Case No. 17-56522

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

Appeal from the United States District Court
For the Central District of California
Case No. 2:15:cv-09420
The Honorable Consuelo B. Marshall

DEFENDANTS-APPELLANTS HUI FENG AND LAW OFFICES OF FENG & ASSOCIATES P.C.'S OPENING BRIEF

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I. JURISDICTION

Plaintiff-Appellee Securities and Exchange Commission ("SEC") filed this action in the U.S. District Court for the Central District of California on December 7, 2015, asserting claims for (1) fraud in the offer or sale of securities in violation of § 17(a) of the Securities Act (15 U.S.C. § 77q(a); (2) fraud in the offer or sale of securities in violation of § 10(b) of the Exchange Act (15 U.S.C. § 78j(b)), and rule 10b-5 thereunder (17 C.F.R. § 240.10b-5); and (3) failure to register as a broker-dealer in accordance with § 15(b) of the Exchange Act (15 U.S.C. § 78o(b)).

The District Court had subject matter jurisdiction over the claims pursuant to 15 U.S.C. §§ 77t(b), 77t(d)(1), 77v(a), 78u(d)(1), 78u(d)(3)(A), 78u(e), and 78aa.

Appellants moved to transfer venue pursuant to 28 U.S.C. §1404(a) because they are based in New York. The motion was denied by the District Court.[1]

Appellants moved for judgment on the pleadings on June 7, 2016 on the ground that the broker registration claim is unconstitutionally vague as applied to Appellants, and the fraud-based allegations lacked particularity which was also denied by the District Court on August 4, 2016. (Dkt. #54.)

The SEC filed for summary judgment on January 17, 2017 and Appellants filed for summary judgment on January 31, 2017. On June 29, 2017, the District

[1] While Appellants tried to set up an immigration office in California for less than a year in 2013 and 2014, Mr. Feng had never been to that office. The SEC chose to bring suit here, despite that Los Angeles is not a forum convenient to Appellants.

Court entered an Order (Dkt. #96) granting the SEC's motion and denying Appellants' motion. Final judgment was entered on August 10, 2017. (Dkt. # 102).

On October 6, 2017, Appellants' filed their notice of appeal. (Dkt. # 103.) This Court has jurisdiction over this appeal pursuant to 12 U.S.C. § 1291.

II. ISSUES PRESENTED

1) Whether the District Court misapplied applicable law in determining that the "EB-5" transactions at issue in this case qualify as "securities."
2) Whether, assuming these transactions were securities, the District Court erred in granting summary judgment on the SECs securities fraud claims.
3) Whether Appellants' activities require federal registration as a "broker."
    a. Whether § 15(a) of the Exchange Act should apply to transactions not involving national markets or exchanges.
    b. Whether Appellants received "transaction-based compensation or commissions" under federal law.
    c. Whether Appellants were "in the business of effecting securities transactions for the account of others" under federal law.
4) Whether § 15(a) of the Exchange Act is unconstitutionally vague as applied to the facts of this case.
5) Whether fees received by offshore offices and business entities for overseas business activities are Appellants' onshore income.

III. SUMMARY OF THE ARGUMENT

The District Court erred in granting summary judgment to the SEC on all three causes of action. First, the District Court incorrectly concluded that the EB-5 investments at issue in this case constitute "securities" under federal law, regardless of whether or not any potential return generated by the investments is outweighed by the administrative fees investors are required to pay to make the investment. While acknowledging that a "security" requires an "expectation of profit," the District Court, nevertheless, held that "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." (ER 19 at lines 3-5.) In other words, in finding an expectation of profit existed, the District Court simply chose to disregard these administrative fees, despite their mandatory nature. This is an error of logic as much as law. If an investor can only earn an investment return by paying a fee that outweighs such return, by definition there can be no "expectation of profit" from such investment. To hold otherwise is to engage in legal sophistry.

IV. STATEMENT OF FACTS

A. Overview of the "EB-5 Program"

In October 1990, Congress enacted § 203(b)(5) of the Immigration and Nationality Act of 1990, which provides that an alien investor may qualify for preferred visa status if the alien is "seeking to enter the United States for the

purpose of engaging in a new commercial enterprise," "which the alien has established," and "which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens" or lawful aliens. 8 U.S.C. § 1153(b)(5)(A); *R.L. Inv Ltd. Partners v. INS*, 86 F. Supp.2d 1014, 1016 (D. Haw. 2000).

Because the immigrant investor program is the fifth preference in the "employment-based" visa preference category, it is commonly referred to as the "EB-5" program. *Id*. The EB-5 program grants lawful permanent resident status in the United States to those who make qualifying investments under the Immigrant Investor Law, 8 U.S.C. §§ 1153(b)(5)1186b; 8 C.F.R. §§ 204.6, 216.6, *Chang v. United States*, 327 F.3d 911, 915 (2003).

In 1991, the Immigration and Naturalization Service ("INS") promulgated regulations for the EB-5 Program's administration. *SEC v. Kameli*, 2017 US. Dist. LEXIS 1428 *2 (N.D.Ill. 2017). Today, the program is administered by the United States Citizenship and Immigration Services ("USCIS"). *Id*. The program's chief purpose is to stimulate the U.S. economy by encouraging infusions of new capital and creating jobs. *Id*.[2] The EB-5 program was amended to permit applicants to

[2] The statute imposes specific capitalization requirements for the purpose of creating jobs. The alien must have invested or be "actively in the process of investing" at least $1,000,000 in the new commercial enterprise, unless the investment is to be made in a "targeted employment area," in which case the

pool their capital in "regional centers" (8 C.F.R. § 204.6(e))[3] which must meet strict USCIS regulations to participate in the program. *Id*. § 204.6(m)(4).

In *Chang v. United States* (9th Cir. 2003) 327 F.3d 911, the 9th Circuit reviewed the EB-5 program and shielded EB-5 program applicants from new USCIS regulations. The court correctly summarized the EB-5 program as follows:

> Appellants have applied to become lawful permanent residents ("LPRs") under the EB-5 program, which grants such status to Immigrant Investors who create jobs for United States workers. EB-5 requires prospective Immigrant Investors to file "I-526" petitions seeking approval of their submitted investment and business plans. After approval, Immigrant Investors and their dependents may enter the country as conditional LPRs. EB-5 requires the Immigrant Investors to file a second petition, an "I-829," between 21 and 24 months after the first petition. The INS is to approve the I-829 petition, and grant unconditional LPR status, if it finds that the petitioner made no material misrepresentations in the I-526 petition and complied with the EB-5 requirements. 8 C.F.R. §§ 204.6, 216.6.

Id., 916.

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

For over 25 years, immigration attorneys in this country – and on the west coast in particular – have helped foreign applicants navigate the complex EB-5

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investment must be at least $ 500,000." *R.L. Inv Ltd. Partners v. INS*, 86 F. Supp.2d 1014, 1017 (D. Haw. 2000).

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

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

In late 2013, the SEC timidly moved to expand its jurisdiction and reclassify the EB-5 visa program as a securities program. Without issuing any formal explanation or guidelines, the SEC suggested for the first time that certain (but not

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[4] *See* ER 368-373 (Eric Posner, "Citizenship for Sale," Slate (May 13, 2015)); ER 374-377 (Editorial Board, "For sale: U.S. citizenship, $500,000 to $1 million," Los Angeles Times (Nov. 29, 2015); ER 378-386 (Alana Samuels, "Should Congress Let Wealthy Foreigners Buy Green Cards?" The Atlantic (Sept. 21, 2015)).]

