17-56522

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

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

Defendants-Appellants,

On Appeal from the United States District Court for the
Central District of California Western Division,
No. 2:15-cv-09420-CBM-SS

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

ROBERT B. STEBBINS
General Counsel

MICHAEL A. CONLEY
Solicitor

JEFFERY A. BERGER
Senior Litigation Counsel

KERRY J. DINGLE
Senior Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(202) 551-6953 (Dingle)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Cases—Continued **Page**

Cases—Continued **Page**

Cases—Continued **Page**

Cases—Continued **Page**

Cases—Continued **Page**

Cases—Continued **Page**

Statutes, Regulations, and Rules

Statutes, Regulations, and Rules—Continued **Page**

Statutes, Regulations, and Rules—Continued **Page**

Other Authorities

Other Authorities—Continued **Page**

JURISDICTIONAL STATEMENT

The district court had jurisdiction under Sections 20(b), 20(d)(1), and 22(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77t(b), 77t(d)(1), 77v(a), and Sections 21(d), 21(e), and 27(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78u(d), 78u(e), 78aa(a). Final judgment was entered pursuant to Federal Rule of Civil Procedure 54(b) on August 10, 2017, ER39,[1] and Appellants' notice of appeal was timely filed on October 6, 2017. This Court has jurisdiction under 28 U.S.C. § 1291.

COUNTERSTATEMENT OF THE ISSUES PRESENTED

The EB-5 Immigrant Investor Program provides foreign nationals who invest in U.S. enterprises with a pathway to obtain a U.S. visa. Appellants Hui Feng and Law Offices of Feng & Associates P.C., Feng's immigration law firm, (collectively "Feng"), promoted particular EB-5 investments to their clients but failed to disclose that they received commissions from the issuers of the investments. Feng also misled issuers by leading them to believe that foreign entities found the investors and instructing them to pay those entities referral fees when, in fact, Feng was the finder and ultimate recipient of the fees. Feng challenges the district court's entry of

[1] "ER__" refers to the Feng's excerpts of record. "SER__" refers to the supplemental excerpts of record filed by the Commission with this brief. "Dkt." refers to the district court's docket. "Br." refers to Feng's opening brief.

summary judgment against him for failing to register as a broker and violating the antifraud provisions of the securities laws. The issues presented are:

1. Whether the district court correctly held that the EB-5 investments are "investment contracts," and thus securities.

2. Whether the district court correctly concluded that Feng violated Section 15(a) of the Exchange Act by acting as an unregistered broker when, among other activities, he received commissions for soliciting clients to invest in EB-5 offerings.

3. Whether the district court correctly held that there is no dispute of material fact that Feng violated the antifraud provisions of the securities laws by deceiving both investors and issuers.

4. Whether the district court acted within its discretion when it included in its disgorgement calculation amounts that were paid to overseas entities in furtherance of Feng's deceptions.

COUNTERSTATEMENT OF THE CASE

A. Regulatory Framework

1. The EB-5 program requires an investment for the purpose of generating a return.

The EB-5 program provides foreigners who invest in a U.S. "commercial enterprise" with a pathway to obtain a U.S. visa. 8 U.S.C. §§ 1153(b)(5)(A), (b)(5)(C)(ii); *see* 8 C.F.R. § 204.6(f)(2). The program is administered by the U.S. Bureau of Citizenship and Immigration Services ("USCIS"). USCIS defines a

"commercial enterprise" as "any for-profit activity formed for the ongoing conduct of lawful business." 8 C.F.R. § 204.6(e).

Foreign investors cannot simply buy a U.S. visa. Rather, Congress requires an investment of money in a U.S. enterprise to spur domestic job growth. *See* S. REP. NO. 101-55, at 21 (1989) (instituting the program "to create new employment for U.S. workers and to infuse new capital into the country, not to provide immigrant visas to wealthy individuals"). Foreign investors must show that they "placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk." 8 C.F.R. § 204.6(j)(2). This requirement is modeled after a comparable Department of State program, which defines an "investment" as the "placing of capital . . . at risk in the commercial sense with the objective of generating a profit." *Id.* § 214.2(e)(12); *see Employment-Based Immigrants*, 56 FED. REG. 60,897 (Nov. 29, 1991) (codified at 8 C.F.R. pts. 103 & 204).

Multiple investors may pool their investments in a single commercial enterprise, "provided each individual investment results in the creation of at least ten full-time positions." 8 C.F.R. § 204.6(g). Since 1992, USCIS has allowed investments in "regional centers"—business entities that combine contributions to sponsor projects and offer foreigners defined investment opportunities. *Id.* §§ 204.6(e), (m)(3); Pub. L. No. 102-395, § 610, 106 Stat. 1828, 1874 (1992). Investments through regional centers "can qualify as securities" precisely because they "pool multiple investors' funds into commercial enterprises" that are managed by others. *Testimony of*

Stephen L. Cohen, SEC Division of Enforcement before the Committee on the Judiciary, United States Senate (Feb. 2, 2016); *see infra* Section I. Pooled investments in regional centers have increased over time and now account for most EB-5 investments.[2] The Commission's increased enforcement actions in this area correspond to this increase in pooled EB-5 investments—*i.e.*, those that can qualify as securities.

2. Brokers are subject to registration and antifraud provisions of the securities laws.

Section 15(a)(1) of the Exchange Act makes it unlawful for a broker "to induce or attempt to induce the purchase or sale of[] any security" unless the broker is registered with the Commission. 15 U.S.C. § 78o(a)(1). Section 3(a)(4)(A) of the Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). Section 15(a) creates strict liability; the Commission is not required to prove scienter or even negligence. *SEC v. Alliance Leasing Corp.*, 2000 U.S. Dist. LEXIS 5227, *23 (S.D. Cal. Mar. 20, 2000).

---

[2] *Compare* U.S. Dep't of State, Report of the Visa Office 2010, Table V, pt. 4 (2010), *available at* https://travel.state.gov/content/dam/visas/Statistics/FY10AnnualReport-TableVI-PartIV.pdf (938 visas issued to investors in regional centers) *with* U.S. Dep't of State, Report of the Visa Office 2017, Table V, pt. 4 (2017), available at *https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableVI-PartIV.pdf* (8,000 visas issued to investors in regional centers out of a total of 8,414 EB-5 visas issued).

The registration requirement is "the keystone of the entire system of broker-dealer regulation." *Roth v. SEC*, 22 F.3d 1108, 1109 (D.C. Cir.), *cert. denied*, 513 U.S. 1015 (1994) (citation and quotation marks omitted). It ensures "that customers are treated fairly, that they receive adequate disclosure[,] and that the broker-dealer is financially capable of transacting business." *Persons Deemed Not to be Brokers*, Release No. 34-22172, 50 FED. REG. 27940, 27941 (July 9, 1985). To that end, registered brokers are "bound to abide by numerous regulations designed to protect prospective purchasers of securities, including standards of professional conduct, financial responsibility requirements, recordkeeping requirements, and supervisory obligations over broker-dealer employees." *Roth*, 22 F.3d at 1109.

In addition to the registration requirement, brokers are subject to the antifraud provisions of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5, which "forbid making a material misstatement or omission in connection with the offer or sale of a security by means of interstate commerce." *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001); *see* 15 U.S.C. § 77q(a); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b). They also prohibit "employ[ing] any device, scheme, or artifice to defraud" and "engag[ing] in any transaction, practice, or course of business which operates . . . as a fraud or deceit." 15 U.S.C. § 77q(a)(1) & (3); *see also* 17 C.F.R. § 240.10b-5(a) & (c) (making it unlawful to "employ any device, scheme, or artifice to defraud" and "engage in any act, practice, or course of business which operates . . . as a fraud or deceit").

B. Feng misled EB-5 regional centers into paying him commissions for soliciting clients to invest in securities offerings, and concealed from clients his receipt of commissions.

1. Feng was engaged by EB-5 regional centers to solicit clients to invest in the centers' EB-5 offerings.

In 2009 Feng began entering into written referral agreements with EB-5 regional centers that entitled Feng to commissions ranging from $15,000 to $70,000 when his clients invested in the centers' EB-5 offerings. SER360-362; SER561; SER20-23; SER24-39; SER43-45; SER46-59; SER225-231. The agreements, which were executed by Feng on behalf of Feng & Associates or by Feng's foreign nominees, made payment of commissions contingent on (1) an investor making the required capital contribution and (2) the USCIS approving the investor's I-526 petition demonstrating compliance with the EB-5 program requirements. *See, e.g.*, SER20; SER33. All of the regional centers that Feng recommended to clients paid such commissions. SER402-403.

Feng described himself to the regional centers as "marketing" or "promoting" the EB-5 investments and requested allocations of spots in the centers' EB-5 offerings that he could sell to his clients. *See, e.g.*, SER75; SER69-72; SER168. Feng was required to fill the allocated spots with investors by a certain date or give up the spots. SER393-394; SER74. Some of the agreements included false representations that Feng had disclosed the referral agreement and the nature of the financial arrangement to the investors. *See, e.g.*, SER20; SER40.

Feng, directly or through his nominees, received approximately $1,268,000 in commissions from at least five regional centers (SER408-409; SER240), and, at the time final judgment was entered, was contractually entitled to receive an additional $3,450,000 in commissions upon the approval of pending I-526 Petitions, SER411.

