No. _____

IN THE

Supreme Court of the United States

HUI FENG AND THE LAW OFFICES OF FENG AND ASSOCIATES PC,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the SEC exceeded its statutory authority under the Securities Exchange Act of 1934, which regulates secondary market transactions in securities on exchanges and the over-the-counter markets, by applying the Exchange Act's broker registration requirements to Petitioners who had no involvement with secondary market transactions.

2. Whether the Ninth Circuit erred in finding that Petitioners violated the antifraud provisions of the federal securities laws when the basis for the finding is Petitioners' alleged breach of an attorney ethics rule and when the alleged misconduct was only tangentially related to purchases or sales of securities.

3. Whether the Ninth Circuit erred in finding "scienter" and "materiality" in this case.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioner The Law Office of Feng and Associates states that it has no parent company, and no publicly held corporation owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

SEC v. Hui Feng and Law Offices of Feng and Associates PC, No. 17-56522 (9th Cir. 2020)

SEC v. Hui Feng and Law Offices of Feng and Associates PC, 2:15-cv-09420-CBM-SS (C.D. Cal. August 10, 2017)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Hui Feng and the Law Offices of Feng and Associates PC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1) is reported at 935 F.3d 721 (9th Cir. 2019). The district court's opinion granting summary judgment for the Securities and Exchange is unreported and available at 2017 WL 6551107 (C.D. Ca. 2017).

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment on August 23, 2019 (App. 1). The court denied a timely petition for rehearing *en banc* on July 31, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Securities Act of 1933,15 U.S.C. § 77a et seq., the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., and the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 et seq. are reproduced at App. 63.

INTRODUCTION

1. In a democracy such as ours, the rule of law means federal agencies are not above the law. In this case, the SEC clearly did not follow the law as written by Congress and instead pursued a securities broker registration policy of its own making for decades without any statutory authorization. Therefore, the SEC has clearly violated the rule of law which this Court must put a stop to. This matter is

particularly urgent because this issue involves fundamental economic rights of citizenry and touches on the economic interest of millions of people in this country through its impact on capital formation.

SEC enforcement actions, which carry dire professional and economic consequences to individuals through the imposition of disgorgement and civil penalties, should be particularly scrutinized by this Court. This is because SEC enforcement actions are cast as civil lawsuits, which federal courts frequently decide through summary judgment as the lower court did in this case thereby denying Petitioners the protections of a jury trial. To add insult to the injury, the District Court failed to view the evidence in the light most favorable to Petitioners, which is the standard for any summary judgment proceeding and the Ninth Circuit failed to correct this mistake in the appeal.

This case is also a test of the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." (*Liu v. SEC*, 140 S.Ct. 1936, 1948 (2020)). As demonstrated below, the SEC and the lower courts have shown a blatant disregard of statutory language in our nation's securities laws which is a direct challenge and insult to the cardinal principle of statutory interpretation that this Court has repeatedly recognized and quoted above. The opinions of this Court must be respected and followed and, therefore, this Court must correct the SEC and the lower courts' mistakes in this case.

The federal securities laws, passed by Congress in the wake of the Great Depression, present a well thought out statutory scheme that comprehensively regulates our nation's securities markets. The Securities Act of 1933 (the "Securities Act") regulates initial offerings of securities by issuers directly to investors in public and private offerings, the Securities and Exchange Act of 1934 (the "Exchange Act") regulates secondary market trading of securities on stock exchanges and in the over the counter markets. Section 2 of the Exchange Act entitled "Necessity for Regulation as Provided in This Title" states "[f]or the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions…"

This Court has also acknowledged that the Exchange Act is focused on secondary market transactions and has stated the Exchange Act "was intended principally to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets…" *Ernst &Ernst v. Hochfelde*r, 425 U.S. 185 (1976)). Finally, the Investment Advisers Act regulates those who provide investment advice to people concerning the purchase and sale of securities.

Section 15(a) of the Securities Exchange Act makes it unlawful for a broker or a dealer to effect a securities transaction without being registered with the SEC. Section 15(a) of the Exchange Act, in keeping with its statutory purpose of regulating secondary market activities on stock exchanges and in the over the counter market, provides for the registration with the SEC of securities brokers who effectuate trades in the secondary securities markets. Section 4(a)(4) of the Exchange Act defines the term "broker" as "any person engaged in the business of effecting transactions in securities for the accounts of others."

