There is no genuine issue of material fact that Defendants were not employees of the regional centers. (*See* evidence cited in support of Defendants Statement of Fact No. 48.)

*14 (N.D. Cal. Aug. 16, 2013).[16]

Here, the undisputed evidence demonstrates: (1) Feng received transaction-based income in the form of commissions or referral fees for referring his clients to the regional centers; (2) Defendants have provided services in connection with the EB-5 Program since 2010, Feng started trading securities in 2003, and operated a hedge fund from 2008 to 2014 for which he conducted securities transactions;[17] (3) Defendants advertised for clients and were active finders of investors by promoting EB-5 projects on the internet and through Feng's website; (4) Defendants were involved in negotiations between regional centers and investors by interfacing directly with regional centers regarding his clients' EB-5 investments, asking regional centers numerous questions regarding the projects, and negotiating with regional centers as to the amount of administrative fees and rebates on Defendants' clients' behalf;[18] and (5) Defendants gave advice regarding investments by conducting research and performed due diligence regarding EB-5 investment projects and providing lists of EB-5 regional centers they recommended clients to invest in.[19] Accordingly, each of the *Hansen* factors—

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[16] Some courts have found the transaction-based compensation factor should be given substantial weight in determining whether the person is a broker under the Act. *See, e.g.*, *Landegger*, 2013 WL 5444052, at *6; *S.E.C. v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011); *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, 2006 WL 2620985, at *6 (D. Neb. Sept. 12, 2006).

[17] Feng declares he has "never sold securities" (Feng Decl. ¶ 35), which directly contradicts his prior sworn testimony and therefore cannot be used to create a genuine issue of material fact. Accordingly, the Court disregards this portion of Feng's declaration as a "sham" declaration. *See Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir. 2009); *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991).

[18] Feng declares he has "never been involved in negotiating the financial terms of [EB-5] investments on [his] clients' behalf." (Feng Decl. ¶22.) The Court disregards this portion of Feng's declaration as a "sham" declaration because it directly contradicts his prior sworn testimony and cannot be used to create a genuine issue of material fact. *See Nelson*, 571 F.3d at 927; *Kennedy*, 952 F.2d at 266-67.

[19] Feng declares he "do[es] not perform any analysis, or make any recommendations to [his] clients based on whether certain projects offer a higher financial return than others." (Feng Decl. ¶¶ 20, 37.) The Court disregards this portion of Feng's declaration as a "sham" declaration because it directly

other than the employee of issuer factor—demonstrate Defendants acted as brokers under the Act.[20]

The Court therefore finds Defendants were brokers subject to registration requirements under Section 15(a) of the Act.

* * *

It is undisputed Defendants never registered as a broker. Accordingly, the Court finds Defendants failed to register as brokers in violation of Section 15(a) of the Act.

E. Securities Fraud—Section 17(a)(2), Section 10(b), and Rule 10b-5

The SEC's first and second causes of action are for violation of Section 17(a)(2) and Section 10(b) of the Act, and Rule 10b-5. "Section 17(a) Act, Section 10(b), and Rule 10b–5 forbid making [1] a material misstatement or omission [2] in connection with the offer or sale of a security [3] by means of interstate commerce."[21] *S.E.C. v. Phan*, 500 F.3d 895, 907-08 (9th Cir. 2007) (internal quotations and citations omitted); *see also S.E.C. v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1092 (9th Cir. 2010).[22] Violations of Section 10(b)

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contradicts his prior sworn testimony and cannot be used to create a genuine issue of material fact. *See Nelson*, 571 F.3d at 927; *Kennedy*, 952 F.2d at 266-67.