[5] *See* ER 387-401(Sanjay Bhatt, "Money from investor visas floods U.S., but doesn't reach targeted poor areas," The Seattle Times (March 7, 2015)); see also ER 402-407 (Lornet Turnbull, "Wealthy immigrants can invest way to visas," The Seattle Times (December 10, 2011)).

all) EB-5 investments "may involve securities offerings."[6] But the SEC offered nothing more than this equivocal statement and the issue was left unresolved. It offered no warning to immigration lawyers or others involved in assisting EB-5 clients to navigate the program that the SEC might suddenly deem them brokers.

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

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[6] *See* ER 315-319 (USCIS and SEC, "Investor Alert – Investment Scams Exploit Immigrant Investor Program" (Oct. 1, 2013)). The report vaguely states that some "regional centers offer investment opportunities in 'new commercial enterprises' that may involve securities offerings," providing no guidance as to which EB-5 investments - if any - constitute securities. Id. (emphasis added). It says nothing about immigration lawyers being considered brokers.

[7] *See* ER 320-322 (SEC, Press Release, "SEC Charges Unregistered Brokers in EB-5 Immigrant Investor Program," S.E.C. 15-127, 2015 WL 3857267 (June 23, 2015)). For the underlying order instituting administrative proceedings, *see* ER 326-331 (*In re Ireeco*, Release No. 75268, 2015 WL 3862865 (June 23, 2015)).

[8] *See* ER 332-363 (*In re Bernstein*, Release No. 76570, 2015 WL 8001128 (Dec. 7, 2015); *In re Kaye*, Release No. 76571, 2015 WL 8001130 (Dec. 7, 2015); *In re Yoo*, Release No. 77459, 2016 WL 1179271 (Mar. 28, 2016); *In re Khorrami*,

attempt to categorize immigration attorneys as brokers, the SEC filed this action against the Feng Parties alleging failure to register as a "broker" and securities fraud in connection with the provision of EB-5 legal services. (Dkt. #1 at ¶ 4.)

C. Appellant's "EB-5" Related Activities.

Appellant Hui Feng was born in China and immigrated to the United States at the age of 19 to attend Hamilton College on full scholarship. (ER 453, ¶ 2.) Feng graduated in 1995 and then earned his law degree from Columbia Law School in 1997. (*Id*). Since then, Feng's legal practice has been primarily focused on immigration law. (*Id*, ¶ 3.) Beginning in approximately 2010, Feng began receiving inquiries from clients in China about the EB-5 program. (*Id*, ¶ 4.) Soon thereafter, he began assisting clients with EB-5 investments. (*Id*.) Substantially all of Feng's EB-5 clients, like his other immigration clients, are Chinese.

In Feng's experience, Chinese EB-5 applicants often have difficulty understanding offering documents and communicating directly with regional centers, whose representatives seldom speak Chinese. (ER 464, ¶5.) Instead, these applicants often rely on Chinese speaking intermediaries to facilitate communications and guide them through the EB-5 process. (*Id*.) The need for such

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Release No. 76572, 2015 WL 8001131 (Dec. 7, 2015); *In re Manesh*, Release No. 76573, 2015 WL 8001133 (Dec. 7, 2015); *In re Bander, PLLC*, Release No. 76569, 2015 WL 8001126 (Dec. 7, 2015); *In re Azarmehr*, Release No. 76568, 2015 WL 8001125 (Dec. 7, 2015)).

intermediaries has given rise to a cottage industry of "immigration agencies" in China, whose services are often of dubious quality. (*Id*.)

As of late 2016, Feng had represented approximately 150 EB-5 clients. (ER 457, ¶ 17.) Of those 150 clients, approximately 30 had obtained permanent or provisional two-year green cards, approximately 80 had obtained I-526 application approvals, an intermediate step to obtaining a green card, and the approximately 40 remaining clients were still awaiting adjudication. (*Id*.) In short, Feng had *never* represented a client whose EB-5 application had been denied while the USCIS data showed an average approval rate of about 80% prior to 2017. (*Id*.)

EB-5 applicants invest through a regional center, which funds various real estate developments. While the terms of each investment varied slightly, each was structured as a "loan" rather than equity investment. (ER 456, ¶ 13.) Feng's clients were offered a fixed rate of return, or interest rate, on the money invested through the regional center. (*Id*.)

In addition to the minimum investment amount of $500,000 required to make an EB-5 investment, for each project, the applicant was required to pay a mandatory fee, referred to as a "marketing" or "management" fee, directly to the regional center. (*Id*; ¶ 14.) These fees, which ranged from $25,000 to $50,000 depending on the project, were unilaterally set by the regional centers. (*Id*.) The effect of these mandatory marketing fees was, in all but one case, to make

investment in the projects at issue "unprofitable." (*Id*; ¶ 15.) This is because the stated financial return offered on the project was outweighed by the mandatory fee. Thus, even assuming a particular EB-5 project was "successful" in that an applicant earned the agreed-upon financial return, after factoring in the mandatory marketing/ management fee, Feng's clients received less money back than they paid to participate. But in Feng's experience this was of little concern since clients' overriding concern was obtaining a visa, not a return on investment. (*Id*; ¶ 20.)

Feng's role in the EB-5 process was that of a lawyer advising his client. Since the financial terms of the various EB-5 investments Feng recommended to his clients were fixed in advance by the regional centers, making them effectively non-negotiable, Feng did not operate as a typical broker or investment advisor by advising clients as to the *financial* merits of a particular project. (*Id*; ¶¶ 19-20.) Instead, Feng advised his clients to invest in those projects he considered most likely to comply with the USCIS' requirements for job creation and therefore meet his clients' ultimate goal of obtaining permanent residency status. (*Id*.)

V. ARGUMENT

A. Applicable Standards of Review.

This appeal is from both the August 4, 2016 order denying the motion for judgment on the pleadings and the June 29, 2017 order granting the SEC's motion for summary judgment and denying Appellants' cross-motion for summary

judgment. Summary judgment is appropriate where the moving party establishes "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A summary judgment decision is reviewed *de novo*. *See, e.g.*, *Szajer v. City of Los Angeles*, 632 F.3d 607, 610 (9th Cir. 2011). Viewing the evidence in the light most favorable to the nonmoving party, an appellate court must determine whether any genuine issues of material fact exist and whether the district court correctly applied the relevant substantive law. *See Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004).

The appeal of the motion for judgment on the pleadings regards whether the District Court properly upheld the SEC's third cause of action for violation of § 15(a) of the Exchange Act or whether the terms "security" and "broker" as used in § 15(a) are unconstitutionally vague as applied here. Rulings as to the constitutionality of a federal statute are reviewed *de novo*. *See Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006) (10 U.S.C. § 12305); *The Ecology Ctr. v. Castaneda*, 426 F.3d 1144, 1147 (9th Cir. 2005).

B. The District Court Erred by Granting Summary Judgment to the SEC and Denying Appellants' Motion for Summary Judgment.

1. A Triable Issue Exists as to Whether the EB-5 Investments at Issue Qualify as "Securities" Under Federal Law.

The threshold issue before the Court is whether the EB-5 investments in this case qualify as "securities" under federal law. In granting the SEC summary

judgment, the District Court decided that the EB-5 transactions at issue constituted "investment contracts" under federal securities laws. This finding was in error.[9]

An "investment contract" is "(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) (italics added); *see also SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). The third prong of this test, requiring "an expectation of profits produced by the efforts of others," requires analysis of whether a transaction involves any expectation of profit. *Warfield v. Alaniz*, 569 F.3d 1015, 1020 (9th Cir. 2009).

In determining whether a particular transaction involved an "expectation of profit," courts have looked to both *subjective* factors, such as the "subjective intent of the purchasers" in opting to enter into the transaction at issue, as well as *objective* factors, such as the "character of the instrument or transaction offered based on what the purchasers were led to expect." *Id*. at 1021.