However, the SEC has routinely exceeded its statutory authority by improperly extending the broker registration requirements of Section 15(a) of the Exchange Act to those, such as Petitioners, who introduce issuers to potential investors for primary market transactions, in other words transactions directly between an issuer and investors not involving an exchange or an over the counter market transaction. In fact, Petitioners' conduct in working with issuers and investors in the primary market puts them squarely within the category "underwriters" as that term is defined in the Securities Act. Section 2(a)(11) of the Securities Act defines an "underwriter" as follows "any person who . . .offers or sells for an issuer in connection with, the distribution of any security, …" The terms "underwriter" in the Securities Act and "broker" in the Exchange Act are two distinct terms and regulate two different types of activities. Specifically, an "underwriter" helps issuers sell or distribute securities through primary market transactions directly between the issuer and investors, while a "broker" effects purchases and sales of securities for clients through secondary market transactions on exchanges and in the over the counter market. Importantly, there is no requirement in the federal securities laws for "underwriters" to register with the SEC.

The distinction between the statutory definitions of a "broker" and an "underwriter" is critical and this Court must ensure that the SEC's overly broad interpretation of who is a broker (and therefore required to register with the SEC) does not swallow up those individuals who are merely underwriters and not required to register. To do otherwise would violate the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." (*Liu v. SEC*, 140 S. Ct. 1936, 1948 (2020)). The SEC's imposition of broker registration requirements to those who assist investors and companies with direct transactions is not only contrary to Congress's statutory scheme but it also severely impacts the ability of small businesses to find qualified investors, raise capital and expand their businesses. Burton, David *Let Entrepreneurs Raise Capital Using Finders and Private Placement Brokers*, Heritage Foundation (July 10, 2018)[1].

The SEC's expansion of broker registration requirements to primary market activities has significantly impeded economic growth and job creation and, consequently, has been subject to long standing criticism by the legal and business communities (*see* American Bar Association, *Report and Recommendations of the Task Force on Private Placement Broker–Dealers* (2005)(hereinafter "ABA Report"), SEC Advisory Committee on Small and Emerging Business Discussion Topics on Finders and Other Intermediaries in Small Business Capital Raising Transactions

[1] Available at https://www.heritage.org/government-regulation/report/let-entrepreneurs-raise-capital-using-finders-and-private-placement

(July 15, 2015)(hereinafter "SEC Discussion Topics"), Burton, *supra*.)[2]. As noted in the ABA report the process of registering as a broker with the SEC is very expensive, extremely time consuming and requires significant costs, including thousands of dollars of net capital requirements, to maintain such registration. The SEC's position that the Exchange Act's broker registration provisions apply to those who operate in the primary markets has also led to significant uncertainty over who is required to register as a broker. This uncertainty is compounded by the severe penalties that can be imposed by the SEC on those who fail to register as brokers. As discussed *infra*, the federal courts in different districts have struggled with this issue with completely different views. Some district courts have been reluctant to impose broker registration requirement upon those who act as intermediaries between companies and investors who are also known as "finders" of capital. However, other district courts refuse to recognize the concept of "finders" and treat finders as unregistered brokers. Still other district courts have used the "Hansen" factors – judicially created by *SEC v. Hansen*, No. 83 Civ. 3692, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984) – as a convenient but statutorily unsupportable way to find that a defendant has acted as an unregistered broker.

Finally, other district courts have simply declined to rule on the issue and have permitted litigation to proceed to a jury trial to determine whether a party acted as an unregistered broker. *See Landegger v. Cohen*, No. 11-cv-01760-WJM-

[2] Available at https://www.heritage.org/government-regulation/report/let-entrepreneurs-raise-capital-using-finders-and-private-placement

CBS, 2013 WL 5444052, at *5 (D. Colo. Sept. 30, 2013); *DeHuff v. Digital Ally, Inc.*, 2009 WL 4908581, *3 (S.D. Miss. 2009); *Foundation Ventures, LLC v. F2G, Ltd*, No. 08 Civ. 10066 (PKL), 2010 WL 3187294, at *5 (S.D.N.Y. Aug. 11, 2010); *Salamon v. Teleplus Enters., Inc.,* No. Civ. 05-2058 (WHW), 2008 WL 2277094, at *8 (D.N.J. June 2, 2008); *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures,* 2006 WL 2620985, *6 (D. Neb. 2006).