2. The offerings required Feng's clients to make a capital contribution and, separately, pay an administrative fee.

The terms of the offerings appeared in private placement memoranda ("PPMs"). *See, e.g.*, SER87-156; SER169-224. All of the EB-5 investments were "structured as limited partnerships, with the EB-5 investor becoming a 'limited partner' in the partnership and the regional center, or a related entity, serving as the general partner." ER455-56. Investors' capital contributions were pooled to provide financing for an identified construction project. SER413-414. Many of the PPMs described the investments as "securities." *See, e.g.*, SER77-81; SER87; SER90-91; SER171-172. The investments offered annual rates of return from 0.5% to 1% of the capital contribution, and sometimes higher. *See, e.g.*, SER556; SER265 (annual return of 0.5%); SER248; SER254 (5% return on investment; prior year's return was 6%); SER453-454 (return on EB-5 Capital securities ranged from 0.5% to 1% annually, with the rate going up each year). The investors received income or profit distributions from the interest paid on the construction loan, which was reported to them on a Schedule K-1 (IRS Form 1065). SER557.

Investors were also required to pay a fee, typically in the range of $30,000 to $50,000, to cover legal and administrative costs of the general partnership. SER557; *see, e.g.*, SER77; SER88-89; SER183. The PPMs made clear that these administrative fees were not part of the capital contribution, were not pooled to finance any part of the projects, and did not earn any interest. *See, e.g.*, SER89; SER99; SER183.

3. Feng directed regional centers to pay commissions to overseas entities, who routed the commissions back to Feng.

In order to avoid running afoul of the securities laws, many regional centers refused to pay U.S. attorneys commissions unless the attorneys were registered brokers. SER459-460; SER69-72; SER279-284. For investors referred by U.S. attorneys not registered as brokers, some centers would discount the administrative fee by $15,000 in lieu of paying the attorney a commission. *See* SER463-466. Feng circumvented the centers' refusal to pay him commissions by electing a nominee in China to receive the funds. SER310-311. The centers believed the nominee was finding investors, when in fact Feng performed those services. SER277-281. Once paid, the foreign nominees would transfer the commission proceeds to Feng. SER310-311.

To further this scheme, Feng formed Atlantic Business Consulting Limited ("ABCL"), an entity based in Hong Kong, "to market EB-5 projects and to establish an overseas affiliate through which EB-5 clients could be referred without running afoul of U.S. securities laws." ER459; *see also* SER307-308; SER396. Feng led the

regional centers to believe that ABCL was finding clients, but in reality Feng and his New York-based law firm provided these services. SER281-284; SER467-469; SER307-308; SER378-379. ABCL's only source of revenue was commissions from regional centers. SER398.

ABCL was an alter ego of Feng. Feng was the sole owner of ABCL at its inception and later became 50% owner, ER459, but always retained sole control of ABCL's bank account. SER313; SER405-407. In order to conceal his relationship with ABCL, Feng had his mother, Xiuyuan Tan, sign agreements between ABCL and the regional centers. SER45; SER36; SER265. Although Ms. Tan was identified as ABCL's President, Feng admitted that she had no role whatsoever in ABCL. SER341-342; SER354-355.

Feng never informed the regional centers that he received the commissions paid to ABCL and other individuals. SER484-485; SER488-489; SER287-289; SER497-498. Feng did not disclose to the regional centers that he was the beneficial owner of ABCL or that he controlled its bank account. SER474-478; SER497-498. In fact, some of the referral agreements signed by Feng's nominees represented that neither the finder nor any representative of the finder was a citizen of the United States. SER226; SER228.

4. Feng represented EB-5 investors without disclosing that he received commissions on the clients' investments.

Between 2010 and 2016, Feng represented approximately 150 mostly Chinese clients who made EB-5 investments. SER412. Feng and his clients entered into retainer agreements that required the clients to pay between $10,000 and $15,000 for supposed EB-5 related legal work. SER562. The retainer agreements did not disclose that Feng received commissions in connection with the clients' EB-5 investments, and expressly stated that "[e]xcept for the fees outlined in this Agreement, there is no agency fee or any other legal fees." SER54; SER563. And, unless clients asked, Feng did not orally disclose that he received the commissions on the investments. SER321.

Beginning in February 2015, while the Commission's investigation was pending, Feng revised his retainer agreement to disclose that promoters may pay certain fees to an overseas company beneficially owned by Feng upon the completion of the client's visa approval. ER461-462. But the revised language failed to fully disclose Feng's financial relationships with the regional centers, which created a risk that Feng might recommend a particular project even if the client's interests would be better served with a different project. SER514-515.

Some clients asked Feng to negotiate with the regional center to reduce the administrative fee. SER346-347; SER351-353. In order to make it appear that he was negotiating on the client's behalf, Feng arranged with the regional center to have a portion of his commission rebated to the client without informing the client—who

generally did not know that Feng received a commission—that part of the commission was the source of the rebate. SER347-349; SER62-68; SER37; SER38. Feng explained that he wanted to "keep as much of the marketing fee as possible" and wanted to avoid "haggl[ing]" with clients who might ask Feng to rebate more of their commission. SR373-375; *see also* SER321-325. Feng provided rebates to approximately 20% of his clients, SER353, while failing to disclose to the other 80% that the administrative fees could be reduced or rebated. SER368-369. Feng admitted this created a "financial conflict" between him and his clients. SER326. More generally, Feng admitted that it was a conflict for him to be paid by an issuer for recommending the investment to a client he was representing in connection with that transaction. SER322-323.

C. The district court granted summary judgment for the Commission.

The Commission filed its action in December 2015, alleging that Feng violated Section 15(a)(1) of the Exchange Act by failing to register as a broker-dealer. The Commission further alleged that Feng violated Sections 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 by failing to disclose to clients that he received commissions and falsely representing to the regional centers that foreign-based persons were responsible for finding investors. ER417-433. The district court denied Feng's motion for judgment on the pleadings in which he argued, among other things, that Section 15(a) is unconstitutionally vague as applied. Dkt. 40; ER1-8.

Following discovery, both Feng and the Commission moved for summary judgment on all claims, and the district court granted the Commission's motion. Dkts. 65, 66; ER33. As an initial matter, the court rejected Feng's argument that the EB-5 investments were not securities. It held that the investments made by Feng's clients qualified as securities because "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." ER19.

The court concluded that Feng qualified as a broker and was liable for failing to register under Section 15. Responding to Feng's arguments, the court noted that there is "[n]o attorney exemption . . . set forth in Section 15" and "decline[ed] to adopt an exemption for attorneys from broker registration requirements under the Act based on public policy grounds." ER20. Applying the factors set forth in *SEC v. Hansen*, 1984 U.S. Dist. LEXIS 17835 (S.D.N.Y. Apr. 6, 1984) and adopted by other courts, including in this Circuit, the district court found that Feng was a broker because the undisputed evidence demonstrated that he (1) "received transaction-based income in the form of commissions or referral fees for referring his clients to the regional centers"; (2) had a history of providing services in connection with securities transactions; (3) "advertised for clients and were active finders of investors"; (4) negotiated between regional centers and investors; and (5) "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." ER22.

The court then found that Feng violated the antifraud provisions by failing to tell investors about his receipt of referral fees. It held that those omissions were material as a matter of law because they created conflicts of interest. ER24-26. The court concluded Feng acted with scienter based on undisputed evidence that he "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." ER27.

The court also found Feng liable for engaging in a scheme to defraud based on two courses of conduct. First, he "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." ER28 (quoting *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)). Second, he "acted to create a 'false appearance of fact' to regional centers regarding Defendants' relationship with ABCL and Chinese agents who received referral fees but did not procure investors." ER30-31.

The court ordered Feng to disgorge $1,268,000, which represented the total amount of commissions he was paid by regional centers, along with prejudgment interest in the amount of $130,517.09. ER30. The court also imposed civil monetary

penalties of $160,000 against Feng and $800,000 against his firm. ER32. Finally, the court enjoined Feng from further violations of the securities laws. ER33.[3]

SUMMARY OF ARGUMENT

1. The district court correctly held that the EB-5 investments here are "investment contracts," and thus "securities," under controlling Supreme Court precedent. The documents on their face gave investors an expectation of generating a return and a promise that their money would be put to profitable use, as the regulations governing the EB-5 program require.

2. The district court properly held that there is no genuine dispute of material fact that Feng violated Section 15(a) by acting as an unregistered broker. The undisputed facts show that Feng, who did not register, acted as a broker when he solicited and promoted investments in particular EB-5 regional centers, received transaction-based compensation (*i.e.*, commissions on investments) from those centers, and regularly participated in securities transactions over the course of years. Section 15(a) is not unconstitutionally vague as applied in this case because Feng had fair notice that his actions were prohibited.

3. Summary judgment was also appropriate on the fraud claims because Feng failed to identify any genuine dispute of material fact concerning his violations.

[3] The court's original summary judgment order, entered on June 29, 2017, set forth an incorrect amount of prejudgment interest. *See* Dkts. 96, 99, 100. The court entered an amended order and judgment on August 10, 2017.

Feng failed to disclose to his clients that he received commissions on the clients' investments in securities through the EB-5 program, and his omissions were material as a matter of law because the commissions created a conflict of interest that would be important to any reasonable investor. The district court also correctly found that Feng engaged in a scheme to defraud by concealing his receipt of commissions from clients and by misleading regional centers regarding his use of foreign nominees to receive commission payments. Feng's assertion that he did not believe he needed to disclose the commissions or his use of foreign nominees lacks an evidentiary basis and is insufficient to raise a genuine dispute of material fact regarding his scienter.