Looking first at *subjective* factors, it is beyond dispute that Feng's clients were personally motivated to "invest" by their desire to obtain permanent

[9] The SEC has historically conceded that analogous immigrant investment programs not involving an "expectation of profit" are *not* securities. For example, on January 18, 2002, the SEC issued a No Action Letter (ER 439-451) to CanAccord Capital Corporation relating to an investment program established under Quebec law in which prospective immigrants who invested CDN $400,000 for a five-year term obtained permanent resident status. Under that program, applicants received back principal only, without interest.

residency status in the U.S. rather than any desire to earn a profit. In fact, given the express terms of these EB-5 "investments," substantially all of which made any profit impossible to earn, it would have been irrational for an investor to have been motivated by profit. In recognition of this fact, District Court found it "undisputed" that EB-5 investors are motivated to participate in the program to obtain permanent residency in the United States. (ER 19 at pg. 11, lines 9-10.)

Nevertheless, the District Court also concluded, without apparent evidentiary support, that "the terms of the EB-5 investments demonstrate capital contributions were made by [Feng's] clients for the purpose of generating a return." This conclusion appears to blur subjective and objective analysis. There was simply no reasonable basis for the trial court to conclude that Feng's clients were truly motivated by anything other than the desire for a green card – and the Court found that fact "undisputed."

And, *objectively*, the terms of the EB-5 investment contracts reveal that, in all but one case, Feng's clients could expect to receive *less* money back than they put in, the very definition of an *un*profitable investment. *See, e.g., SEC v. Edwards*, 540 U.S. 389, 395-96 (2004) (noting "profits" under *Howey* is determined simply by looking at "financial returns on investments.")

Although Feng's 150 EB-5 clients invested in roughly 30 separate projects, all of which contained slightly different financial terms, after factoring in the

mandatory "marketing" or "administrative" fees, in all but *one* case, it was literally impossible for investors to earn a profit. Thus, it defies logic to argue these investors could have had the reasonable "expectation of profit" *Howey* requires based on objective factors. "[S]ubstance governs, not name or label or form. […] What matters is the economic reality of the transaction." *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1130 (9th Cir. 2013), citing *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 848 (1975).

a) Bad Facts Make Bad Law: The Court's Reliance On Liu *is Misplaced.*

Nevertheless, relying on *S.E.C. v. Liu*, 2016 U.S. Dist. LEXIS 181536 (C.D. Cal. Aug. 17, 2016), a case involving a Ponzi scheme, the District Court held these mandatory investment fees should *not* be considered in determining whether an expectation of profit existed. This reasoning, and the reasoning in *Liu* on which it relies, is both flawed and unpersuasive, and should be abandoned by the Court.

First, to state the obvious, *Liu*, a district court opinion, is not binding precedent. Although *Liu* argues that there is "no legal authority for the proposition that the size of an investment fee can alter the nature of an investment contract itself," this argument misses the point. An expectation of *profit* cannot be considered in isolation, without considering any mandatory fees required to generate the return. Surely, a rationale investor who believed that he could earn a $10 "return" if he were only willing to pay a $15 "fee" to invest would not expect

to earn a *profit* from such investment. Rather, this attempt to separate the terms of the supposed investment contract from the *mandatory* fee required to engage in the investment in the first place makes little logical sense. Since one can't even make the "investment" without paying the mandatory "fee," failing to account for the fee in determining whether the underlying investment was *profitable* makes little sense. To hold otherwise is to engage in legal sophistry.

b) The Court Improperly Conflated the SEC and USCIS' Different Regulatory Standards

Importantly, the regulatory regimes surrounding the USCIS and the SEC are simply different, and this difference must be acknowledged. The USCIS' requirement for investment of risk capital "for the purpose of generating a return on the capital placed at risk" (8 C.F.R. § 204.6(j)(2)) **is a different standard** than the "expectation of profits" required under *SEC v. R.G. Reynolds Enters., Inc*., 952 F.2d 1125 (9th Cir. 1991) and *SEC v. W.J. Howey Co*., 328 U.S. 293 (1946). They measure different things. The court in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975) recognized that, in determining whether there was an expectation of profit, associated fees are considered.[10] *Id.* at 856.1 The USCIS, in

[10] The IRS also includes such fees to determine capital gains, the IRS *includes* ancillary costs related to investments: "The basis of stocks or bonds you buy is generally the purchase price plus any costs of purchase, such as commissions and recording or transfer fees." Internal Revenue Serv., U.S. Dep't of the Treasury, Pub. No. 551, Basis of Assets, p.2 (2016), https://www.irs.gov/pub/irs-pdf/p551.pdf. So the IRS also uses a different standard than the USCIS.

determining "return", is **required to exclude** anything but the $500,000. *See* 8 C.F.R. § 204.6(j)(2).

As mandated to by the Code of Federal Regulations, the USCIS looks solely to the $500,000 placed at risk and the "return" on that amount. But that narrow view does *not* account for the mandatory marketing/administrative fees EB-5 investors must pay, which in the securities (and IRS) world *must* be considered.

c) The Proper Standard

The present case is most analogous to *Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975) where the Supreme Court found that the "investment" was motivated overwhelmingly by non-monetary factors and therefore not a security.

> [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 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).

It is undisputed that EB-5 investors are motivated by their desire for U.S. permanent residency status rather than a financial return. Nevertheless, the District Court effectively disregarded this clear subjective motivation, thrusting *Forman* to

the side, and instead focusing on post-*Forman* rulings- *S.E.C. v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 463-64 (9th Cir. 1985) and *S.E.C. v. Aqua-Sonic Prods. Corp.*, 687 F.2d 577 (2d Cir. 1982), *cert. denied*, 459 U.S. 1086 (1982), both of which held that investments made primarily for tax benefits satisfied the expectation of profits prong under *Howey*.

However, both *Goldfield* and *Aqua-Sonic* can be reasonably reconciled with *Forman* since tax benefits are still financial benefits and therefore can reasonably be considered "profits." Unlike a tax benefit, obtaining permanent US residency is an entirely non-monetary benefit which cannot reasonable be characterized as a "profit," and is non-transferable, only conferring value to the recipient. Similar to *Forman*, EB-5 investors are motivated by their desire to "use or consume" something, in this case the benefits and privileges of U.S. permanent residency.

2. A Triable Issue Exists as to Whether Appellants' Activities Qualified Them as "Brokers" Under § 3(a)(4) of the Exchange Act.

Section 15(a) of the Exchange Act, requires "brokers" to register with the SEC.[11] The purpose of § 15(a)'s registration requirement is to ensure "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."

[11] Section 3(a)(4) of the Securities Exchange Act defines a "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).

Roth v. S.E.C., 22 F.3d 1108, 1109 (D.C. Cir. 1994). The District Court erred in determining Feng to be a "broker" at the summary judgment stage.

As a threshold matter, the broker definition is in the Exchange Act, not the Securities Act. The intended purpose of the Exchange Act is to regulate "trading markets and their participants."[12] "And that purpose is to protect investors through regulation of transactions upon national securities exchanges and in over-the-counter markets against manipulation of share prices." *SEC v. Benger*, 934 F.Supp.2d 1008, 1013 (N.D.Ill. 2013).