The Court should grant certiorari in this matter so as to clarify that the broker registration provisions of Section 15(a) of the Exchange Act do not apply to people and firms such as Petitioners who are acting as an "underwriter" between issuers and investors or who do not operate on exchanges or in the over the counter market.

2. The Ninth Circuit also erroneously upheld the District Court's finding that Petitioners violated the antifraud provisions of the federal securities laws. The Ninth Circuit affirmed the district court's finding that Feng engaged in securities fraud in violation of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act based on two theories of fraud liability: material omissions, and schemes to defraud. The Ninth Circuit's finding that Petitioners' omissions violated the antifraud provisions of the federal securities laws is based on Petitioners' alleged violation of an attorney ethics rule. But the Ninth Circuit's decision is contrary to this Court's holding in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977) where the Court held that absent manipulation, deception or fraud, a state law fiduciary duty claim is not an actionable federal securities law claim. Not all

alleged failures to disclose are actionable under Section 10(b) of the Exchange Act or Section 17(a)(2) of the Securities Act. *See Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1222 (9th Cir.1980) (citing *Santa Fe Industries*).

In addition, the Ninth Circuit's holding that Petitioners engaged in schemes to defraud is based on alleged misconduct that is too remote from the purchase or sale of securities to qualify as securities fraud under *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). The Court has rejected similar scheme based claims of securities fraud when the alleged misconduct is not sufficiently connected to the purchase or sale of securities. *Stoneridge Investment Partners v. Scientific-Atlanta*, 552 U.S. 148 (2008). The Ninth Circuit also improperly held Petitioners' ordinary business objectives to increase profits as evidence of scienter under *Ernst & Ernst v. Hochfelder*, 425 US 185 (1976). The Ninth Circuit has also applied the wrong standard for materiality for securities fraud claims. *United States v. Laurienti*, 611 F.3d 530, 541-42 (9th Cir. 2010) (holding that not all compensation arrangements are necessarily "material" even within a trust relationship)

The Court should grant certiorari to decide the issues above, which involve fundamental economic rights of citizenry and are frequently litigated in lower federal courts with disparate results.

STATEMENT

A. Factual Background

The U.S. Immigrant Investor Program, which is colloquially referred to as the EB-5 program, provides legal permanent residency in the United States to foreign nationals who invest in U.S.-based projects. *See* 8 U.S.C. § 1153(b)(5)(A). Generally, qualified immigrants may gain U.S. visas through direct investment of at least $1 million in a new commercial enterprise that creates at least ten full-time jobs for U.S. workers. *Id.* § 1153(b)(5)(A), (C). Investment in a business in a "targeted employment area" lowers the required capital investment amount to $500,000. *Id.* § 1153(b)(5)(C)(i), (ii).

Multiple foreign investors may pool their money in the same enterprise, provided that each invests the required amount and "each individual investment results in the creation of at least ten full-time positions." 8 C.F.R. § 204.6(g). Pooled investments are made through "regional centers," which are regulated by the U.S. Citizenship and Immigration Services ("USCIS"), which is an agency of the U.S. Department of Homeland Security. The regional centers offer specific projects to investors and manage the pooled investments. *See id.* § 204.6(e), (m).

A foreign national investing in an enterprise must file an I-526 application with the USCIS to prove that the investment will satisfy EB-5 program requirements. *Id.* § 204.6(a), (j)(2). Approval results in conditional permanent resident status. Two years later, the investor may remove the conditions on lawful permanent resident status by filing an I-829 petition, demonstrating that the investment satisfied the EB-5 requirements and created, or will create within a reasonable period, ten qualifying jobs. *Id.* § 216.6.