4. Finally, the district court acted within its discretion when it ordered disgorgement in the full amount of commissions Feng received, including money paid to overseas entities he controlled. Feng forfeited his objection to disgorging money paid offshore by failing to raise it below. In any event, Feng cannot avoid disgorging his ill-gotten gains by routing them through overseas entities.

STANDARD OF REVIEW

The Court "review[s] the district court's summary judgment *de novo*, applying the same standards that applied in the district court." *Montana Wilderness Ass'n v. McAllister*, 666 F.3d 549, 554 (9th Cir. 2011) (internal quotation marks omitted). Summary judgment is appropriate where "there is no genuine dispute as to any material fact." FED. R. CIV. P. 56(a). "When a properly supported motion for summary judgment is made," the non-moving party must come forth with "specific

facts" showing that there is a genuine issue for trial, and that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250 (1986) (quoting FED. R. CIV. P. 56(e)); *see United States Postal Serv. v. Ester*, 836 F.3d 1189, 1198 (9th Cir. 2016) (upholding summary judgment where non-moving party met the moving party's evidence with mere speculation rather than "specific facts").

The Court reviews the district court's imposition of remedies—including the amount to be disgorged—under the deferential abuse of discretion standard. *SEC v. Goldfield Deep Mines Co.*, 758 F.2d 459, 465 (9th Cir. 1985); *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113 (9th Cir. 2006).

ARGUMENT

I. THE EB-5 INVESTMENTS THAT FENG SOLD ARE INVESTMENT CONTRACTS, AND THUS SECURITIES.

Congress's purpose in enacting the securities laws "was to regulate *investments*, in whatever form they are made by whatever name they are called." *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990). Congress thus defined "security" broadly "to encompass virtually any instrument that might be sold as an investment," *id.*, including an "investment contract." 15 U.S.C. § 77b(a)(1).

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) (applying the test for

investment contracts set forth in *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298 (1946)). Feng challenges only the district court's conclusion that *Howey*'s third prong is met—he argues that his clients invested without an expectation of profits. Br. 12-13. The district court correctly held that *Howey* was satisfied because the investments offered an anticipated return, they were marketed as securities, and investors expected that the regional centers would put their investments to profitable use as required by EB-5 regulations. *See Howey*, 328 U.S. at 298 ("An investment contract thus came to mean a contract or scheme of 'placing capital or laying out of money in a way intended to secure income or profit from its employment.'") (citation omitted).

A. Feng's clients entered into investment contracts that gave them an expectation of generating a return.

The district court concluded that the investments are investment contracts based on the following characteristics: "(1) the terms of the EB-5 investments note a potential for profit; (2) many of the private placement memoranda for the EB-5 investments describe the offerings as 'securities'; 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." ER16. As demonstrated by the record, each of those findings was correct.

1. The offerings included a potential for a return.

The offering documents on their face describe a potential for generating a return. The district court found—and Feng does not dispute—that the PPM for each

offering specified an annual return or interest payment. *See, e.g.*, ER16 & n.4; Br. 9 ("Feng's clients were offered a fixed rate of return, or interest rate, on the money invested through the regional center."). It is settled that instruments offering a fixed rate of return can be investment contracts. *See SEC v. Edwards*, 540 U.S. 389, 397 (2004).

Feng's suggestion that there can be no expectation of profits where a separate, administrative fee outstrips anticipated returns (Br. 13-14) is not supported by any precedent. There is no case where a court has held that a documented rate of return somehow ceases to create an expectation of profits, and thus negates the existence of a security, because of a separate cost component. It is particularly inappropriate to depart from the *Howey* line of cases where, as here, the offering documents made clear that the administrative fee was not part of the investment. *See, e.g.*, SER99 (explaining that the "syndication fee" of $45,000 "shall not constitute a Capital Contribution"); SER183 (explaining that "in addition to the . . . Capital Contribution" investors would pay an "Administrative Fee" to "be used by the General Partner to defray organizational and operational costs"). Indeed, Feng stressed to USCIS that the administrative fees were separate from his clients' investments. SER238.

As an additional indicator that the third *Howey* prong is met, investors relied on the efforts of the EB-5 promoters to minimize any loss of their capital contribution. *See* SER545-546; SER548; SER550 ("Q. And was getting your money back at the end of the five years, was that an attractive part of the investment? A. Yes."). "[R]isk of

loss is sufficient to bring the transaction within the meaning of a security," where "an investor's avoidance of loss depends on the promoter's sound management and continued solvency." *SEC v. Eurobond Exch., Ltd.*, 13 F.3d 1334, 1340 (9th Cir. 1994) (internal quotation marks omitted); *see also El Khadem v. Equity Sec. Corp.*, 494 F.2d 1224, 1229 (9th Cir.), *cert. denied*, 419 U.S. 900 (1974) (holding that an investment was a security where the investor received a fixed financial gain and only her risk of loss depended on the management skills of others).

Investors also relied on the regional centers to put their investments to profitable use. Feng construes the "expectation of profits" requirement too narrowly by focusing solely on the size of the returns flowing to investors. Br. 12-14. This Court's opinion in *Warfield v. Alaniz* shows that *Howey* is satisfied where one person invests money with the expectation that another person will put it to profitable use. There, this Court rejected the argument that purchasers of charitable gift annuities did not purchase securities "because they lacked the intent to realize a financial gain and were motivated solely to make a charitable donation." 569 F.3d 1015, 1021 (9th Cir. 2009). Defendants had argued that under the annuity's terms "it was *impossible* for purchasers to see returns on their investment and that accordingly, any payments to Defendants could not constitute 'profits.'" *Id.* at 1024 (emphasis in original). Yet the Court, recognizing that "[the] definition of investment contract 'embodies a flexible rather than a static principle,'" held that the expectation of profits requirement was satisfied because "the purchaser may well have anticipated an increase in investment

that would accrue to the benefit of the charity." *Id.* at 1020 (quoting *Howey*, 328 U.S. at 299) and 1024 (emphasis added). As the Court explained, excluding as security holders those who might expect their investment to generate profits for others would "effectively render[] the investment contract definition inapplicable to [the elderly]." *Id.* at 1023. Thus, *Warfield* stands for the proposition that investing money with the expectation that it will be put to profitable use is sufficient to satisfy *Howey*, even if much of the profit does not flow back to the investor. Feng acknowledged that the EB-5 program requires investors to have that expectation because a failed project will not create jobs and will leave the investor unable to obtain a visa. SER314-315.

2. The offering documents describe the investments as securities.

The PPMs repeatedly called the investments "securities" and explained that the offerings were being made pursuant to the U.S. securities laws. *See, e.g.*, SER79; SER121; SER87; SER91; SER93; SER171-172. For example, the PPMs typically required the investor to declare he or she was an "accredited investor" to qualify for the registration exemption available under Rule 506 of Regulation D—a Securities Act provision that would become relevant only if the offerings were securities. SER79; SER115-116; SER171-172. As the Supreme Court has stated, the offerings should "be judged as being what they were represented to be." *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943); *accord Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 (1985) (explaining that when an instrument bears a security's "usual characteristics, 'a

purchaser justifiably [may] assume that the federal securities laws apply'") (quoting *United Housing Fund, Inc. v. Forman*, 421 U.S. 837, 850 (1975)).

In addition, as Feng acknowledged, "all of the EB-5 projects in which [his] clients have invested have been structured as limited partnerships, with the EB-5 investor becoming a 'limited partner' in the partnership and the regional center, or a related entity, serving as the general partner." ER467. Limited-partnership interests, such as those sold here, "clearly are securities" where "the investors had no managerial role whatsoever." *SEC v. Murphy*, 626 F.2d 633, 640-41 (9th Cir. 1980) ("[A] limited partnership generally is a security . . . because, by definition, it involves investment in a common enterprise with profits to come solely from the efforts of others."); *Matek v. Murat*, 862 F.2d 720, 726 n.8, 730 (9th Cir. 1988), *abrogated on other grounds by Koch v. Hankins*, 928 F.2d 1471, 1477-78 (9th Cir. 1991) ("Limited partnerships are almost always held to be securities."). Feng does not argue that investors had *any* involvement in the development or operation for any of the EB-5 projects, and the undisputed evidence shows that the promised profit was to be derived from developers' efforts, not investors'. *See* SER338-339 (admitting that all of his clients were passive investors relying on developers to manage the EB-5 projects).

3. The investments were offered pursuant to regulations that require them to satisfy *Howey*'s third prong.

The EB-5 investments were sold pursuant to federal regulations that require investors to show that they "placed the required amount of capital at risk for the

purpose of generating a return on the capital placed at risk." 8 C.F.R. § 204.6(j)(2). It was critical that the offerings' terms included a return on capital because without it the investors would not have been eligible for visas under the EB-5 program.[4] Indeed, the issuers believed that they were offering investment contracts, SER443; SER446; SER457; SER486-487; SER494, with one regional center even requiring Feng to label the instruments as securities on the cover of any marketing document he created. *See* SER25 (requiring Feng to include a statement that the "securities offered" could not be sold in the United States or to U.S. persons without proper registration).