Based on the text of § 15(a) of the Exchange Act, only persons utilizing exchange facilities are intended to be subject to broker registration. Importantly, the Exchange Act envisioned national exchanges and over the counter markets or local exchanges. Broker registration is required only for those who use national or local exchange facilities to effect securities transactions. But Congress created an exemption in the text of § 15(a) for brokers only working intra-state and using local exchanges instead of national exchanges. In other words, for those brokers who don't use national or local exchange facilities, § 15(a) does not apply. So the traditional interpretation of the statute to provide an exemption for only those brokers who work both intra-state and who do not use national exchanges is

[12] Securities Regulation: Cases and Materials, Seventh Edition by James D. Cox, Robert W. Hillman and Donald C. Langevoort, Chapter 1. The Framework of the Securities Regulation, Section B(1)(b): The Securities Exchange Act of 1934.

overlooking the threshold requirement for use of either national or local exchange facilities, and is therefore incorrect. Unless Congress further amends § 15(a) to expand the reach of the Exchange Act to cover brokers regardless of their use of exchange facilities, the Court shouldn't either.[13]

Even if the Court ignores the intended purpose of the Exchange Act and § 15(a), Appellants are still not required to register as brokers because they simply don't meet the criteria. Absent further involvement, "[m]erely bringing together the parties to transactions, even those involving the purchase and sale of securities, is not enough" to warrant broker registration under § 15(a). *Apex Global Partners, Inc. v. Kaye/Bassman Intern. Corp*., 2009 WL 2777869, *3 (N.D.Tex.2009). Rather, to qualify as a "broker," an individual must be involved at "key points in the chain of distribution," such as participating in the negotiation, analyzing the issuer's financial needs, discussing the details of the transaction, and recommending an investment. *Cornhusker Energy Lexington, LLC v. Prospect Street Ventures*, 2006 WL 2620985 at *6 (D. Neb. 2006).

In *SEC v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011), the SEC alleged a defendant had acted as an unregistered broker where he received transaction-

[13] Based on Appellants' review of available case law, historically, the SEC has only enforced § 15(a) against brokers using national or local exchange facilities for effecting securities transactions, and only recently has the SEC begun enforcing § 15(a) against brokers even if they do not use such.

based commissions for actively soliciting "intimate friends and family" over a period of two years. However, the court determined the defendant had acted as a facilitator rather than a broker since his conduct "consisted of nothing more than bringing together the parties to a transaction," and the SEC presented no evidence of the defendant possessing "authority over the accounts of others." *Id*. at 1339.

Similarly, in *SEC v. M&A West, Inc*., U.S. Dist. LEXIS 22452 (N.D. Cal. June 20, 2005), the court was unwilling to classify the defendant as a broker where he was paid to facilitate securities transactions without actually controlling the accounts of others. Noting that "no assets were entrusted to [the defendant], and … no evidence [was shown] that he was authorized to transact for the account of others" the *M&A West* court held that "[a]lthough [defendant] was in the business of facilitating securities transactions among other persons," this did not equate "to 'effecting transactions in securities for the account of others.'" *Id* at *9.

Relying on both *Kramer* and *M&A West*, the court in *SEC v. Mapp*, 240 F.Supp 569, 592 (N.D.Tex. 2017) found "control over the account of others" to be an ***element*** rather than a factor in finding that a defendant acted as a "broker."[14] If

[14] In *Mapp*, the court held that since the defendant lacked "authority over the accounts of others" and "was [not] authorized to transact for the account of others," he was merely *facilitating* securities transactions rather than performing the functions of a broker. *Mapp*, 240 F.Supp.3d at 592-93. The court further noted defendant was neither involved in negotiating the price or terms of the transaction nor performed the other functions of a broker-dealer, which also weighed against classification as a broker.

this were an element, then it is beyond dispute that it is missing here – and therefor there could be no § 15(a) liability. Nevertheless, the District Court conveniently sidestepped this issue by concluding that, in this case, since there were *three* transactions, out of a total of approximately 150, where client funds passed briefly through Feng's accounts, albeit at the request of clients having difficulties with Chinese currency regulations,[15] this meant Feng had been "entrusted with assets [and] authorized to transact for the account of others." (ER 23, fn. 20.) This conclusion is in error.[16]

The record reveals that Feng, unlike a traditional "broker," was neither entrusted with his client's assets nor authorized to transact on their behalf in the *vast majority* of cases. Rather, similar to the defendant in *Mapp*, while Feng may have *facilitated* transactions, he was not involved in negotiating their terms or in other activities typical of a broker-dealer.

a) Erroneous Application of the Hansen *Factors*

While the factors enunciated in *S.E.C. v. Hansen*, U.S. Dist. LEXIS 17835, 1984 WL 2413 (S.D.N.Y. Apr. 6, 1984) have not been formally adopted in the 9th Circuit, the District Court nonetheless chose to focus its analysis almost exclusively on the various factors set forth therein to conclude that Appellants'

[15] ER 459, ¶ 23.

[16] At a minimum, if only these three transactions contain the relevant factors, then liability should be limited to these three transactions *only*.

activities qualified him as a "broker." However, even assuming the "Hansen factors" are the dispositive test on this issue (and as discussed above, it is not), the District Court did not apply them properly. The 9th Circuit should decide if the *Hansen* factors are even applicable here, and if so, how to distinguish between broker activities embodied in the *Hansen* factors from immigration service activities rendered in the EB-5 context.

According to *Hansen*, activities that may indicate that a person is a broker include, inter alia, that 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 to the merits of the investment or gives advice; and 6) is an active rather than passive finder of investors.

Hansen, 1984 U.S. Dist. LEXIS 17835, 1984 WL 2413, at *10.

(1) The *Hansen* Factors Are Vague, Ill-Defined, And Subject To Differing Factual Interpretations.

Making a *Hansen* analysis even more difficult is the fact that there is a dearth of authority regarding the definitions of certain key terms. For example, what are "commissions" in the second *Hansen* factor? Some courts, including *Kramer*, call this factor "transaction-based compensation." But many compensation schemes could be called transaction-based, including an attorney's contingent fee structure, and there is an absence of authority for any consistent

definition of what this means. As such, how is an immigration attorney –let alone the public– to know when they may have crossed the line to reach the "hallmark" of being a broker?

As another example, the fourth *Hansen* factor is whether Appellants are "involved in negotiations between the issuer and investor."[17] Feng, as an immigration attorney for his clients, reviews immigration law compliance issues and explains them to his non-English speaking clients based on communications from EB-5 regional centers. Do these communication and translation services constitute "negotiations between the issuer and investor?" Also, as discussed by the Court in *M&A West,* attorneys are traditionally involved in various business transactions as legal counsel. Should such activity by attorneys in EB-5 program transactions become a factor for being considered as a broker?

[17] The District Court disregarded Feng's declaration that he has "never been involved in negotiating the financial terms of [EB-5] investments on [his] clients' behalf." (ER 22, fn. 18.) The Court did so based on circular logic: If the "investment" was only the $500,000, then this is an absolutely true statement and should not have been disregarded. But here, for the Court to say Feng's declaration was contradictory, then the Court *must* have determined that the entire invested amount (both the $500,000 *and* the "marketing" or "administrative" fees) must be the "investment." But if that is true, then as explained above, there can be no expectation of profit since the investment can't yield a profit, and these are not securities. You can't have it both ways…but that's what the District Court did.

The fifth *Hansen* factor is "makes valuations as to the merits of the investment or gives advice."[18] Again, first, immigration attorneys in EB-5 transactions are not secretaries or typists, they are supposed to provide legal advice on the merits of each EB-5 program to their clients. Their evaluation, however, is not focused on which EB-5 program can make money for clients, unlike what a broker or investment advisor does. (*See* ER 458, ¶ 20.)[19] As previously discussed, clients in EB-5 program are focused on obtaining green cards, are not attracted to the EB-5 program for profit, and are prepared to lose money in an EB-5 program for the sake of obtaining green cards. As such, this *Hansen* factor is generally not even applicable to immigration attorneys with regard to the EB-5 program.

As to the sixth *Hansen* factor, whether Appellants are "active rather than passive finder of investors," the reality is that immigration attorneys like Appellants legitimately seek legal clients interested in the EB-5 program. The SEC

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[18] Truly, this *Hansen* factor makes absolutely no sense. Unless otherwise exempted, brokers are not allowed to give investment advice. Investment Advisers (not brokers) give investment advice. *Compare* 15 U.S.C. § 78c(a)(4) [brokers] and 11 U.S.C. §80b-2(a)(11) [investment advisers]. This "factor" is irrelevant to whether someone is acting as a broker.