Feng conducts an immigration law practice in New York City. (App. 6) Between 2010 and 2016, he led approximately 150 clients through the EB-5 process, substantially all of whom were Chinese nationals. (*Id.*) Feng holds a law degree from Columbia University and an MBA from the Tuck School of Business at Dartmouth. (App. 7)

Feng charged his clients a $10,000 to $15,000 upfront fee for his legal services. (*Id.*) His clients are mostly Chinese multi-millionaires created by decades-long economic boom in China since 1990s. His legal services naturally require him and his law office staff serving as a liaison between clients and regional centers, explaining the English-language offering materials to his clients, negotiating with regional centers regarding administrative fees charged to the clients by the centers, and compiling and submitting his clients' signed offering documents to regional centers. (*Id.*)

Feng also entered into introduction agreements with a small number of regional centers wherein if one of Feng's legal clients made a capital contribution to one of these regional centers, and if the USCIS approved the investor's I-526 petition, the regional center agreed to pay Feng a fee ranging from $15,000 to $70,000. (*Id.*) Feng did not disclose to his clients the fees he received from the regional centers unless they specifically asked about them. Payment of a commission or marketing fee by regional centers to marketing agents is an EB-5 industry practice. (*Id.*)

The practice of paying domestic finders -- including immigration attorneys – was an industry standard practice that was started by regional centers at the start of the EB-5 program in 1990s. (App. 8) The SEC did not begin objecting to the practice of paying finders for EB-5 marketing until 2013. Prior to that time regional centers paid Feng marketing fees directly. Sometime in 2013, alerted by the SEC's potential unregistered broker enforcement actions, some regional centers required the marketing fees be paid to overseas agents so as to be compliant with the SEC's demands. (*Id.*) Therefore, Feng directed some of the marketing fees to be paid to his representatives overseas. (*Id.*) There is no evidence those fees were ever transferred to Feng.

Feng presented evidence in the District Court that starting in 2014 he set up an overseas entity called Atlantic Business Consulting Limited ("ABCL") and opened three offices in China and hired consultants for each office to act as client contacts for the marketing or referral activity. (App. 8-9) These facts were never disputed by the SEC. Nevertheless, the SEC claims that Feng is responsible for all those activities. Starting from 2014, all the marketing and referral fees were paid by the regional centers to ABCL. There is no evidence those fees were transferred to Feng. In addition, the fees were used to pay for overseas office expenses and consultants' salaries. (App. 14-15)

The basis of the agreements between the regional centers and Feng's investors was disclosed in the regional centers' offering materials, also known as private placement memoranda ("PPMs"). (App. 9) The regional centers structured the investments as limited partnerships, in which the investors became limited partners and the regional center was the general partner. (*Id.*) The regional centers promised investors a fixed, annual return on investment, which ranged across projects from 0.5 to 5 percent of the capital contribution, and investors received

Schedule K-1 tax forms to report their investment income from the otherwise financed a specified construction project. (App. 9-10) At the end of the investment term, typically five to six years, the regional centers promised the investors a return of their capital contribution, subject to market risks. (App. 10)

The PPMs required that investors pay an administrative fee, which ranged across projects from $30,000 to $50,000, in addition to the capital contribution of $1 million or $500,000. (*Id.*) The PPMs expressly stated that these administrative fees were for operating and marketing costs, were not part of the capital contribution, and did not earn interest. (*Id.*)

Approximately 20 percent of Feng's clients asked him to seek a reduced administrative fee from the regional centers. In those instances, Feng negotiated with regional centers and facilitated contracts between those regional centers and his clients for a rebate of a portion of the administrative fee. (*Id.*) The Ninth Circuit found that Feng did not disclose to these clients that the administrative fees helped to fund his commissions, or that the regional centers offset the clients' administrative fee rebate with a reduction in the commissions to which he was contractually entitled. (*Id.*)

B. Procedural Background

1. The SEC filed a civil complaint against Feng and his law firm on December 7, 2015. (App. 11) The first and second causes of action allege fraud under Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), and Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), respectively. (*Id.*) The third cause of action alleges failure to

register as a broker-dealer under Section 15(a) of the Exchange Act, 15 U.S.C. § 78o. (*Id.*) In an appearance of institutionalized and systemic discriminatory law enforcement actions against minorities, the SEC subsequently filed two more federal cases in California both against immigration attorneys of minority background alleging similar unregistered broker and securities fraud claims. *See SEC v. Steve Qi*, Case No. 2:17-cv-08856, District Court, C.D. California; *SEC v. Jean Danhong Chen*, Case No. 3:18-cv-06371, N.D. California.