B. The investments are securities regardless of individual investors' purported subjective motivations.

Feng argues that *United Housing Fund, Inc. v. Forman* requires this Court to accept his speculation that "EB-5 investors are motivated by their desire for U.S. permanent residency status rather than a financial return." Br. 16. But *Forman* made clear that the name assigned is not "irrelevant to the decision whether it is a security," and that, indeed, "most instruments bearing [these] traditional titles," like "securities," are covered by the securities laws. *Forman*, 421 U.S. at 850. As the Supreme Court

---

[4] The Commission's No-Action Letter issued in *CanAccord Capital Corporation*, SEC No-Action Letter, 2002 SEC No-Act. LEXIS 55 (Jan. 18, 2002) is distinguishable because the Canadian Immigrant Investor Program at issue there prohibited investors from receiving a return on their capital. In any event, that No-Action Letter does not constrain the Commission's action here. *N.Y.C. Emples. Ret. Sys. v. SEC*, 45 F.3d 7, 12 (2d Cir. 1995) (A no-action letter "is an informal response, and does not amount to an official statement of the SEC's views. . . . [It also] does not create or destroy any legal rights." (citing 17 C.F.R. § 202.1(d)).

clarified in *Landreth*, only cases involving "unusual instruments not easily characterized as 'securities'" require examination of the "economic reality underlying the transactions" in order to determine whether "the instruments were actually of a type that falls within the usual concept of a security." 471 U.S. at 690-91. Where an investment instrument is "plainly within the statutory definition," on the other hand, "[t]here is no need . . . to look beyond the characteristics of the instrument to determine whether the [Securities and Exchange] Acts apply." *Id.*

Nor does *Warfield* support Feng's argument that the investors' alleged, subjective motivation is the primary measure of whether they invested in securities. Br. 12. In *Warfield*, this Court held that the inquiry into whether an instrument is an investment contract is "focus[ed]" on objective factors—*i.e.*, "on what the purchasers were offered or promised." 569 F.3d at 1021 ("Under *Howey*, courts conduct an objective inquiry into the character of the instrument or transaction offered based on what the purchasers were 'led to expect.'"); *see also C.M. Joiner*, 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); *Goldfield*, 758 F.2d at 463-64 (focusing on representations contained in marketing brochure to conclude that investment satisfied the "expectation of profits" element). As the district court properly understood, *Warfield* ensures that the application of securities

laws does not depend on the particular perspectives of individual investors[5] and prevents use of belated speculation about investors' motivations to escape liability. *See* ER15 (quoting *Warfield*, 569 F.3d at 1021).

The EB-5 investments here are fundamentally different from the real estate investment found not to be a security in *Forman*, which stands for the unremarkable proposition that "purchas[ing] a commodity for personal consumption or living quarters for personal" use—an apartment—is not a security when the purchaser is not relying on "the efforts of others" to generate profits. *Forman*, 421 U.S. at 852, 857-58 (holding that shares in a non-profit housing development did not constitute securities because investors purchased housing with no expectation of generating a return dependent on the efforts of others). The purchasers in *Forman* took "no risk in any significant sense" because, "[i]f dissatisfied with their apartments, they [could] recover their initial investment in full." *Id.* at 857 n.24. Unlike in *Forman*, the investors here were required by federal law to place their capital at risk for the purpose of generating a return. 8 C.F.R. § 204.6(j)(2). They expected that the regional centers' efforts would result in capital appreciation, and thus would return their investments—with interest—and satisfy the requirements of the EB-5 program. If the efforts of the

[5] Indeed, at least one investor specifically sought out an EB-5 investment with a high return. SER245 ("My criteria is low risk and high return."). Feng's unworkable test would render that client's investment a security, but not an identical investment made by another client.

regional centers' managers failed to invest in successful projects the investors risked losing not only their visas but also their investments.

Forman is also distinguishable because there is no comparable concern that triggering the securities laws would unduly expand the Commission's authority to cover "important questions as to the appropriate balance between state and federal responsibility" for housing policy. 421 U.S. at 859 n.26. The EB-5 program is already federally regulated and, as USCIS has welcomed, can implicate the Commission's authority. *See Testimony of Nicholas Colluci, Chief of the Office of Immigrant Investor Program USCIS on the EB-5 Immigrant Investor Program, before the Committee on the Judiciary, United States Senate* (Feb. 2, 2016) (recognizing that the "program necessitates collaboration with several other agencies" including the Commission, "with whom [the Immigrant Investor Program Office] shares a robust collaborative relationship"). The focus of the Securities Act is "the capital market of the enterprise system," including "the sale of securities to raise capital for profit-making purposes," which in this instance is the creation of the EB-5 projects and the jobs they generate. *See Forman*, 421 U.S. at 849; *see also* Br. 4 (acknowledging that the EB-5 program's "chief purpose is to stimulate the U.S. economy by encouraging infusions of new capital and creating jobs"). In furtherance of its mandate, the Commission has rightly "taken an active role enforcing the securities laws as appropriate in the EB-5 context," particularly by investigating suspected violations of the securities laws related to "limited partnership interests or limited liability company units" offered by "regional centers, and their related

entities." *Testimony of Stephen L. Cohen, Associate Director, Division of Enforcement on the EB-5 Immigrant Investor Program, before the Committee on the Judiciary, United States Senate* (Feb. 2, 2016).

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE UNDISPUTED MATERIAL FACTS SHOW THAT FENG ACTED AS A BROKER.

The district court correctly found that Feng was liable under Section 15(a) for acting as an unregistered broker because, among other activities, he solicited investors in exchange for over $1 million in commissions from EB-5 regional centers. ER22-23; SER552-553; SER408-409. Feng contends that he did not act as a broker and that Section 15(a) is unconstitutionally vague as applied, but both arguments lack merit.

A. Feng violated the Exchange Act by serving as an unregistered broker.

The definition of "broker" set forth in Section 3(a)(4), and incorporated into Section 15, is "construed broadly" to "promote both investor protection and the integrity of the brokerage community." *In the Matter of Frederick W. Wall*, Release No. 52467, 2005 SEC LEXIS 2380, *8 (Sept. 19. 2005) (Comm. Op.) (internal quotation marks omitted). Feng nevertheless asks this Court to take a narrow interpretation of the meaning of "broker" based on his misunderstanding of the securities laws.

To begin with, Feng suggests, without any basis, that one can be a broker only for securities traded on an exchange. This is incorrect: the Exchange Act requires registration of brokers who facilitate transactions that occur directly between parties

(*i.e.*, "over-the-counter" trading). Loss, Seligman & Paredes, Securities Regulation Chapter 6.A.2.a (Section 15 authorized the Commission to provide for registration of brokers or dealers of over-the-counter securities); *see* S. REP. NO. 792, 73d Cong., 2d Sess., at 6 (1934) (distinguishing between "organized exchanges" and "unorganized 'over-the-counter' markets" and explaining that the Commission's power to regulate the latter "is vitally necessary to forestall widespread evasion of stock exchange regulation by the withdrawal of securities from listing on exchanges, and by transferring trading therein to 'over-the-counter' markets where manipulative evils could continue to flourish, unchecked by any regulatory authority."). Feng even acknowledges that one purpose of the Act "is to protect investors . . . in over-the-counter markets," *see* Br. 18 (quoting *SEC v. Benger*, 934 F. Supp. 2d 1008, 1013 (N.D. Ill. 2013)), which include *all* transactions that do not take place on an exchange. *See* Loss, Seligman & Paredes, Fundamentals of Securities Regulation Chapter 8.A.2. He then misconstrues an exemption for brokers "whose business is exclusively intrastate *and* who do[] not make use of any facility of a national securities exchange." 15 U.S.C. § 78o(a)(1) (emphasis added). Feng does not qualify for this exemption because his business was not "exclusively intrastate," and the statute imposes a registration requirement on persons, such as Feng, who broker over-the-counter, interstate securities transactions. *See, e.g.*, *SEC v. Collyard*, 861 F.3d 760, 767 (8th Cir. 2017) (affirming summary judgment against defendant who acted as an unregistered broker in connection with over-the-counter securities transactions).

Feng further contends he that does not qualify as a broker under the statutory definition. Interpreting the statute, courts have developed a "nonexclusive" list of factors to determine whether a person has "engaged in the business" of "effecting" securities transactions. *Collyard*, 861 F.3d at 766 (applying the factors set forth in *SEC v. George*, 426 F.3d 786 (6th Cir. 2005)); *SEC v. Imperiali, Inc.*, 594 Fed. Appx. 957, 961 (11th Cir. 2014), *cert. denied*, 136 S. Ct. 346 (2015) (same); *see In the Matter of Joseph Kemprowski,* Release No. 34-35058, 1994 SEC LEXIS 3743, *5 (Dec. 8, 1994).[6] These factors include whether the person (1) received commissions or other transaction-based compensation in connection with securities transactions, (2) solicited investors or promoted securities to investors, and (3) regularly participated in securities transactions.[7] *See, e.g.*, *George*, 426 F.3d at 797. The application of those factors here demonstrates that Feng was acting as a broker.

[6] A number of courts in this Circuit have employed these factors. *See SEC v. Holcom*, 2015 U.S. Dist. LEXIS 189380, *18 (S.D. Cal. Jan. 8, 2015) (defendant broker sold securities, marketed securities through advertisements and direct conversations with potential investors, and provided recommendations and advice to potential investors about the securities' worth and safety); *SEC v. Small Bus. Capital Corp.*, 2013 U.S. Dist. LEXIS 116607, *51 (N.D. Cal. Aug. 16, 2013) (active solicitation of investors and regular sales over a number of years); *SEC v. Earthly Mineral Sols., Inc.*, 2011 U.S. Dist. LEXIS 36767, *8 (D. Nev. Mar. 23, 2011) (solicited investors, promoted securities, and sold securities).