[19] The District Court disregarded Feng's declaration that he has "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." (ER 22, fn. 19.) This was error, as the Court failed to review the actual evidence, which makes it clear that Feng performed *legal* due diligence, not financial. See also *SEC v. M&A West, Inc.*, *supra*, at *27.

and the District Court have conflated seeking legal clients with seeking "investors" – especially since these clients are not typical investors driven by profits.[20] These clients need the service of immigration attorneys because they want to apply for green cards.

The *Hansen* factors (and the other definitional issues raised above) are threshold issues that determine whether registration under § 15(a) is required. Since the 9th Circuit has yet to dispositively address the issue, we urge the Court to provide a clear and persuasive discussion about these elements and/or factors for the public to follow, and so the SEC doesn't have to waste taxpayer money and judicial resources over similar issues in the future.

In reality, the services provided by Feng to his clients are better thought of as *legal* – not financial – advice. Feng drafted petitions to maximize his clients' chances of securing permanent legal status, transmitted documents, provided language translation, obtained client signatures, and engaged in other clerical tasks inherent to the practice of law, none of which are reasonably characterized as activities of a "broker."[21]

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[20] The SEC has not cited a single case where a Feng client invested in an EB-5 program without applying for immigration benefits.

[21] Although the District Court characterized Feng's advice to his clients as the sort of investment advice described in *Hansen*, this is inaccurate (and, since even registered brokers aren't allowed to give "investment advice" this should be irrelevant). It is undisputed that Feng's recommendation of regional centers was

3. As a Policy Matter, Subjecting Attorneys to Broker Registration Requirements Makes Little Sense Given the Heightened Duties Attorneys Already Owe Their Clients.

As an attorney in New York State, Feng already owed his clients the highest of fiduciary duties. As a result, requiring him to register as a broker would serve little purpose. The attorney-client relationship entails one of the highest fiduciary duties imposed by law. *In re Hayes*, 183 F.3d 162 (2nd.Cir. 1999) (citing *In re Cooperman*, 83 N.Y.2d 465, 472 (1994) (noting that under New York law, "[t]his unique fiduciary reliance ... is imbued with ultimate trust and confidence" and "[t]he duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's.")

In apparent recognition of the special quality of the attorney-client relationship, a closely-related federal law expressly exempts attorneys from registration. For example, 11 U.S.C. §80b-2(a)(11) of the Investment Advisers Act of 1940 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

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based solely on their track record in obtaining green cards rather than the merits of any financial return they offered.

from this definition so long as their "performance of such services [are] solely incidental to the practice of [their] profession."

This definition recognizes that the dividing line between the advice often provided by lawyers to their clients and the advice provided by financial professionals regulated under federal law is less than clear. Similarly, the *M&A West, Inc*. court recognized that lawyers, who commonly draft documents and "orchestrate transactions" are not commonly regarded as brokers. *SEC v. M&A West, Inc*., *supra*, at *9.

Although § 15(a) of the Exchange Act does not provide the same express exemption for lawyers as the Investment Advisors Act, the rationale for interpreting it to exclude attorneys like Appellant from coverage is the same. Since lawyers are often called on to provide advice on a variety of financial matters, and since they are already held to heightened fiduciary duties in their dealings with their clients, subjecting them to additional regulation as "brokers" or "investment advisors" would serve little purpose.

This is particularly true in the context of EB-5 transactions, whose participants are foreigners, often with limited English proficiency, and who are required to navigate a complex legal and regulatory process. Seasoned immigration attorneys such as Feng are particularly well suited to assist their clients in navigating this process and forcing attorneys such as Feng to register as "brokers"

will only reduce the pool of qualified professionals available to advise EB-5 applicants.[22]

4. As a Policy Matter, Requiring Broker Registration of Attorneys Under These Circumstances Makes Little Sense.

It is interesting to note while the SEC is convinced that the EB-5 program is a securities offering program and the US licensed immigration attorneys who advised foreign clients or regional centers are unregistered brokers, offshore brokerage activity does not require registration.

> In general, Rule 15a-6 exempts from the federal broker-dealer registration requirements of Section 15(a) of the Exchange Act, 15 U.S.C. § 78o, "foreign entities engaged in certain activities involving U.S. investors and securities markets." See Registration Requirements for Foreign Broker-Dealers, Exchange Act Release No. 27,017, 54 Fed. Reg. 30013, 30013 (July 18, 1989).

Capital Mgmt. Select Fund v. Bennett (2d Cir. 2012) 680 F.3d 214, 231.

What this means is that numerous Chinese EB-5 finders and/or brokers exist and may be paid commissions without any recourse by the SEC.[23] The Chinese do not view the EB-5 program as a securities offering program. Since the SEC can't touch the Chinese EB-5 brokers due to their one-sided statutory exemption, the

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[22] Even if the broker registration exemption is not available to Defendants as attorneys, Defendants' activities should qualify as investment advisor services expressly exempted from registration by the Investment Advisors Act of 1940. *See* Advisers Act § 202(a)(11)(B), codified at 15 U.S.C. § 80b-2(a)(11)(B).

[23] This is at least part of the reason why the Regional Centers were free to pay commissions to overseas entities.

SEC could only launch investigations and law suits against US licensed immigration attorneys over broker registration issue while shutting their eyes towards the fact that most of Chinese EB-5 investors are seeking help from unlicensed and unregistered migration agencies in China.

The SEC's current enforcement action is effectively prohibiting US-licensed bilingual immigration attorneys from helping Chinese investors, therefore giving the unregulated Chinese migration agencies a virtual monopoly over EB-5 advisory services. As such, the SEC is forcing US-based attorneys (who are licensed and regulated as attorneys) to not help these people, and is instead forcing them to go to unregulated offshore entities potentially rife with fraudulent practices. This doesn't seem to comport with reason – in effect, we're endorsing overseas fraud to obtain domestic investment. That can't be the intended policy.

5. A Triable Issue of Fact Exists as to Whether Appellants Committed Securities Fraud, in violation of § 17(a)(2) and § 10(b) of the Act.

Appellants further contend that the District Court erred in granting the SEC summary judgment on its first and second causes of action for securities fraud. "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." *S.E.C. v. Phan*, 500 F.3d 895, 907-08 (9th Cir. 2007) (internal quotations and citations omitted). Violations of Section 10(b) and

Rule 10b–5 "require scienter," whereas [v]iolations of Sections 17(a)(2)…require a showing of negligence."

As it relates specifically to *omissions*, Rule 10b-5 makes it unlawful "to omit 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." 17 C.F.R. § 240.10b-5(b). Thus, to prevail on its fraud claim under Rule 10(b)(5), the SEC must demonstrate both the *materiality* of the omission *and* that the omitted statement was necessary to render other "statements made" not misleading. The SEC failed to make either showing as a matter of law.

6. A Triable Issue Exists as to Whether the Allegedly Fraudulent Omissions Were *Material*.

In granting summary judgment, the District Court determined that Feng's failure to voluntarily disclose to his clients, prior to February 2015, that he was receiving referral fees from regional centers, constituted a *material* omission, as a matter of law, in violation of federal securities laws. (Order at pg. 17:2-3). This finding was in error.

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). "Determining materiality in securities fraud cases should ordinarily be left to the

trier of fact." *Phan*, 500 F.3d at 908. "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).

In determining the omissions in this case *were* material, the District Court appears to have considered only the SEC's evidence that certain of "Defendant's clients would have chosen a cheaper investment or asked to receive a portion of Defendants' commissions if they had known Defendants received money from the regional centers," (ER 24 at 16:13-17:1) while simultaneously disregarding evidence to the contrary submitted by Feng, in the form of *twenty-eight* separate declarations from former clients, and depositions of several of them, all of which stated, in essence, that such information was not material to them. (ER 40-122.)