Petitioners filed a motion to change the venue of the litigation to New York, which is Feng's home state and where his law office is located, but that motion was denied. Feng has never done any EB-5 business personally in California other than setting up a service office for his law office's clients staffed by a consultant.

The defendants filed a motion for judgment on the pleadings for lack of due process and lack of particularities, which the district court denied in August 2016. (App. 11) The parties subsequently filed cross-motions for summary judgment. Feng argued that the EB-5 investments were not "securities" because the investors had no expectation of profit—only of obtaining a green card and even if EB-5 offerings were securities, Feng acted as an immigration attorney not as a "broker." (*Id.*) The SEC argued that the "undisputed" evidence showed that Feng acted as a "broker" of "securities" as a matter of law. (*Id.*) Petitioners contended that a jury trial was warranted because whether a non-disclosed piece of information was material to Feng's clients is disputed and should have been a question of fact that was submitted to a jury. The district court found no genuine dispute of material fact and granted summary judgment for the SEC on all three causes of action. (App. 11) The district court failed to apply the standard for summary judgment which required it to view the evidence "in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The Ninth Circuit failed to correct this mistake in the appeal.

2. Feng and his law firm appealed the District Court's decision to the Court of Appeals for the 9th Circuit. The 9th Circuit summarily affirmed the lower court's decision in all aspects without addressing most of the legal arguments raised by Petitioners in the appeal. The Ninth Circuit denied a timely petition for rehearing *en banc* on July 31, 2020 without any discussion or reasoning. The Ninth Circuit denied Petitioners' *en banc* petition after this Court's decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020), which held that legitimate business expenses have to be deducted from an SEC disgorgement award, even though the Ninth Circuit explicitly held that it would not permit Petitioners to deduct legitimate business expenses. (App. 62) ("Feng should not have been collecting these commissions in the first place, and it would be unjust to permit him to retain some of the ill-gotten funds to cover his expenses." App. 30)

REASONS TO GRANT THE PETITION

I. The SEC's Improper Expansion of the Broker Registration Requirement of the Exchange Act to Primary Offerings of Securities is Not Consistent with Congress's Statutory Scheme

A. The Federal Securities Laws Must be Read Together in One Comprehensive Regulatory Scheme

The Securities Act and the Exchange Act, together with other financial regulatory laws such as the Investment Advisers Act of 1940 constitute "an integral regulatory scheme designed to provide investors with certain minimal protections." Keller and Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 Ohio St. L.J. 329, 330 (1988). The Court in *Morrison v. National Australian Bank,* 561 U.S. 247 (2010) held that the Securities Act of 1933 and the Exchange Act formed part of the same comprehensive regulation of securities trading.

Other courts have also read the Securities Act, the Exchange Act and the Advisers Act *in pari materia*, meaning courts endeavor to construe them as a single consistent scheme of regulation whenever possible. *Globus v. Law Research Service, Inc*., 418 F.2d 1276, 1286, Fed. Sec. L. Rep. (CCH) P 92474 (2d Cir. 1969) (*citing Rosenberg v. Globe Aircraft Corp*., 80 F. Supp. 123, 124 (E.D. Pa. 1948)). The Court has understood these federal securities law statutes to "constitute interrelated components of the federal regulatory scheme governing transactions in securities," regarding their interdependence as "a relevant factor in any interpretation of the language Congress has chosen." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206

(1976); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 384 (1983) (adopting a "cumulative construction" of the Securities Act and the Exchange Act).

B. The Securities Act Regulates New Issues of Securities and the Exchange Act Regulates Trading in the Secondary Market

The Exchange Act was enacted one year after the Securities Act. While the Securities Act regulated new issues of securities and was primarily a registration and disclosure law, the Exchange Act regulated trading in the secondary market on securities exchanges and in the over the counter market (*see* §2 of the Exchange Act). "Issuer transactions are those involving the sales of securities by [an] issuer to investors…trading transactions are the purchasing and selling of outstanding securities among investors." Cox, Hillman, Langevoort, *Securities Regulation*, 6th Edition, Chapter 1.A.1 and 2. To regulate issuer or primary market transactions, Congress first enacted the Securities Act. To regulate trading or secondary market transactions, Congress subsequently enacted the Exchange Act. Loss, Seligman & Paredes, *Fundamentals of Securities Regulation*, 6th Edition, Chapter 1.D.2 and 3.