[20] Notwithstanding the *Hansen* factors, Defendants, relying on *S.E.C. v. M&A West, Inc.*, 2005 WL 1514101 (N.D. Cal. June 20, 2005), *aff'd*, 538 F.3d 1043 (9th Cir. 2008), and *S.E.C. v. Mapp*, 2016 U.S.Dist.LEXIS 140141 (E.D. Tex. Oct. 7, 2016), argue they did not act as brokers because there were only "three isolated incidents" during which a client wired funds to Feng, who then transferred the funds to the escrow agent specified by the regional center. Both *M&A West* and *Mapp* are distinguishable because those cases dealt with situations where there was no evidence (or no allegations) that the defendant had been entrusted with assets or authorized to transact for the account of others. In contrast, here it is undisputed that "[f]rom time to time, an investor would wire funds to Feng, who handled the transfer of funds to the regional centers." (*See* evidence cited in support of SEC Statement of Fact No. 147.)

[21] The parties do not address the interstate commerce factor, but it is undisputed Defendants had offices in the United States and China, Defendants' EB-5 clients were from China, and Defendants' clients made investments with regional centers in the United States as part of the EB-5 Program.

[22] Defendants argue there is no evidence the regional centers actually or reasonably relied on Defendants' alleged misrepresentations. However, "the SEC, unlike a private plaintiff, is not required to establish reliance for a § 10b or Rule 10b–5 securities fraud action." *S.E.C. v. All. Leasing Corp.*, 28 F. App'x 648, 652

and Rule 10b–5 "require *scienter*," whereas [v]iolations of Sections 17(a)(2) . . . require a showing of negligence." *Phan*, 500 F.3d at 908.

(1) Material Omissions

A fact "is material 'if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.'" *Platforms Wireless Int'l Corp.*, 617 F.3d at 1092 (quoting *Phan*, 500 F.3d at 908).[23]

Feng declares: (1) he did not voluntarily disclose regional centers paid him a referral fee prior to February 2015; (2) he only acknowledged he received a referral fee from regional centers if clients asked him; and (3) as of February 2015 he began to disclose he would receive referral fees in the engagement agreements his clients signed prior to retaining Feng's legal services. (Feng Decl. ¶ 34.)[24] The SEC offers evidence Defendants' clients would have chosen a cheaper investment or asked to receive a portion of Defendants' commissions if they had

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(9th Cir. 2002) (citing *S.E.C. v. Rana Research Inc.*, 8 F.3d 1358, 1363-64 (9th Cir. 1993)).

[23] "Determining materiality in securities fraud cases should ordinarily be left to the trier of fact." *Phan*, 500 F.3d at 908 (internal quotations and citation omitted). "Materiality typically cannot be determined as a matter of summary judgment because it depends on determining a hypothetical investor's reaction to the alleged misstatement." *Id.* "Only if the established omissions are so obviously important to an investor, that reasonable minds cannot differ on the question of materiality is the ultimate issue of materiality appropriately resolved as a matter of law by summary judgment." *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). Here, the parties agree materiality may be determined as a matter of law. Moreover, the Court finds no reasonable minds can differ on whether Defendants' omissions were material. (*See infra*.)

[24] Defendants focus on the fact Feng disclosed receiving commissions if clients asked him. The burden to disclose, however, is on Defendants—it is not clients' burden to inquire whether Defendants have a conflict of interest. Moreover, it is undisputed only 10-20% of Feng's clients specifically asked if Feng was being compensated by regional centers. (*See* evidence cited in support of SEC Statement of Fact No. 199.) Moreover, the SEC legal ethics expert opined that Feng's purported "disclosure" in his legal services agreements after February 2015 fails to meet applicable ethical disclosure requirements. (*See* Wendel Decl. ¶¶ 23-24.)

known Defendants received money from the regional centers.[25]