Setting aside whether the trial court properly disregarded these declarations,[24] the appropriate question is whether the omitted information would

[24] The trial court sustained the SEC's objection to the "Investor Declarations" filed on March 8, 2016 (ECF Nos. 18-1 through 18–28; ER 40-122) (*See* Req. for Evid. Ruling on Specific Objections (ER 478-79); and ER 13 at 1-4 (sustaining objections). In doing so, the District Court abused its discretion. The primary

have been material to the hypothetical *reasonable* investor rather than any particular actual investor.[25] *See SEC v. Kameli*, 2017 U.S. Dist. LEXIS 142842 * 21 (N.D. Ill. 2017) (noting evidence proffered by the SEC not dispositive as to whether information material to reasonable investor). At a worst, the conflicting evidence on this issue as to materiality makes clear it should not have been decided at the summary judgment stage, but rather should have been left to the trier of fact.

Moreover, the authority cited by the District Court in support of determining materiality at the summary judgment stage is unpersuasive, and actually supports the opposite conclusion. The primary case cited by the District Court, *S.E.C. v. All. Leasing Corp*., 28 F.App'x 648, 651 (9th Cir. 2002) is an unpublished memorandum opinion that should not have been cited by the trial court and has no precedential value. *See* Ninth Circuit Rules 36-1, 36.3.[26]

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authority cited by the SEC (and presumably relied upon by the trial court), *Jack v. Trans World Airlines*, 854 F.Supp. 654, 659 (N.D.Cal. 1994) applies only when a translation is submitted. (citing FRE 604, 901) (emphasis added) ("Witness testimony translated from a foreign language must be properly authenticated and any interpretation must be shown to be an accurate translation done by a competent translator.") However, in the present case, the declarations are submitted in both English and Chinese and therefore do not constitute "translations."

[25] Asking "gimme" questions about whether you'd rather have more money than less isn't enough for materiality. The real question is, would the difference in fees have made a difference to your decision to make the EB-5 investment. And the SEC never asked any investor that question.

[26] *All. Leasing Corp.* fails to articulate the basis for its determination that a 30% commission was material in that case and should have been disclosed. Presumably,

More instructive is *United States v. Laurienti*, 611 F.3d 530, 541 (9th Cir. 2010) a case involving a "pump and dump" scheme," where the court found the failure by a broker to disclose a bonus commission was material, where the bonus was payable only if a particular (house) stock was purchased since, in that case, the undisclosed bonus structure clearly created an incentive for brokers to "pump" the fraudulent stock. Significantly, *Laurienti* recognized that:

> …brokerages often have complicated compensation systems and that brokers sometimes receive additional compensation on client purchases of particular securities products. Our holding today does not mean that all compensation arrangements are necessarily "material" even within a trust relationship… For example, *de minimis* variations in compensation among different securities products would be immaterial as a matter of law.

Laurienti, 611 F.3d at 542. Appellants presented evidence that the sort of refund paid to Feng by the regional centers were customary within the EB-5 industry. Several regional center officials testified that the finders' fees and/or marketing fees paid to Appellants are normal industry practice. And, unlike in *Laurienti*, there was no evidence presented in this case to indicate Feng's advice to his EB-5 clients was influenced in any way by the fees he received from the regional centers.

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the court assumed the existence of such a commission structure had the potential to distort investment advice. However, this conflict of interest is not at issue here. In this case, the payments Feng received from regional centers were structured so as to negate any conflict of interest. Since Feng did not earn his payment until his clients obtained their goal of obtaining a green card, Feng had no incentive to steer his clients improperly. This is analogous to a legal contingency fee, where a lawyer earns his fee only in the event his client obtains a recovery.

Similarly misguided was the trial court's reliance on *Vernazza v. SEC*, 327 F.3d 851, 859 (9th Cir.), *amended*, 335 F.3d 1096 (9th Cir. 2003) for the proposition that *potential* conflicts of interest are always material and therefore have to be disclosed. The *Vernazza* defendants were found to have falsely represented to the SEC (and their clients) via mandatory filings and disclosures, that they had no financial interest in investments they had recommended. In contrast, Feng, who is indisputably not an investment advisor, had no such affirmative disclosure obligation in this case.

7. A Triable Issue Exists as to Whether the Omitted Statement Was Necessary to Render Other Statements Non-Misleading.

Feng's failure to disclose his payments from regional centers prior to February 2015 did *not* render other disclosures to his clients misleading. Or, at a minimum, this presented a triable issue improperly decided at summary judgment.

Absent a duty to disclose, an omission does not give rise to a cause of action under § 10(b) and Rule 10b-5. *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988). Rather, an actionable omission claim arises only when disclosure is "necessary ... to make the statements made, in light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b); *see also Golden Palm Invs. L.P. v. Azouri*, 2015 U.S.Dist. LEXIS 75095 * 5 (D. Nev. 2015) ("Simply put, an omission is unlawful only when its non-disclosure makes another statement misleading.").

It is undisputed that Feng's clients were required to pay a mandatory marketing and/or administrative fee to the regional centers to make their EB-5 investments, regardless of whether some portion of the fee was ultimately refunded from the regional center to Feng. It is further undisputed that the mandatory fees charged by the regional center were fully disclosed to Feng's clients.

Since the cost of the EB-5 transaction was fixed in advance and payments to Feng from the regional centers did *nothing* to increase the costs to his clients, any failure to disclose these payments could not render other disclosures misleading.

8. The District Court Erred to The Extent It Relied on State Law to Create a Disclosure Obligation.

Although somewhat unclear, it appears the District Court also may have relied on purported New York state law ethics requirements in determining Feng failed to properly disclose payments from the regional center to his clients. (*See* ER 11 at 16, fn. 24 (noting that the SEC's legal ethics expert opined that Feng's disclosures after February 2015 failed to meet applicable ethical disclosure requirements)). However, the issue of whether Feng may have had an ethical duty arising from state law to disclose payments from the regional center to this clients is simply not germane to the determination of whether this omission violated federal securities laws.

"The language of §10(b) gives no indication that Congress meant to prohibit any conduct not involving *manipulation* or *deception*." *Santa Fe Industries, Inc. v.*

Green, 430 U.S. 462, 473 (1977) (italics added). Therefore, "[t]he critical issue in determining whether conduct meets the requirement of *deception*…is whether the conduct complained of includes the omission or misrepresentation of a material fact, or whether it merely states a claim for a breach of a state law duty." *Panter v. Marshall Field & Co.*, 646 F.2d 271, 288 (7th Cir. 1981). Similarly, in *Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268 (9th Cir. 2017), this circuit held that an undisclosed violation of a company's code of ethics cannot support a claim of securities fraud.

Here, the SEC alleged that nondisclosure of potential conflict of interest by Appellants –which should be a New York State Bar issue– is actually a federal securities fraud claim. This is not supported by case law.

9. A Triable Issue of Fact Exists as to Whether Appellants Acted with the *Scienter* Required for a Violation of § 10(b) and Rule 10b-5.

Scienter is "a mental state embracing the intent to deceive, manipulate, or defraud." *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568–69 (9th Cir. 1990). Determining scienter "is a subjective inquiry. It turns on the defendant's actual state of mind." *Gebhart v. SEC*, 595 F.3d 1034, 1041 n. 10 (9th Cir. 2010). "Summary judgment is generally inappropriate when mental state is an issue, unless no reasonable inference supports the adverse party's claim." *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th Cir. 1984).

Although somewhat unclear, the District Court appears to have concluded that Appellants acted *recklessly* and therefore with the requisite scienter. (Order at 19:2-10). However, this Court has defined *reckless* conduct as:

> a *highly unreasonable* omission, involving not merely simple, or even inexcusable negligence, but 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 … [T]he danger of misleading buyers must be actually known or so obvious that any reasonable man would be legally bound as knowing, and the omission must derive from something more egregious than even 'white heart/empty head' good faith.