The Exchange Act provides for detailed oversight of stock exchanges and of broker-dealers, including registration, prudential regulation, and antifraud controls. Laby, Arthur, *Regulation of Global Financial Firms After Morrison v. National Australia Bank*, 87 St. John's L. Rev. 561 (2014). This Court has also noted that the "1934 Act was intended principally to protect investors against manipulation of stock prices through regulation of transactions **upon securities exchanges and in over-the-counter markets**…" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976)) (emphasis added)

Section 15(a) of the Exchange Act, in keeping with its statutory purpose of regulating secondary market activities on stock exchanges and in the over the counter market, provides for the registration with the SEC of securities brokers who effectuate trades in the secondary securities markets. "Broker" means "any person engaged in the business of effecting transactions in securities for the accounts of others." 15 U.S.C. § 3(a)(4)(A). The Section 15(a) broker registration provision is only contained in the Exchange Act, not in the Securities Act, indicating Congressional intent to require broker registration only in the context of secondary market trading transactions. As a comparison, anti-fraud provisions are contained in both Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act of 1934, which demonstrates that if Congress wanted a statutory provision to be applied to both the primary issuance market and the secondary trading market, it knew how to do it. *See Nken v. Holder*, 556 U.S. 418, 430 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).

While the Exchange Act defines "exchanges" [3], it does not define "over-the-counter markets." However, the definition of "over-the-counter markets" is well

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[3] Section 3(a)(1) of the Exchange Act says the term "exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

known in the financial and securities industries. It is most commonly defined as secondary market trading networks among brokers and dealers as market makers.

> All securities not trading on a national securities exchange trade in an over-the-counter (OTC) market…As distinguished from the securities exchanges, OTC trading is not centralized on a discrete number of exchange floors. Instead, OTC dealers may become market makers in a security by signifying an intent to deal in that security. Joel Seligman (former Chairman of SEC Advisory Committee on Market Information), *The SEC and the Future of Finance*, Chapter 1, page 18 (1985).

Unlike exchanges the over-the-counter network is an electronic market not a physical location.

> The over-the-counter ("OTC") market is not found in any physical location. It is a market that exists among dealers who communicate electronically and by telephone…. Each security traded in the OTC market has at least one market maker, i.e., a dealer that undertakes to set prices at which it obligates itself to buy (bid price) or sell (asked price) the security…Stuart R. Cohn, 1 *Securities Counseling for Small & Emerging Companies* § 17:3 (2018).

The industry understanding of the over-the-counter market is consistent with Congress's understanding. "An over the counter market is characterized by an interdealer quotation system which regularly disseminates quotations of obligations by identified brokers or dealers, by electronic means or otherwise." House Report No. 100-391(II) – House Ways and Means Committee October 26, 1987. *See also,* U.S. Congress, Office of Technology Assessment, *Electronic Bulls and Bears: U.S. Securities Markets & Information Technology*, OTA-CIT-469 (Washington, DC: U.S. Government Printing Office, September 1990) ("Over-the-counter: A market in which securities transactions are negotiated and executed through competing dealers, operating by telephone and computer networks, rather than on an exchange.”).

The industry and Congressional understanding that the over-the-counter market is different from the primary market where issuers sell securities directly to investors is shared by the general public. *See., e.g.* Encyclopedia.com https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/over-counter-securities-market

Legal commentators agree that individuals or firms that operate in the primary market do not trigger the broker registration requirements of Section 15 of the Exchange Act. Citing the original text of Section 15 Professor David Lipton pointed out, “brokers and dealers would trigger the Commission’s authority **only** if they (1) used the mails or instrumentalities of interstate commerce to make or create an over-the-counter market…or (3) used any facility of such a market.” David A. Lipton, *A Primer on Broker-Dealer Registration*, (Catholic University Law Review, Vol. 36, Issue 4, Article 5, at 901, Summer 1987, footnote 5) (emphasis added).