The Court finds Defendants' omissions regarding receipt of referral fees are material as a matter of law. *See S.E.C. v. All. Leasing Corp.*, 28 F. App'x 648, 652 (9th Cir. 2002) (defendant's failure to disclose a 30% commission was material as a matter of law to the investor's assessment of the strength of the potential investment because "reasonable minds cannot differ on the question of materiality") (quoting *TSC Indus.*, 426 U.S. at 450); *United States v. Laurienti*, 611 F.3d 530, 541 (9th Cir. 2010) (noting "[i]n deciding whether to buy a given stock, a reasonable investor would consider it important that, in contrast to the purchase of most stocks, the broker would receive a 5% commission from the purchase of this particular (house) stock," and therefore "reject[ing] Defendants' argument that the bonus commissions are immaterial as a matter of law"); *Schaffer Family Inv'rs LLC v. Sonnier*, 2016 WL 6917269, at *6 (C.D. Cal. July 5, 2016) (finding defendant's misrepresentation he did not have any financial benefit in connection with investments made by plaintiffs were material misrepresentations as a matter of law where defendant admitted "he did in fact receive 'finder's fees' and commissions . . . in connection with the investments made by Plaintiffs throughout the period from 2008 to 2013").[26]

Moreover, "[i]t is indisputable that ***potential*** conflicts of interest are 'material' facts with respect to clients." *Vernazza v. S.E.C.*, 327 F.3d 851, 859 (9th Cir.), *amended*, 335 F.3d 1096 (9th Cir. 2003) (emphasis added).[27] Here,

[25] *See* Escalante Decl. Ex. 201, Fenglei Bao 7/15/15 SEC Inv. Test. 29:1-33:4; *id.* Ex. 207, Xiangyang Guo 7/28/15 SEC Inv. Test. 29:16-30:19; *id.* Ex. 206, Feng Depo. 292:2-284:1.

[26] Defendants' omissions regarding receipt of commissions is material as a matter of law, even assuming the overall cost to clients was the same regardless of the commission received by Defendants. *See Laurienti*, 611 F.3d at 535, 541 (rejecting defendant's contention that omissions regarding bonus commissions paid to brokers for house stocks were "immaterial as a matter of law" despite fact overall cost to the client was the same, regardless of the commission received by the broker).

[27] *See also S.E.C. v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 201 (1963); *Chasins*, 438 F.2d at 1172.

Feng testified there was a potential conflict of interest with respect to Defendants' receipt of commissions/referral fees from regional centers.[28]

(2) In Connection With the Offer or Sale of a Security

Defendants promoted certain regional centers to their clients but failed to disclose their financial interest (i.e., receipt of commissions/referral fees) in those regional centers. Defendants' clients in turn invested in securities offered by those regional centers recommended by Defendants. Therefore, Defendants' omissions "coincided" with a securities transaction. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006). *See also Feitelberg v. Merrill Lynch & Co.*, 234 F. Supp. 2d 1043, 1052 (N.D. Cal. 2002), *aff'd sub nom. Feitelberg v. Merrill Lynch & Co.*, 353 F.3d 765 (9th Cir. 2003) (finding alleged misfeasance was "clearly . . . 'in connection with' the sale of securities" where plaintiff alleged defendant's analysts issued positive research reports to increase or maintain the price of the securities of the company reported on and alleged the investing public was victimized by this practice because the public "***relied on what they thought was objective advice***") (emphasis added). Accordingly, the Court finds Defendants' omissions were in connection with the offer or sale of a security.[29]

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[28] *See* Escalante Decl. Ex. 204, Feng 12/2/14 SEC Inv. Test. 112:23-113:23; *id.* Ex. 205, Feng 2/13/15 SEC Inv. Test. 299:16-303:1. Feng also declared he changed his standard legal service agreement in February 2015 to state the following: "Client may obtain other advisory services from an overseas consulting firm which is controlled by Attorney; as disclosed in EB-5 offering documents, the consulting firm may receive compensation from sponsor companies to cover necessary marketing and administrative fees[.] . . . ***The compensation has the risk of impacting Attorney's judgment on the project*** . . .." (Feng Decl. ¶ 34 n.4 (emphasis added).)

[29] The Court rejects Defendants' contention that the commissions they received were not in connection with the offer or sale of a security because it was "based on an immigration event" which "related solely to the approval of an EB-5 application." *See S.E.C. v. Zandford*, 535 U.S. 813, 821 (2002) (The Supreme Court has "refused to read the [Act] so narrowly" such that a fraud that did not take place within the context of a securities exchange is not prohibited by § 10(b)," and has noted the Act "must be read flexibly, not technically and restrictively" in determining whether a fraud was in connection with the purchase or sale of securities.).

