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May 3, 2019

Ms. Molly C. Dwyer
Clerk of the Court
United States Court of Appeal for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: SEC v. Feng, et al., No. 17-56522, Notice of Supplemental Authority

Dear Ms. Dwyer:

Pursuant to Federal Rule of Appellate Procedure 28(j) and Circuit Rule 28-6, Appellants respectfully submit an Order denying a motion for summary judgment brought by the SEC in *Securities and Exchange Commission v. Luca International Group, LLC et al.*, Case No. 3:15-cv-03101-CRB (N.D.Cal. September 6, 2018) (attached), as supplemental authority.

While the broader *Luca* case involves other defendants and theories of liability, the SEC's motion for summary judgment attached hereto pertains mostly to defendants Michael (Yong) Chen and Entholpy EMC, Inc. (referred to as the "Chen Parties" in the attached Order)¹ for alleged violations of § 15(a) of the Exchange Act. This is the same registration provision at issue in the instant *Feng* case, and is the only cause of action in the *Luca* case that names the Chen Parties as defendants.

Importantly, the Hon. Charles R. Breyer, in denying the SEC's motion, wrote:

The Court concludes that there is a genuine dispute of material fact as to the Chen Parties' conduct that prevents the Court from determining whether the Chen Parties acted as brokers as contemplated by Section 15(a) of the Exchange Act.

Order on MSJ, 2:8-11.

In *Feng*, the SEC argues that Appellants acted as brokers because *Feng* "solicited investors" (*See* SEC's Brief, pp. 31-33), but there is a dispute as to whether everything the SEC argues was solicitation of investors was actually *Feng* acting as a lawyer by

¹ The Chen Parties are also represented in the *Luca* case by Andrew B. Holmes.

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assisting clients in the EB-5 process, and that every so-called “solicitation” was instead Feng providing legal services to immigration clients (or soliciting immigration clients, rather than soliciting investors). The order denying summary judgment in the *Luca* case stands for the proposition that such disputes should preclude a finding – as a matter of law – for the SEC on this issue.

Very truly yours,

HOLMES, TAYLOR, COWAN & JONES LLP

By: /s/ Andrew B. Holmes
 Andrew B. Holmes

Enclosure

United States District Court
Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

ENTHOLPY EMC, INC., et al.,

Defendants.

Case No. [15-cv-03101-CRB](#)

**ORDER GRANTING IN PART AND
DENYING IN PART CROSS-
MOTIONS FOR SUMMARY
JUDGMENT**

Plaintiff Securities and Exchange Commission (“SEC”) moved for summary judgment against defendant Lei (Lily) Lei for allegedly violating Sections 5(a) and 5(c) of the Securities Act of 1933, 15 U.S.C. §§ 77e(a), (c), and Section 15(a) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78o(a). See Pl. MSJ (dkt. 186) at 1. Lei conceded violating these securities laws. See Lei Opp’n (dkt. 202) at 1. The SEC additionally moved for summary judgment against defendants Yong (Michael) Chen and Entholpy EMC, Inc. (collectively, the “Chen Parties”) for allegedly violating Section 15(a) of the Exchange Act. See Pl. MSJ at 1. The Chen Parties cross-moved for summary judgment, requesting dismissal of the SEC’s claims against them. See Chen MSJ (dkt. 193) at 1. The Court held a motion hearing on August 31, 2018. See Min. Entry (dkt. 219).

1 On summary judgment, a movant must demonstrate “that there is no genuine
2 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
3 Fed. R. Civ. P. 56(a). A fact is material if it could affect the outcome of the case under
4 governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute of
5 material fact is genuine if the evidence, viewed in light most favorable to the nonmoving
6 party, “is such that a reasonable jury could return a verdict for the nonmoving party.” Id.
7

8 The Court concludes that there is a genuine dispute of material fact as to the Chen
9 Parties’ conduct that prevents the Court from determining whether the Chen Parties acted
10 as brokers as contemplated by Section 15(a) of the Exchange Act. Accordingly, while the
11 Court GRANTS the SEC’s undisputed motion as to defendant Lei, it DENIES the SEC’s
12 and the Chen Parties’ cross-motions. The Court will address remedies as to defendant Lei
13 at a later date.
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16 **IT IS SO ORDERED.**

17 Dated: September 6, 2018



18 CHARLES R. BREYER
19 United States District Judge
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