SEC v. Platform Wireless Int's Corp., 617 F.3d 1072, 1093 (9th Cir. 2010) (italics added).

In this case, the issue of scienter should not have been determined at summary judgment. Although the trial court concluded, based on the SEC's evidence, that "Feng knowingly failed to disclose [his] receipt of commissions to [his] clients because [he] wanted to avoid having to negotiate with clients about rebating portions of the commissions,"[27] Feng, himself, offered evidence that he did not feel it necessary to disclose this information since it had no effect on the ultimate terms of the EB-5 investment to his clients.[28] (ER 460-61, ¶ 30.)

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[27] *See* ER 27 at lines 14-16.

[28] Since the fee paid to Feng did nothing to increase costs to his clients, or otherwise harm them relative to what they would have paid to make the same

Certainly, a triable issue existed as to whether Feng "inten[ded] to deceive, manipulate, or defraud" his clients by omitting this information.

10. A Triable Issue of Fact Exists as to Whether Feng Engaged in a "Scheme to Defraud" in Violation of § 17(a)(1) and Rule 10b(5)(a) or (c).

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 or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5(a), (c).

In granting summary judgment on this claim, the District Court concluded Feng had deceived his *clients* by creating the appearance that any administrative fee rebate was coming from the regional center rather than Feng, himself. (ER 28 at lines 14-22). As to the *regional centers*, the trial court concluded Feng defrauded them by setting up an overseas company, ABCL, to receive payments. (*Id*., 20-22.)

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investment absent Feng's involvement, Feng did not believe he was acting deceptively by failing to disclose this information to his clients.

As to "deceiving" his clients, issuing rebates was a matter of discretion to be exercised solely by Feng. Feng had no obligation to disclose whether some clients had requested and/or received rebates. For example, if a vendor decides to give a customer a discount because he simply wants to –not because he has to– that doesn't create a right for all vendees to know the value of the discount the vendor provided. It is a matter solely within the discretion of the vendor.

Also, the scheme to defraud claim under 10b-5(a) or (c) cannot be a recast of an omission claim under 10b-5(b). A party cannot prove scheme liability when the alleged acts constituting the scheme are "nothing more than a reiteration of the misrepresentations and omissions that underlies plaintiffs [sic] disclosure claim." *SEC v. Lucent Techs., Inc.*, 610 F.Supp.2d 342, 361 (D.N.J. 2009) (quoting *TCS Capital Mgmt. v. Apax Partners, L.P.*, No. 06-cv-13447, 2008 U.S.Dist. LEXIS 19854, *22 (S.D.N.Y. Mar. 7, 2008)). The fact of the matter is Feng did not disclose the finders' fees. Whatever Feng did otherwise to avoid such disclosure is still the same omission claim under 10b-5(b).

As to the alleged fraud on the regional centers, Feng has the right to set up overseas offices and business entities to pursue all lawful business activities. The SEC has not presented any evidence as to why Feng's overseas activities are illegal. It is up to the regional center to conduct due diligence as to whether they could engage in lawful business activity with Feng's overseas entities. Even if it

turns out that the regional centers have a problem with legal compliance because of the business they engaged with Feng's overseas entities does not mean Feng or Feng's overseas entities are engaging in fraud – there is no evidence (or it is at least disputed) that Feng intended to mislead the regional centers.

C. The District Court Erred in Denying Appellants' Motion for Judgment on the Pleadings.

Appellants further appeal the District Court's August 4, 2016 order denying their motion for judgment on the pleadings as to the third cause of action, for violation of § 15(a) of the Exchange Act, on the grounds that the terms "security" and "broker" are unconstitutionally vague as applied in this case. "An appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment." *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984); *see also Lovell v. Chandler*, 303 F.3d 1039, 1049 (9th Cir. 2002). Moreover, rulings as to the constitutionality of a federal statute are reviewed *de novo*. *See Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006) (10 U.S.C. § 12305); *The Ecology Ctr. v. Castaneda*, 426 F.3d 1144, 1147 (9th Cir. 2005).

In the Ninth Circuit, a statute is void for vagueness, and thus unconstitutional, if it fails one of two tests: (1) "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits;" or (2) "if it authorizes or even encourages arbitrary and discriminatory

enforcement." *S.E.C. v. Gemstar-TV Guide Int'l, Inc.*, 401 F.3d 1031, 1048 (9th Cir. 2005). As applied to the facts of this case, this statute is unconstitutional.

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

The term "broker" is broadly defined under § 3(a)(4)(A) of the Exchange Act to include "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). But this definition – which employs imprecise phrases such as "engaged in the business" and "effecting transactions" – is far from conclusive as to who falls within this category. As a result, intelligent persons must guess at the definition of "broker" and "differ as to its application." *Hockings*, 129 F.3d at 1072. Although the SEC takes the position that an immigration attorney who receives payments from regional centers but whose work for clients is otherwise well within the confines of what is generally considered legal work should be deemed a "broker," federal courts in analogous cases involving mere finders have rejected this simplistic application of the term "broker."

In *S.E.C. v. M&A West, Inc.*, No. C-01-3376, 2005 WL 1514101 (N.D. Cal. June 20, 2005), *aff'd*, 538 F.3d 1043 (9th Cir. 2008), the district court granted summary judgment *sua sponte* in favor of the defendant on the SEC's § 15(a) claim. The SEC asserted that the defendant businessman acted as a broker because he served as a "middleman" to facilitate reverse mergers by helping a private

company identify "suitable public shell companies," preparing documents for the reverse merger, obtaining the signatures for the documents, and ultimately receiving payment upon completion of the mergers. *Id*. at *3-4, 9. However, the court rejected that contention, concluding that the defendant was not a broker, and reasoning as follows:

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

Id. at *9 (emphasis in original).

Of note, the SEC chose not appeal the district court's "not a broker" ruling cited above, yet the SEC takes the same position – rejected by the Court in M&A West – almost 10 years later? Essentially, the SEC seeks to have the M&A West ruling overturned, but without warning or notice to the public.

2. Section 15(a) Is Unconstitutionally Vague as Applied To Appellants.

Due to the ambiguity of the statutory term "broker," an ordinary person in Appellants' position would have to – at best – guess whether his or her legal

services constituted broker conduct where the SEC issued no guidance on the matter. As a threshold matter, an immigration attorney assisting EB-5 clients would have no reason to know that his legal services were in connection with securities in the first place, and thus by definition would not have known he was acting as a broker. Instead, an ordinary immigration attorney could reasonably believe that EB-5 investments are not securities, and that even if they were, providing legal services to EB-5 clients is not broker conduct.

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

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

Furthermore, given extant case law, a person in Appellant's position could reasonably have concluded the very opposite: that EB-5 investments do not in fact qualify as securities. In *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), the Supreme Court explained that a "security" exists only where the "investor 'is attracted solely by the prospects of a return' on his investment." *Id.* at 852 (quoting *SEC v. W.J. Howey Co.*, 328 U.S. 293, 300 (1946)). The Court specifically warned against elevating form over substance and instructed that "the emphasis should be on economic reality." *Id.* at 848. Thus in *Forman*, because the investors who bought shares of a housing cooperative "were attracted solely by the prospect of acquiring a place to live, and not by financial returns on their investments," the Supreme Court concluded the shares were not securities. *Id.* at 853-54. The Court reasoned that "when a purchaser is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply." *Id.* at 853.