(3) Scienter/Negligence

"Scienter can be established by intent, knowledge, or in some cases 'recklessness.'" *Platforms Wireless Int'l Corp.*, 617 F.3d at 1092 (citing *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568–69 (9th Cir.1990) (en banc)). Recklessness that constitutes scienter "is conduct that consists of a highly unreasonable act, or omission, that is an 'extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'" *S.E.C. v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001) (quoting *Hollinger*, 914 F.2d at 1569). Negligence for purposes of Section 17(a)(2) and (3) is the "fail[ure] to use the degree of care and skill that a reasonable person of ordinary prudence and intelligence would be expected to exercise in the situation." *S.E.C. v. Schooler*, 2015 WL 3491903, at *10 (S.D. Cal. June 3, 2015).

The SEC offers undisputed evidence that Defendants knowingly failed to disclose their receipt of commissions to their clients because they wanted to avoid having to negotiate with clients about rebating portions of the commissions.[30] Accordingly, there is no genuine issue of material fact regarding whether Defendants acted with scienter in failing to disclose their receipt of commissions.

(4) Scheme to Defraud

Section 17(a)(1) makes it "unlawful for any person in the offer or sale of any securities . . . to employ any device, scheme, or artifice to defraud" or "engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(1), (3). Similarly, Rule 10b-5(a) and (c) make it "unlawful for any person, directly or indirectly, . . . (a) To employ any device, scheme, or artifice to defraud, . . . or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud

[30] "[W]hether or not [Defendants] believed that the investment program was a security is not material to scienter." *All. Leasing Corp.*, 28 F. App'x at 651-52.

or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(a), (c). To be liable for a scheme to defraud under Section 17(a) and Rule 10b-5, a defendant must have "committed a manipulative or deceptive act in furtherance of the scheme." *Cooper v. Pickett*, 137 F.3d 616, 624 (9th Cir. 1997). *See also Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 938 (9th Cir. 2009). Specifically, the 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. It is not enough that a *transaction* in which a defendant was involved had a deceptive purpose and effect; the defendant's *own conduct* contributing to the transaction or overall scheme must have had a deceptive purpose and effect." *Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006), *vacated on other grounds by Simpson v. Homestore.com*, 519 F.3d 1041, 1041-42 (9th Cir. 2008) (emphasis in original).

As to Defendants' clients, there is no genuine issue of material fact based on the evidence before this Court that (1) Feng would try to make it appear the rebate was coming from the regional center, rather than from Feng, because he wanted his clients to think he was negotiating on their behalf; (2) Feng believed if his client knew the rebate was coming from Feng, the client would demand that Feng rebate the rest of the referral fee/commission from Feng; (3) when Feng does negotiate for a regional center to rebate a fee, in some instances 100% of the rebate is coming from Feng's marketing fee but Feng does not disclose this to his clients. (*See* evidence cited in support of SEC's Statement of Fact Nos. 210-212.) Accordingly, it is undisputed Defendants acted to create a "false appearance of fact" to clients that rebates were coming from regional centers in order to prevent Defendants' clients from demanding money from Feng.

As to regional centers, there is no genuine issue of material fact based on the evidence before this Court that:

(1) Feng was solely responsible for setting up ABCL, has sole

control over ABCL's bank account, and is the sole beneficial owner of ABCL;

(2) ABCL had no employees other than employees of Feng's law firm;

(3) Although Xing Tan was added as a 50% owner of ABCL in December 2014, she has no dealings with clients or regional centers, has no authority over ABCL's bank account, and has never received compensation from ABCL;

(4) Feng represented to regional centers he was working with individuals in China who were procuring investors and who demanded payment of referral fees;

(5) Feng had his relatives execute referral agreements on behalf of ABCL with some regional centers even though the relatives had no role in procuring investors;