[7] Another commonly cited factor—whether the defendant was an employee of the issuer—is not present in this case, but that factor, like all others, is not dispositive. *See George*, 426 F.3d at 797 (non-employee was a broker); *Collyard*, 861 F.3d at 767 (same).

1. Feng received transaction-based compensation from the regional centers in connection with his clients' investments.

Chief among the factors present in this case is that Feng received money from the regional centers that was directly tied to investments made by Feng's clients. Courts have held that "transaction-based compensation" is "a hallmark that a person is a broker." *SEC v. Mieka Energy Corp.*, 259 F. Supp. 3d 556, 561 (E.D. Tex. 2017); *see Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, 2006 U.S. Dist. LEXIS 68959, *20 (D. Neb. Sept. 12, 2006).[8] A person who receives such compensation has a salesman's stake in the transaction, which "represents a potential incentive for abusive sales practices that registration is intended to regulate and prevent." *SEC v. Collyard*, 154 F. Supp. 3d 781, 789 (D. Minn. 2015), *aff'd in part, vacated in part on other grounds*, 861 F.3d at 763; *accord Landegger v. Cohen*, 2013 U.S. Dist. LEXIS 140634, *16 (D. Colo. Sept. 30, 2013); *Cornhusker,* 2006 U.S. Dist. LEXIS 68959 *20; *see also Persons Deemed Not to be Brokers*, Release No. 34-22172, 50 FED. REG. 27940, 27942 (transaction-based compensation "can induce high pressure sales tactics and other problems of investor protection which require application of broker-dealer regulation").

[8] *Accord George*, 426 F.3d at 797 ("payment by commission" indicates broker status); *SEC v. Martino*, 255 F. Supp. 2d 268, 284 (S.D.N.Y. 2003) (defendants were brokers in part because they "received commissions").

The record demonstrates that Feng received these types of payments. Feng entered into written agreements with regional centers entitling him to commissions ranging from $15,000 to $70,000 each time one of his clients invested in an EB-5 project. SER561. It is undisputed that Feng (directly or through nominees) received at least $1,268,000 in commissions. SER408-409. The commissions are particularly problematic here because Feng's allocated spots in certain offerings created an incentive for Feng to push clients to close the deal so he would not lose out on the commissions he could earn by filling those spots. SER393-394 ("[B]asically the deal is if we couldn't secure . . . enough clients for those spots by the end of February then we gave up the spots to other people.").

Feng has no response to this evidence, as his brief largely ignores these payments. Nowhere does he contest that they constitute "transaction-based compensation." *See SEC v. Muehler*, 2018 U.S. Dist. LEXIS 58518, *19 (C.D. Cal. Apr. 4, 2018) (transaction-based compensation included "a commission premised on investor funds raised for each customer"); *SEC v. Gagnon*, 2012 U.S. Dist. LEXIS 38818, *33 (E.D. Mich. Mar. 22, 2012) (referral commissions were transaction-based compensation). In fact, despite their centrality to this case, Feng does not discuss the commissions until a footnote thirty-three pages into his brief. Br. 33 n.26.

2. Feng solicited investors and promoted particular EB-5 securities.

Another indication that Feng acted as a broker was his "regular[] involve[ment] in communications with and recruitment of investors for the purchase of securities," namely the EB-5 investments. *George*, 426 F.3d at 797; *see also Collyard*, 861 F.3d at 767 (defendant actively recruited investors including sending emails to clients); *Imperiali*, 594 Fed. Appx. at 961 (defendant was a broker where he "spoke with investors, acted as the 'closer' for his sales team, and drafted memoranda for potential investors"). The undisputed evidence demonstrates that Feng "advertised for clients and was an active finder of investors by promoting EB-5 projects on the internet and through Feng's website." ER22; SER329; SER384-388 (detailing solicitation through Feng's website); SER389-392 (acknowledging solicitation through participation on online chatrooms). Feng estimated that eighty percent of his clients were solicited through the website. SER329-331.

Once Feng identified potential investors and recruited them as clients, he promoted particular EB-5 investments. ER22. For example, he admitted to advising clients which regional centers had a "high probability of success." ER457. That required assessing whether each project would be able to sustain itself for four to five years, which was required in order for his clients to show that their investment created the requisite number of jobs. SER314-315. He also analyzed and ranked the "financial soundness" of various EB-5 investment opportunities in order to formulate

his recommendations. SER386-387. Feng considered himself qualified to analyze investments based on his professional degree from Dartmouth's Tuck School of Business. SER399-401. Providing such advice is a telltale sign that a person is acting as a broker. *Collyard*, 861 F.3d at 767 (defendant brokers gave advice including "predicting financial success" of particular investments); *SEC v. U.S. Pension Trust Corp.*, 2010 U.S. Dist. LEXIS 102938, *23-24, 54 (S.D.Fla. Sept. 30, 2010) (defendants were brokers where they discussed risk with investors and "advised them on the merits of the investments"); *Hansen*, 1984 U.S. Dist. LEXIS 17835, *27 (Hansen's frequent and "extensive advice with regard to the merits" of the investment was one fact establishing that he was a broker).

Feng's assertion (Br. 24 n.18) that "brokers are not allowed to give investment advice" is wrong. The statutory definition of "investment adviser" that Feng cites contains an exemption for brokers who give advice that is "incidental to the conduct of his business as a broker," a congressional allowance for brokers to give certain types of advice without being deemed investments advisers. 15 U.S.C. § 80b-2(a)(11)(c) (stating that such advice will not convert a broker into an investment adviser provided the broker "receives no special compensation therefor").

Feng appears to argue that his financial advice does not qualify him as a broker because he provided legal advice. Br. 24-25. But regardless of whether he also provided some legal advice to his clients, the record demonstrates that he provided financial advice while persuading clients to invest in particular EB-5 projects that paid

Feng commissions for each completed investment. It is often just such a "combination of factors" that establishes that a defendant acted as a broker as a matter of law. *SEC v. CKB168 Holdings, Ltd.*, 210 F. Supp. 3d 421, 453 (E.D.N.Y. 2016) (defendants received commissions as opposed to salary, promoted the merits of investments, actively found investors, and acted as intermediaries between issuer and investors); *see In the Matter of 3C Advisors & Assocs., Inc.*, Release No. 3-13070, 2016 SEC LEXIS 2534, *18 (Jul. 22, 2016) ("[D]etermining whether an entity acted as a broker requires 'evaluat[ing] the totality of [its] activities.'") (quoting *Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934*, 68 FED. REG. 8686, 8689 (Feb. 24, 2003)).

3. Feng regularly participated in securities transactions.

The extent and regularity of Feng's involvement with securities transactions further demonstrates that he qualifies as a broker. *Collyard*, 861 F.3d at 767(defendant had "a history of selling others' securities"); *SEC v. Ridenour*, 913 F.2d 515, 517 (8th Cir. 1990) (regular participation in securities transactions and attempts to find and keep clients). Courts have deemed persons brokers where their participation in securities transactions were not "isolated incidents" because they "participated in the sale of stock of numerous issuers over a period of several years." *SEC v. Martino*, 255 F. Supp. 2d 268, 284 (S.D.N.Y. 2003). The number of investors solicited and the amount of investments are also relevant. *SEC v. Kenyon Capital, Ltd.*, 69 F. Supp. 2d 1,

13 (D.D.C. 1998) (defendants were brokers where they solicited 40 investors and received $1.7 million in investments).

With respect to the transactions at issue here, the undisputed evidence shows that Feng solicited approximately 150 EB-5 investors who invested at least $65 million in the securities of at least eight different issuers over a period of years beginning in 2009. SER412; SER240-241; SER554-556.[9] Feng was heavily involved in those transactions. The undisputed evidence shows that he and his employees:

- "assist[ed clients] in understanding the nature of an EB-5 investment and the various procedural steps that are involved in making such an investment," and "serve[d] as the liaison between the regional center and [the] client" (ER458);
- summarized and explained the English-language offering documents to investors, most of whom did not speak English (SER334-336; SER558);
- negotiated with the regional centers on his clients' behalf regarding the amount of administrative fees (SER375; SER560);
- obtained offering documents from the regional centers, printed out the signature pages of the documents, prepared instructions explaining what the clients should sign, and transmitted the signed offering documents to the regional centers (SER363-367; SER559);
- submitted clients' paperwork to the regional centers to complete the investment transactions (SER482-483; SER559);

[9] Feng has a long history of trading securities dating back to 2003. *See* ER22; SER297-299 (Feng operated a hedge fund from 2008 to 2014 for which he conducted securities transactions); SER541-542 (Feng started trading securities in 2003, he is a principal of the hedge fund Opto Global where he is responsible for trading securities).

- assisted clients with transferring funds to the United States (SER544; SER559); and

- in at least three instances, transferred money from investors to issuers using his law firm's bank accounts. (ER459; SER370-371; SER57-61; SER84-86; SER560).