Likewise, in the EB-5 context, it is self-evident that applicants commit their capital not for the purpose of earning a financial return, but rather to obtain a green card, as this Court has recognized in other cases. *See Chang*, 327 F.3d at 929 (as EB-5 investors, "Appellants sought no guarantee of success, but a contingent promise that, if they held up their end of the bargain by fulfilling the terms of their approved I–526 petitions, they would obtain the LPR [legal permanent resident] status promised by the EB–5 program.") These principles are further reflected by

the SEC's No Action letter issued to CanAccord Capital (*see* fn. 9, *supra*). The Canadian immigrant investor program at issue in *CanAccord* is analogous to the EB-5 program with the exception that, under the Canadian program, immigrants received no interest on their "investment" while under the terms of the EB-5 investments at issue here investors received nominal interest payments that are outweighed by the mandatory fees paid to invest.

Because EB-5 applicants are wholly driven by the expectation of a green card rather than financial return, an immigration attorney in Appellants' position had ample reason to believe EB-5 investments would not be deemed "securities."

4. An Ordinary Immigration Attorney Would Not Reasonably Suspect That He Was Acting as A Broker.

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

An immigration attorney counseling an EB-5 client is concerned with compliance with the applicable regulatory standards, which govern everything from the amount of capital that must be invested, to the characteristics of the commercial enterprise or regional center that receives the capital, to the contents of

the business plan for the commercial enterprise, to amount of jobs created as a result. *See* 8 C.F.R. §§ 204.6, 216.6.

For example, every I-526 Petition filed by a foreign national seeking to participate in the EB-5 program must be accompanied by a business plan that "should reasonably demonstrate that the requisite number of jobs will be created by the end of [the] two-year period" following adjudication of the petition. (*See* ER 306.)

Accordingly, an immigration attorney must provide indispensable *legal* – not financial – advice on complying with these elements and drafting the petitions to maximize the chances that the applicant will attain their legal objective: securing permanent legal status. Currently there are 834 approved regional centers in the United States. Given the hundreds of options for foreign applicants to choose from, it is an intrinsic part of the immigration attorney's job to research and identify regional centers and their projects that meet the legal criteria mandated by EB-5 regulations. And while an immigration attorney might transmit documents, provide language translation, and obtain client signatures, these too are clerical tasks inherent to the provision of legal services. None of the foregoing tasks – which have defined EB-5 attorneys' work for the past two decades – would cause a reasonable attorney to believe he or she was acting as a broker.

5. The Statutory Vagueness Promotes Arbitrary Enforcement.

Vague statutes are also unconstitutional if they fail to "establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). "[P]recision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox Television*, 132 S. Ct. at 2317. Otherwise, minimal guidelines "encourage arbitrary and discriminatory enforcement" and "may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* at 357-58.

Here, the malleability of the term "broker" invites the risk of arbitrary and uneven enforcement of the securities laws. Even in the short period since the SEC first decided to pursue alleged brokers in the EB-5 industry last year, it is conspicuous and telling that the overwhelming majority of persons being charged under § 15(a) are immigration attorneys working in small firms, as opposed to business persons engaged in finding EB-5 applicants – i.e., finders. *See supra* at p. 6 & nn.7-8. Such disparity is persons being charged under § 15(a) are immigration attorneys working in small firms, as opposed to business persons engaged in finding EB-5 applicants – i.e., finders. *See supra* at p. 6 & nn.7-8.[29] Such disparity is surprising, since the attorneys and businessmen were allegedly engaged in

[29] Of note, solo immigration attorneys are easy targets for the SEC because they typically lack the financial and professional resources to fight with the SEC.

similar tasks of "recommending" regional centers, "acting as a liaison" between clients and regional centers, "facilitating the transfer and/or documentation of investment funds," and receiving compensation from the regional centers.16 Given that thousands of EB-5 clients work with regional centers each year, *supra* at p.5 & n.3, it is both surprising and troubling that the SEC has hardly brought any cases against professional finders, and instead has devoted virtually all of its resources to target solo immigration attorneys. While only the SEC can explain this apparent disparate treatment, it nevertheless underscores the danger of discriminatory enforcement that the void-for-vagueness doctrine is meant to protect against. As the Supreme Court recently emphasized, the vagueness of a statute that fails to provide clear guidance for enforcement may "encourage seriously discriminatory enforcement." *Fox Television*, 132 S. Ct. at 2317.

D. The District Court erred by attributing receipt of offshore fees as Appellants' onshore income.

It is undisputed that as the inquiries by Chinese clients over EB-5 program grew, Appellants set up overseas offices in China in April 2013 and hired Chinese consultants to provide EB-5 related immigration consulting services to Chinese clients. Appellants' overseas offices compete with migration services offered by non-US licensed or registered migration agencies in China for clients. In April 2014, Appellants set up business entities in Hong Kong and later worked with

another business partner to manage the immigration services in China. These facts are not disputed by the SEC.

Prior to April 2013, Appellants received $35,000 from the regional centers upon receipt of a clients' immigration application approval. After April 2013, all fees from the regional centers were paid to Appellants' overseas offices and business entities. Regional centers pay the same fees to migration agencies in China that conduct the same advisory services.

Without presenting any evidence or citing any legal authority, the SEC categorized all fees paid to cover the expenses for Appellants' overseas offices as fees received by Appellants, and sought disgorgement of these fees from Appellants. However, there are no regulations disallowing US persons from creating overseas entities to conduct business overseas. These offshore entities are routinely treated as a separate legal and financial entity from the owners in the United States. To ask Appellants to disgorge income earned by these overseas entities is without legal basis.

VI. CONCLUSION

If immigration attorneys advising EB-5 clients need to register as brokers because EB-5 program investments are securities offerings, what about other corporate attorneys advising securities transactions? Where is the line? By reasonable extension of the SEC's allegations, all corporate attorneys may need to

register as brokers if they want to advise securities transactions and be paid for their services.

Here the SEC is suddenly asserting its power over the EB-5 program which, until just a few years ago, was considered solely as an immigration program. The EB-5 program is an important immigration program for the United States. The public has a significant interest over the issues presented by this case.

The law is unclear, or we wouldn't be here. Appellants believe the SEC has overstepped, and that the District Court's decision was incorrect. We respectfully ask this Court to review the facts and the law here, and to find that, first, the EB-5 investments (as offered here) were not securities. If so, the inquiry stops there, as the registration and antifraud provisions require an underlying security. If the Court does not decide that, then we ask the Court to determine that the activities of Appellants did not require registration under § 15(a) of the Exchange Act, and that the fact of the contingent fees received by Appellants did not trigger any kind of disclosure requirement.

Dated: April 9, 2018

HOLMES, TAYLOR, SCOTT & JONES LLP

By: 

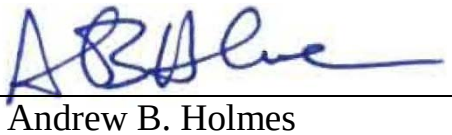
Andrew B. Holmes
Attorney for Defendants-Appellants

STATEMENT OF RELATED CASES

Appellants Hui Feng and Law Offices of Feng & Associates P.C. are unaware of any related cases pending in the Ninth Circuit.

Dated: April 9, 2018

HOLMES, TAYLOR, SCOTT & JONES LLP

By: 

Andrew B. Holmes
Attorney for Defendants-Appellants

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)(7)

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains proportionately spaced typeface of 14-point Times New Roman prepared using Microsoft Word and contains 12,611 words.

Dated: April 9, 2018

HOLMES, TAYLOR, SCOTT & JONES LLP

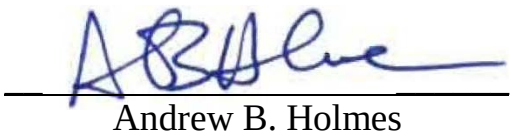
By: _____
Andrew B. Holmes
Attorney for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

To the best of my knowledge, all participants in this case are registered CM/ECF users who are being automatically served through the Appellate ECF system.

I declare under penalty of perjury that the foregoing is true and correct. Dated this 9th day of April 2018, at Los Angeles, California.



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Signature of Attorney or Unrepresented Litigant [/s/ Andrew B. Holmes] Date [Apr 9, 2018]

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