(6) Xiuyuan Tan signed agreements with regional centers wherein she identified herself as "President" of ABCL;

(7) Xiuyuan Tan signed a marketing agreement with regional center DCRC-Skyland wherein DCRC-Skyland agreed to pay Tan a fee of $30,000 per client;

(8) Feng emailed regional center DCRC-Skyland on January 11, 2014 and wrote "attached is the signed marketing agreement to our agent in China";

(9) Xiuyuan Tan is Feng's mother and had nothing to do with the procurement of investors and did not provide services under the marketing agreements she signed with regional centers;

(10) Feng never told DCRC regional center that Xiuyuan Tan was his mother, that she had no role in finding overseas EB5 investors, and that she had no role at ABCL;

(11) DCRC-Skyland regional center wired $210,000 in commissions to a bank in Hong Kong to an account in the name of Huizhen Xi, Feng's mother-in law;

(12) Feng did not disclose to DCRC that Huizhen Xi was Feng's mother-in-law who had nothing to do with the procurement of investors or otherwise providing services under the agreement with DCRC;

(13) DCRC regional center entered into a foreign finder agreement with ABCL on September 16, 2015, wherein ABCL represented neither ABCL, its general partners, managing members, directors, executive officers nor any other officer is a citizen of the US, ABCL did not directly or indirectly maintain a physical office in the United States, and ABCL and its representatives will conduct all of their activities outside the U.S.;

> (14) DCRC wired commissions to an account in the name of ABCL for finding investors;
>
> (15) Feng never told DCRC regional center that Feng is a 50% owner of ABCL; and
>
> (16) DCRC would likely have ceased doing business with Feng and his Chinese "agents" had Feng disclosed his relationship to ABCL and those "agents."[31]

Defendants contend regional centers knew Defendants were using overseas agents and overseas companies related to Defendants to accept payments from regional centers, relying on deposition testimony from Brian Ostar, a representative of EB-5 Capital regional center, who testified that he asked Feng, "Do you have a sister agency in China who we can pay" referral fees. (Holmes Decl. Ex. 14, Ostar Depo. 68:4-14.) Defendants argue "sister" agency did not mean a company with no relationship to Feng, and therefore regional centers asked for and knew Chinese agents and ABCL had relationships with Feng. The evidence offered by Defendants, however, is limited to one regional center. Moreover, the next nine lines of Ostar's deposition, which were excluded by Defendants, provide:

> Q. [When you asked if Feng has a "sister agency" in China you could pay,] [d]id you mean an unrelated entity with which -- with whom Mr. Feng dealt with in China?
> A. Yes.
> Q. And in writing that sentence, did you mean to suggest to Mr. Feng that he should set up a paper company so that he could indirectly receive referral fees?
> . . .
> THE WITNESS: No.

(Ostar Depo. 68:15-24.) Accordingly, Defendants fail to offer evidence demonstrating regional centers were aware of Defendants' relationship with ABCL and overseas agents. It is therefore undisputed Defendants acted to create a "false appearance of fact" to regional centers regarding Defendants' relationship

[31] *See* evidence cited in support of SEC's Statement of Fact Nos. 86-100, 105-107, 113-116, 249, 257, 320-325, 327, 328, 332, 333, 346, 336-338, 341, 348, 352.

with ABCL and Chinese agents who received referral fees but did not procure investors.

The Court thus finds Defendants violated Sections 17(a) and 10b-5 based on a scheme to defraud clients and regional centers.

F. Disgorgement of Profits and Prejudgment Interest

"The district court has broad equity powers to order the disgorgement of 'ill-gotten gains' obtained through the violation of the securities laws." *S.E.C. v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir.1998) (citations omitted). "Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable." *Id.* *See also Platforms Wireless*, 617 F.3d at 1099-100 (affirming award of prejudgment interest in securities fraud action). Joint and several liability for the disgorgement of illegally obtained proceeds is appropriate "[w]here two or more individuals or entities collaborate or have a close relationship in engaging in the violations of the securities laws." *Platforms Wireless*, 617 F.3d at 1098 (citing *First Pac. Bancorp*, 142 F.3d at 1191-92).