Feng's conduct thus went far beyond merely bringing together parties to a transaction, *contra* Br. 19, and included the types of activities that courts have repeatedly said will trigger the broker registration requirement. *See Cornhusker*, 2006 U.S. Dist. LEXIS 68959, *20 (defendant "will be performing the functions of a broker-dealer, triggering registration requirements," if the defendant was "involv[ed] in negotiations," and discussed "details of securities transactions" with clients); *see also Collyard*, 861 F.3d at 767 (providing assistance in filling out a subscription agreement and occasionally passing payments from investors to issuers suggest broker status); *Mieka Energy Corp.*, 259 F. Supp. 3d at 561 (helping investors with paperwork to close the sales suggests broker status).[10]

4. Feng's other arguments for why he does not qualify as a broker fail.

Faced with undisputed facts that he acted as a broker, Feng offers two arguments, both of which lack merit. *First*, Feng criticizes the factors discussed above

[10] To the extent Feng argues that he was not required to register because he acted as a "finder," neither Congress nor the Commission has created a "finder" exception to the registration requirement for brokers. *See Collyard*, 861 F.3d at 768 (no "finders defense" available to those who are otherwise "brokers"); *Kemprowski*, 1994 SEC LEXIS 3743, *5.

as "vague, ill-defined, and subject to differing factual interpretations," Br. 22, without acknowledging that they have been widely used by courts and without explaining why these factors do not allow courts to determine who is a broker. Instead, Feng incorrectly argues that a single factor—whether the defendant was "entrusted with his client's assets" or "authorized to transact on their behalf"—is required and is not present here. Br. 20-21. But no court has deemed control of assets or accounts to be a necessary condition of being a broker.

Feng's reliance on *SEC v. Mapp*, 240 F. Supp. 3d 569 (N.D. Tex. 2017) for this proposition is misplaced. *Mapp* agrees that control over client funds is *just one* of several factors for a court to consider when determining broker status. *Id.* at 592-93; *see also SEC v. Margolin*, 1992 U.S. Dist. LEXIS 14872, *15 (S.D.N.Y. Sept. 30, 1992) (defendant was a broker where he provided clearing services for his clients, participated in dozens of transactions, received transaction-based compensation, advertised for clients, and "possess[ed] client funds and securities"); *Martino*, 255 F. Supp. 2d at 283 (citing *Margolin*). Ultimately, the court held that the defendant was not required to register as a broker where he did not control the accounts or assets of his clients and *also* did not "negotiate[] the price or terms of the transaction" or "perform[] any of the other functions of the broker-dealer." *Mapp*, 240 F. Supp. 3d at 593. Feng's conduct is readily distinguishable.

The two cases on which the *Mapp* court (and Feng) rely—*SEC v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011) and *SEC v. M&A West, Inc.*, 2005 U.S. Dist. LEXIS

22452 (N.D. Cal. June 20, 2005)—are also distinguishable. Kramer's conduct was limited to telling nine "intimate friends and family" that he thought a particular security offering was a good investment. *Kramer*, 778 F. Supp. 2d at 1340. And the *M&A West* defendant undertook limited activities acting as the middleman in four reverse mergers. 2005 U.S. Dist. LEXIS 22452, *26-27. There was no evidence that he solicited investors or provided advice, or that he engaged in securities transactions with any regularity. *Id.* Neither *Kramer* nor *M&A West* requires control over funds or accounts as an element of a Section 15(a) claim.

Nevertheless, by Feng's own admission, in at least three instances, a portion of a client's EB-5 investment was transferred through his law firm's bank account. ER459; SER370-371. Thus, Feng did have control over his client's funds at times. As such, even if the Court were to focus on this factor, it only helps to demonstrate that Feng is liable for failing to register as a broker.

Second, this Court should reject Feng's invitation to create new law by exempting attorneys from registering as brokers. Br. 26-29. While the Commission has the power to create exemptions from registration, 15 U.S.C. § 78o(a)(2), such exemptions "have traditionally been narrowly drawn in order to promote both investor protection and the integrity of the brokerage community," and the Commission has never exempted attorneys as a class. *Persons Deemed Not to Be Brokers*, Release No. 34-22172, 50 FED. REG. 27940, 27941. To the contrary, it has required attorneys who act as brokers to register. *Id.* at 27942 ("Insofar as [attorneys] are

retained by an issuer specifically for the purpose of selling securities to the public and receive transaction-based compensation, these persons . . . should register as broker-dealers."); *Brumberg, Mackey & Wall, P.L.C.*, SEC No-Action Letter, 2010 SEC No-Act. LEXIS 406 (May 17, 2010) (denying no-action request under Section 15(a)(1) to law firm that intended to solicit investors for client in exchange for a percentage of the funds raised). Feng supplies no authority that compels the Court to carve out a new exemption for attorneys on the basis of their preexisting fiduciary duties.

Moreover, Feng's professed concern that the Commission is prohibiting U.S. immigration attorneys from assisting foreign investors is unfounded. Br. 29. Attorneys who provide legal advice to clients regarding the EB-5 program, but who do not act as brokers for clients' securities transactions, are not obliged to register. Conversely, because Section 15(a) is a registration requirement and not a ban on serving as a broker, attorneys who act as brokers may continue to participate in EB-5 offerings so long as they register. Far from believing that the Commission's enforcement of the securities laws undermines the EB-5 program, USCIS officials have welcomed the Commission's regulation of EB-5 securities. *See Testimony of Nicholas Colluci, Chief of the Office of Immigrant Investor Program USCIS on the EB-5 Immigrant Investor Program, before the Committee on the Judiciary, United States Senate* (Feb. 2, 2016).

B. Section 15(a) is not unconstitutionally vague.

Feng's contention that Section 15(a) is unconstitutionally vague as applied in this case is without merit. Br. 40-48. To begin with, statutes imposing civil penalties and regulating businesses do not require the same precision as statutes regulating speech and criminalizing conduct. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) ("economic regulation[s]" are "subject to a less strict vagueness test" because their subject matter is "more narrow" and "businesses . . . can be expected to consult relevant legislation in advance of action"); *accord SEC v. Gemstar-TV Guide Intern., Inc.*, 401 F.3d 1031, 1048 (9th Cir. 2005). A statute is presumed to be constitutional and raises vagueness problems only if it "'fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "'if it authorizes or even encourages arbitrary and discriminatory enforcement.'" *Gemstar-TV Guide Intern.*, 401 F.3d at 1048 (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)).

A statute is not vague simply because "in some factual circumstances assessing liability . . . will be difficult." *Salman v. United States*, 137 S. Ct. 420, 428, 580 U.S.__ (2016). Where, as here, the alleged conduct does not implicate the First Amendment, the vagueness challenge "must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975). The "touchstone" of vagueness analysis "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was" proscribed.

United States v. Lanier, 520 U.S. 259, 267 (1997); *see also Hoffman Estates*, 455 U.S. at 495 ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.").

Feng claims that Section 15(a) is unconstitutionally vague because he did not understand that his clients were entering into investment contracts that qualified as securities. Br. 43-44. But Feng's purported lack of understanding does not make the statute unconstitutional, particularly when decades of precedent applying *Howey* make clear that an investment in a common enterprise managed by others for the purpose of generating a return, like the investments here, creates an investment contract. Moreover, Feng's assertion is incredible in light of the record: he distributed PPMs to investors that referred to the investments as securities (SER335-336; SER79; SER121; SER87; SER91; SER93; SER171-172) he agreed to market the investments as securities (SER25); and the regulations for pooled EB-5 investments specifically require the investments to place capital at risk "for the purpose of generating a return," 8 C.F.R. § 204.6(j)(2).

Likewise, Feng cannot credibly argue that Section 15(a) did not make it reasonably clear his conduct would be considered that of a broker. Over the course of more than eighty years, courts have developed a substantial body of law that interprets the broker provisions of the Exchange Act. *See infra* Section II.A; *see Skilling v. United States*, 561 U.S. 358, 404 (2010) (even an uncertain statute may be clarified by "judicial gloss"); *Go Leasing v. Nat'l Transp. Safety Bd.*, 800 F.2d 1514, 1525 (9th Cir.

1986) ("[P]otential vagueness may be mitigated by judicial or executive interpretation of the challenged provision."). These provisions, as interpreted by the courts, would inform any diligent attorney that (1) lawyers are not immune from Section 15(a) liability, and (2) receipt of transaction-based compensation is one of the hallmarks of being a broker. Feng was also aware that several promoters refused to send his commissions to U.S.-based bank accounts for fear of violating Section 15(a)(1). SER376; SER430. And he admitted to wondering whether it was necessary to become a broker in the context of his EB-5 practice but did not follow through because he thought it would be "costly." SER416.

Feng cannot transform his purported ignorance of law into a vagueness claim. *Jerman v. Carlisle*, 559 U.S. 573, 574 (2010) (attorney debt collectors were not excused from their violation of the Fair Debt Collection Practices Act based on their "incorrect interpretation of the requirements of that statute"). Feng could have sought guidance, including requesting a "no-action" letter from Commission staff regarding the application of the broker definition to his circumstances. *Go Leasing*, 800 F.2d at 1525 (statute not vague as applied where it was "certainly reasonable to expect that Go Leasing would have made efforts to investigate or to inquire with the FAA to determine if its conduct fell outside the bounds of the regulation"). But instead he forged ahead, engaging in conduct that classifies him as a broker and required him to register.

Section 15(a) does not authorize or encourage arbitrary and discriminatory enforcement, as Feng suggests. A vague statute is one that lacks "any ascertainable standard for inclusion and exclusion" of conduct within its scope. *Smith v. Gougen*, 415 U.S. 566, 578 (1974). Since Section 15(a) was enacted over eighty years ago, courts and the Commission have repeatedly distinguished between defendants who acted as brokers and those who did not without any court suggesting it could not discern a standard for applying the statute. *See Brennan v. United States Dep't of Homeland Sec.*, 691 Fed. Appx. 332, 333 (9th Cir. 2017) (a word is not vague that has a "settled legal meaning" that "courts have often defined and applied").

Feng's unsupported assertion that the Commission is targeting immigration attorneys in the EB-5 space is undercut by his acknowledgement that the Commission first brought unregistered broker claims "against two business entities (not law firms) that allegedly introduced EB-5 projects to more than 150 immigrants." Br. 7; ER320-322. In any event, decisions regarding where to expend enforcement resources are inherently part of an agency's discretionary authority because "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing" and "is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985); *see also FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 516-18 (2009) (an agency is free to change its enforcement policy so long as its new policy is not arbitrary or capricious). The Commission's increased enforcement against fraud in EB-5 securities offerings is

neither arbitrary nor capricious—it is a result of the recent and sharp increase in EB-5 offerings made through regional centers that qualify as investment contracts under *Howey*. *See Testimony of Stephen L. Cohen, SEC Division of Enforcement before the Comm. on the Judiciary, United States Senate* (Feb. 2, 2016).

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT FENG VIOLATED THE ANTIFRAUD PROVISIONS.

The district court's grant of summary judgment on the antifraud claims was also correct because the undisputed evidence shows that Feng made material omissions to his clients regarding his receipt of commissions and engaged in a scheme to defraud both his clients and the regional centers. The record also makes clear that Feng engaged in his deceptive conduct with scienter.

A. Feng's omissions in the face of a duty to disclose are actionable under the securities laws.

Feng does not contest that he omitted to disclose to his clients that he received commissions from the regional centers. ER24; *see* Br. 39 ("The fact of the matter is Feng did not disclose the finders' fees."); ER460. A "duty to disclose arises when one party has information that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." *Chiarella v. United States*, 445 U.S. 222, 228 (1980) (internal quotation marks omitted). Feng acknowledges (at Br. 26) that he "owed his clients the highest of fiduciary duties" that included the duty to disclose conflicts of interest. *See, e.g.*, New York Rules of Professional Conduct ("NYS Rule") 1.7(a)(2) (duty to disclose conflicts); NYS Rule

1.4(a)(1) (duty to communicate); NYS Rule 1.8(a) (duty to disclose business relationships); NYS Rule 1.8(f) (duty to disclose third party payment of attorney's fees).

But he is incorrect that a breach of a professional fiduciary duty cannot give rise to a duty to disclose for the purposes of the federal securities laws. Br. 34-36. A failure to disclose material information in the context of a fiduciary relationship can violate the federal securities laws when the breach occurs in connection with a securities transaction. *SEC v. Cochran*, 214 F.3d 1261, 1264-65 (10th Cir. 2000).[11] There is nothing improper or unusual about securities-fraud liability arising from a defendant's breach of a well-recognized fiduciary duty. *United States v. O'Hagan*, 521 U.S. 642, 652-54 (1997) (holding in the insider trading context that attorney-client relationship creates a fiduciary duty for securities-fraud liability purposes); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153 (1972) (employees of bank in trust relationship with tribe had a duty to disclose to tribe members that they were market makers for securities sold by the tribe members, where employees were in a position to gain financially from the sales); *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991), *cert. denied*, 503 U.S. 1004 (1992) (some relationships, including the attorney-

[11] Both *Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1278 (9th Cir. 2017), and *Panter v. Marshall Field & Co.*, 646 F.2d 271, 288 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981), cited by Feng (Br. 36), are distinguishable because those courts held that the defendants had no duty to disclose.

client relationship, are "inherently fiduciary"); *SEC v. Singer*, 786 F. Supp. 1158, 1169 (S.D.N.Y. 1992).

Feng argues that his omissions regarding commissions did not make other statements regarding fees misleading because the commissions did not increase his clients' costs. But an omission is actionable under Section 17(a) and Section 10(b) where the defendant had a duty to speak arising from a fiduciary duty *or* where the omission renders another statement misleading (*i.e.*, a half-truth). *See Laurienti*, 611 F.3d at 540-41; *accord SEC v. Dorozhko,* 574 F.3d 42, 46-50 (2d Cir. 2009). Because Feng breached a duty to disclose, the Commission was not required to prove that any other statements were rendered misleading by Feng's omissions. And he had to disclose the commissions regardless of whether they increased his clients' costs because, even assuming costs were constant as Feng claims (Br. 35),[12] clients may have viewed Feng's investment recommendations through a more skeptical lens had they known of his financial stake. *See Laurienti*, 611 F.3d at 535, 541 (holding that if a broker and a client have a trust relationship, the broker must disclose bonus commissions paid to the broker for particular investments despite the fact that the bonus did not change the cost to the client).

[12] Feng's testimony that "sophisticated investors" were able to negotiate to obtain a rebate of the administrative fee undermines this assertion. SER347-353.

B. Feng's omissions are material as a matter of law.

The district court correctly held that Feng's omissions regarding his receipt of commissions were material as a matter of law. ER25. An omission 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." *SEC v. Phan*, 500 F.3d 895, 908 (9th Cir. 2007) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988)). Although often a question for the trier of fact, materiality can be determined as a matter of law if it is "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality." *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 (1976) (internal quotation marks omitted); *see SEC v. Gillespie*, 349 Fed. Appx. 129, 130-31 (9th Cir. 2009).

By Feng's admission, his failure to disclose that a regional center paid him to recommend an investment to a client he was representing in connection with that investment created a conflict of interest. SER322-323. The conflict was particularly stark given that the commission amounted to more than the client's legal fees. "It is indisputable that potential conflicts of interest are 'material' facts with respect to clients and the Commission." *Vernazza v. SEC*, 327 F.3d 851, 859 (9th Cir.), *amended*, 335 F.3d 1096 (9th Cir. 2003) (investment adviser's failure to disclose that he had a financial interest in securities he recommended was material)[13]; *see also Press v. Quick &*

[13] Feng fails in his attempt to distinguish between his omissions and the defendant's

[*continued on next page*]

Reilly, 218 F.3d 121, 130 (2d Cir. 2000) (stating, in dicta, that "knowledge that [investors'] broker-dealers have a conflict of interest, *i.e.*, that their broker-dealers are paid by the money market funds the broker-dealers selected for 'automatic sweeps' of plaintiffs' uncommitted account balances, is material"). Commissions in particular are important because knowledge of their existence "might lead an investor to believe that [the broker] served at the same time as agent for two masters" with "different objectives respecting" the investment. *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230, 242 (2d Cir. 1985) ("Commissions that defendants receive on the CDs they sell to the public are relevant and must be disclosed."); *Du Pont v. Brady*, 646 F. Supp. 1067, 1072 (S.D.N.Y. 1986), *reversed on other grounds by* 828 F.2d 75 (2d Cir. 1987) (finding attorney's failure to disclose to client his firm's 15% commission on sale of security that attorney recommended to client to be a material omission).

The Commission presented uncontroverted evidence that Feng's omissions were material to his clients. Individual clients testified that Feng's receipt of commissions would have been material to them because it would have caused them to attempt to negotiate a discount on the administrative fees and to consider Feng's

---

misrepresentations in *Vernazza*. Br. 34. This Court applies the same standard of materiality for omissions in the face of a duty to disclose as it applies to affirmative misstatements or half-truths. *Laurienti*, 611 F.3d at 541 (if a broker and client have a fiduciary relationship, then the broker has an obligation to disclose all facts material to that relationship).

advice in a different light. SER251-258; SER246-247. Feng's testimony reveals that he believed his commissions were material. He concealed that he received commissions because he feared disclosing that fact would lead clients to negotiate higher rebates of their administrative fees, which would be paid out of his commission. SER323-324 ("Q. So, you stand to make more money if the investors don't ask? A. Right."). Feng admitted that his clients would rather pay a lower administrative fee, and that such a choice would be reasonable. SER425.

To rebut this evidence, Feng points to twenty-eight near-identical declarations that purportedly show that his clients did not care about the commissions, Br. 31 & n.24, but the district court properly excluded those declarations because they lacked an assurance the declarants knew what they were signing, ER478-79; ER13. Feng's attorney admitted at the summary judgment hearing that the declarations were "a standard translation that was done and provided to each of the declarants," and that "they were not certified translators that did it." SER591. He also admitted there was "no indication that the person who signed [each declaration] understand[s] English." SER592. In fact, Feng testified that the majority of his clients could not speak English. SER335. This case is indistinguishable from *Jack v. Trans World Airlines, Inc.*, in which a party "failed to lay a proper foundation for the admission of [] translated affidavits" where the affiants "signed affidavits in two languages" but the party who sought to admit the affidavits "d[id] not explain . . . whether the affiants were advised

of the content of the English-language affidavits before signing them." 854 F. Supp. 654, 659 (N.D. Cal. 1994), cited at Br. 31-32 n.24.

Finally, Feng claims to have showed that commissions were "customary within the EB-5 industry" (Br. 33), but does not support this contention with any citation to the record. In any event, he does not explain how that would remedy the failure to disclose that *he* received commissions. Absent such an express disclosure, his clients were left unable to weigh the possibility that their attorney's advice was distorted by his desire to get a commission. *See* SER501-517.