The Court finds Defendants are jointly and severally liable for disgorgement of profits in the amount of $1,268,000 for commissions received by Defendants in connection with the EB-5 Program, and prejudgment interest in the amount of $468,012.

G. Civil Penalties

The Act authorizes three tiers of civil penalties, the amount of which is to be "determined by the court in light of the facts and circumstances." 15 U.S.C. §§ 77t(d), 78u(d)(3)(B). Second tier penalties may be imposed where the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. §§ 78u(d)(3)(B), 77t(d)(2).[32]

[32] The maximum second-tier penalty for violations that occurred between 2010 and March 5, 2013 is the greater of (1) $75,000 per violation for a natural person or $375,000 per violation for "any other person"; or (2) the gross amount of

Since Defendants' violation of the Sections 10(b) and 17(a) of the Act and Rule 10b-5 were based on fraudulent omissions, second tier penalties per violation are proper here. Moreover, Defendants' fraud continued to occur after March 5, 2013,[33] such that second-tier penalties of $80,000 per violation by Feng and $400,000 per violation by Defendant Law Offices may be imposed.

Accordingly, the Court imposes $160,000 in civil penalties against Defendant Feng and $800,000 in civil penalties against Defendant Feng & Associates as requested by the SEC.

H. Permanent Injunction

To obtain a permanent injunction against Defendants, "the SEC had the burden of showing there [is] a reasonable likelihood of future violations of the securities laws." *S.E.C. v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980). "The existence of past violations may give rise to an inference that there will be future violations." *Id.* (citation omitted). "In predicting the likelihood of future violations, a court must assess the totality of the circumstances surrounding the defendant and his violations," and "considers factors such as 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 defendant's professional occupation, that future violations might occur; and the sincerity of his assurances against future violations." *Id.* (citation omitted).

Here, the evidence before the Court demonstrates Defendants are immigration attorneys who have been involved in the EB-5 Program since 2010,

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pecuniary to the defendant as a result of the violation. 17 C.F.R. §§ 201.1004, 201.1005. The maximum second-tier penalty for violations that occurred after March 5, 2013 is the greater of (1) $80,000 per violation for a natural person or $400,000 per violation for "any other person"; or (2) the gross amount of pecuniary to the defendant as a result of the violation. 17 C.F.R. §§ 201.1004, 201.1005.

[33] Defendant Feng admits he did not disclose receipt of fees from regional centers until 2015. (*See supra*.) Furthermore, it is undisputed Feng did not disclose his relationship with ABCL and his Chinese "agents" with regional centers. (*See supra*.)

continue to advise clients in connection with the EB-5 Program, and have clients with pending EB-5 petitions. Moreover, based on the evidence before the Court, there is no genuine issue of material fact that (1) Defendant Feng created a new off-shore entity, called Kilogram, and a new law firm called HC Law because various regional centers refused to do business with ABCL and Defendants as a result of the SEC's action; (2) Feng has a 50% ownership interest in Kilogram; and (3) Feng has not disclosed his ownership interest in Kilogram to regional centers that have contracted with it. (*See* evidence cited in support of SEC's Statement of Fact Nos. 120-126.) Accordingly, a permanent injunction is warranted here because the evidence demonstrates a reasonable likelihood Defendants will continue to engage in conduct in violation of the Act. *See, e.g.*, *Murphy*, 626 F.2d at 655; *S.E.C. v. Currency Trading Int'l, Inc.*, 2004 WL 2753128, at *11 (C.D. Cal. Feb. 2, 2004); *Cross Fin. Servs., Inc.*, 908 F. Supp. at 734.

IV. CONCLUSION

Accordingly, the Court **GRANTS** the SEC's Motion For Summary Judgment, and **DENIES** Defendants' Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: June 29, 2017.

HON. CONSUELO MARSHALL
United States District Judge