C. The undisputed facts show that Feng engaged in a scheme to defraud.

The district court separately found Feng liable for engaging in a scheme to defraud both his clients and the regional centers. ER27-31. To be liable for a scheme to defraud under Sections 17(a)(1) and (3) and Rule 10b-5(a) and (c), a defendant must have "committed a manipulative or deceptive act" that "had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme." *Simpson*, 452 F.3d at 1048; *see Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212 n.32 (1976) (noting that the language in Rule 10b-5 was derived in significant part from Section 17(a)).

Feng engaged in numerous deceptive acts that reinforced his scheme to defraud his clients and the regional centers. Undisputed evidence shows that he took steps to "create 'a false appearance of fact' to clients that rebates were coming from regional centers in order to prevent Feng's clients from demanding money from

Feng." ER28; *see* SER347-349; SER321-325; SER373-374; SER421-422. For example, Feng directed one regional center to provide a rebate to a customer using a portion of Feng's commission, but Feng asked the center not to disclose the source of the rebate in order to keep the client in the dark about Feng's receipt of commissions. SER62-68.

Undisputed evidence also shows that Feng "acted to create a 'false appearance of fact' to regional centers regarding his relationship with ABCL and Chinese agents who received referral fees but did not procure investors." ER29-31. In order to evade the regional centers' prohibitions on paying domestic attorneys to act as finders, Feng had payments routed to foreign nominees who would transfer the funds back to Feng. SER310-311. Feng also created ABCL, a foreign entity with no purpose other than to act as a depository for commission payments, and concealed from the regional centers that he controlled it. SER474-478. To further this deception, he had his mother sign agreements with the regional centers on behalf of ABCL, even though she had no role whatsoever in the company. SER341-342; SER354-355.

Notably, Feng does not point to any facts that refute the district court's conclusions. Instead, he complains that the Commission's "scheme to defraud" claim impermissibly duplicates its Section 10b-5(b) omission claim. But even if liability under Sections 17(a)(1) and (3) and Rule 10b-5(a) and (c) requires a showing of

conduct beyond Feng's omissions, Br. 39,[14] that requirement is met here in at least two ways. First, Feng's misrepresentations and deceptive conduct to defraud the regional centers were not a basis of the district court's Rule 10b-5(b) or Section 17(a)(2) finding. Thus, those "scheme to defraud" allegations are not duplicative of any other basis of liability. Second, the Commission premised its "scheme to defraud" claim on Feng's additional deceptive conduct to conceal his omissions from clients (*e.g.*, obscuring the source of rebate paid to the clients), not on the omissions themselves.

Feng also appears to argue that his deceptive actions cannot form the basis of a scheme to defraud because those actions were not separately illegal. Br. 39. That is incorrect. Actions taken to "conceal a scheme" to defraud under the securities laws may give rise to liability even when the actions themselves are not deceptive or

---

[14] In *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, this Court stated that "[a] defendant may only be liable as part of a fraudulent scheme based upon misrepresentations and omissions under Rules 10b-5(a) or (c) when the scheme also encompasses conduct beyond those misrepresentations or omissions." 655 F.3d 1039, 1057 (9th Cir. 2011), *cert. denied*, 566 U.S. 1034 (2012). The Supreme Court recently granted certiorari in *Lorenzo v. SEC*, No. 17-1077 (certiorari granted June 18, 2018), where it will address whether, in an enforcement proceeding brought by the Commission, a person who knowingly disseminates false or misleading statements is categorically immune from liability under Section 17(a)(1), Section 10(b), and Rule 10b-5(a) and (c) if the person did not "make" false or misleading statements for purposes of Rule 10b-5(b). *Lorenzo* could affect whether this Court's statement in *WPP* was correct that conduct beyond misrepresentations or omissions is required to prove a claim under Rules 10b-5(a) or (c). Regardless of how the Supreme Court answers that question, Feng would be liable because his misconduct went far beyond misrepresentations or omissions.

unlawful. *See SEC v. Wey*, 246 F. Supp. 3d 894, 918 (S.D.N.Y. 2017) ("deceptive" conduct that is not "inherently unlawful" can give rise to liability for a scheme to defraud). Feng cannot, in furtherance of a fraud, create offices overseas and obscure the source of rebates provided to customers, even if, absent fraud, he may up set up overseas offices or give discounts to certain customers. *In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 161 (S.D.N.Y. 2012) (creating an entity to conceal how cost savings were allocated was "inherently deceptive").

D. The undisputed facts show that Feng acted with scienter.

Summary judgment was proper given the evidence of Feng's scienter. "Violations of Section 17(a)(1), Section 10(b) and Rule 10b-5 require scienter." *Dain Rauscher*, 254 F.3d at 856*; see also Gebhart v. SEC*, 595 F.3d 1034, 1040 (9th Cir.), *cert. denied*, 561 U.S. 1008 (2010) (scienter may be established by a showing of either actual knowledge or recklessness). Where mental state is at issue, a defendant cannot escape summary judgment "merely by denying (or intentionally disregarding) what any reasonable person would have known." *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1094 (9th Cir. 2010).

The district court found there was undisputed 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." ER27. Feng testified that he knew it was a conflict to "get[] money from the issuer and at the same time represent[] a client who's investing in the issuer," but that he

stood to make more money if investors did not know about the commissions. SER322-324. For summary judgment purposes the district court was free to disregard Feng's insistence that his omission was not made with scienter because he "did not feel it necessary to disclose this information." Br. 37; *see Platforms Wireless*, 617 F.3d at 1094 (holding that "no reasonable person could deny that [a] statement was materially misleading" and disregarding defendant's professed subjective belief that his statements were not misleading). And while Feng claims there is no evidence that he intended to mislead the regional centers, Br. 40, he used surrogates to sign marketing agreements with the regional centers and provided no legitimate business purpose for doing so, SER340-344. The only reasonable inference—which it was permissible for the court to draw in granting summary judgment—is that he did so in order to conceal the fact that the money would be going back to him. *See Platforms Wireless*, 617 F.3d at 1094-95.

IV. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN ORDERING DISGORGEMENT OF ILL-GOTTEN GAINS PAID TO OVERSEAS ENTITIES FENG CONTROLLED.

Feng does not challenge the district court's authority to award disgorgement or impose penalties; he argues only that he should not have been required to disgorge amounts paid to overseas entities he admittedly controlled. Br. 48-49. Feng never raised this point to the district court. *See, e.g.* Dkt. 66 at 24-25 (arguing only that disgorgement of money Defendants had not yet received would be inappropriate; the Commission agreed in its opposition (Dkt. 73 at 25)). Thus, he forfeited this

argument raised for the first time on appeal. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010) ("[A]n issue will generally be deemed waived on appeal if the argument was 'not raised sufficiently for the trial court to rule on it.'") (quoting *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992)).

In any event, the district court acted within its discretion in including these amounts in the disgorgement award. "The district court has broad equity powers to order the disgorgement of 'ill-gotten gains'" and "broad discretion in calculating the amount to be disgorged." *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1260-61 (9th Cir. 2013) (internal quotation marks omitted); *JT Wallenbrock*, 440 F.3d at 1113. "'The amount of disgorgement should include all gains flowing from the illegal activities.'" *Platforms Wireless*, 617 F.3d at 1096 (quoting *JT Wallenbrock*, 440 F.3d at 1114, alteration omitted). A disgorgement calculation requires only "a reasonable approximation of profits causally connected to the violation." *JT Wallenbrock*, 440 F.3d at 1113-14 (internal quotation marks omitted). Once the Commission presents that approximation, "the burden shifts to the defendants to demonstrate that the disgorgement figure was not a reasonable approximation." *Platforms Wireless*, 617 F.3d at 1096.

The Commission met its burden by submitting evidence that Feng had collected $1,268,000 in marketing and referral fees. SER408-409; ER30-31. Feng did not rebut the reasonableness of the Commission's approximation but now argues, for the first time and without support, that commissions paid to the foreign office he

created and controlled are untouchable. Br. 48-49. To the contrary, ill-gotten gains are subject to disgorgement regardless of whether they are located domestically or were dissipated abroad. *See SEC v. World Capital Mkt., Inc.*, 864 F.3d 996, 1002-3, 1008 (9th Cir. 2017) (affirming a disgorgement award that included amounts relief defendant dissipated abroad); *SEC v. Benger*, 2015 U.S. Dist. LEXIS 151412, *19 (N.D. Ill. Nov. 9, 2015) (no deduction from disgorgement award for amounts paid to foreign sales agents defendants retained "to help them carry out their scheme"). A contrary holding would permit defendants to shield ill-gotten gains simply by routing them through an offshore entity.

CONCLUSION

The district court's grant of summary judgment and entry of final judgment should be AFFIRMED.

Respectfully submitted,

ROBERT B. STEBBINS
General Counsel

MICHAEL A. CONLEY
Solicitor

JEFFERY A. BERGER
Senior Litigation Counsel

s/ Kerry J. Dingle
KERRY J. DINGLE
Senior Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(202) 551-6953 (Dingle)

July 9, 2018

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32-1(a) because it contains 13,810 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-Point Garamond.

s/ Kerry J. Dingle
KERRY J. DINGLE

July 9, 2018

STATEMENT OF RELATED CASES

The Commission is not aware of any related cases, as defined in Circuit Rule 28-2.6, that are currently pending before this Court.

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2018, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Service was accomplished on appellants via the CM/ECF system. I also hereby certify that, as required by Circuit Rule 31-1, upon notification from the Clerk of Court, I will cause an original and seven (7) copies of the foregoing to be delivered to:

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

s/ Kerry J. Dingle
KERRY J. DINGLE