C. The SEC Has Improperly Extended the Broker Registration Provisions Beyond the Secondary Markets of Exchanges and Over-The-Counter Trading.

The SEC has routinely exceeded its statutory authority by improperly extending the broker registration requirements of Section 15(a) of the Exchange Act to those, such as Petitioners, who introduce issuers to potential investors for primary market transactions, in other words transactions directly between an issuer and investors not involving an exchange or an over the counter market transaction. For reasons unknown, no defendant or federal court has ever challenged the SEC's obvious statutory overreach until this case. The SEC's imposition of Section 15's broker registration requirements to those who assist investors and companies with direct transactions is not only contrary to Congress's statutory scheme but it also severely impacts the ability of small businesses to find qualified investors, raise capital and expand their businesses. (Burton, *supra*)

The SEC's unwarranted and sweeping expansion of broker registration obligations to those who operate only in primary markets occurred sometime in 2000 for reasons unknown. Moreover, the SEC's expansion of broker registration requirements to primary market activities has significantly impeded economic growth and job creation and, consequently, has been subject to long standing criticism by the legal and business communities (*see* ABA Report; and SEC Discussion Topics). The SEC's position that the Exchange Act's broker registration provisions apply to those who operate in the primary markets has also led to significant uncertainty over who is required to register as a broker and the liability of businesses who work with unlicensed individuals and firms.

The result of the SEC's application of broker registration requirements to primary securities transactions has also led to ongoing conflicts in the federal courts with different courts arriving at different conclusions concerning whether the broker registration requirements apply to those who work only in the primary market. For example, some federal courts have been reluctant to impose broker registration requirement upon those who act as intermediaries between companies and investors who are also known as "finders" of capital. *See SEC v. Mapp*, 240 F.Supp.3d 569 (E.D. Tex. 2017); *SEC v. M&A West*, No. C-01-3376 VRW, 2005 WL 1514101, at *9 (N.D. Cal. June 20, 2005); *SEC v. Kramer*, 778 F.Supp.2d 1320 (M.D. Fla. 2011); *Jones v. Whelan*, No. 99 Civ. 11743, 2002 WL 485729, at *7 (S.D.N.Y. Mar. 29, 2002); *Warshay v. Guinness PLC*, 750 F. Supp. 628, 636(S.D.N.Y.1990), *aff'd*, 935 F.2d 1278 (2d Cir. 1991).

However, other federal courts refuse to recognize the concept of "finders" and treat finders as unregistered brokers. *See SEC v. Collyard*, 861 F. 3d 760 (8th Cir. 2017); *SEC v. Art Intellect, Inc.,* No. 2:11-CV-357, 2013 WL 840048, at *20 (D. Utah Mar. 6, 2013); *SEC v. Rabinovich & Assocs.*, LP, 2008 WL 4937360, at *5 (S.D.N.Y. Nov. 18, 2008); *SEC v. Offill,* No. 3:07-CV-1643-D, 2012 WL 246061, at *7 (N.D. Tex. Jan. 26, 2012). Still other district courts have used the "Hansen" factors – judicially created by *SEC v. Hansen*, No. 83 Civ. 3692, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984) – as a convenient but statutorily unsupportable way to find that a defendant has acted as an unregistered broker.

Finally, other federal courts have simply declined to rule on the issue and have permitted litigation to proceed to a jury trial to determine whether a party acted as an unregistered broker. *See Landegger v. Cohen*, No. 11-cv-01760-WJM-CBS, 2013 WL 5444052, at *5 (D. Colo. Sept. 30, 2013); *DeHuff v. Digital Ally, Inc.*, 2009 WL 4908581, *3 (S.D. Miss. 2009); *Foundation Ventures, LLC v. F2G, Ltd*, No. 08 Civ. 10066 (PKL), 2010 WL 3187294, at *5 (S.D.N.Y. Aug. 11, 2010); *Salamon v.*

Teleplus Enters., Inc., No. Civ. 05-2058 (WHW), 2008 WL 2277094, at *8 (D.N.J. June 2, 2008); *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures,* 2006 WL 2620985, *6 (D. Neb. 2006).

In this matter, the 9th Circuit's holding erroneously upheld the District Court's finding that Petitioners acted as unregistered brokers under Section 15(a) of the Exchange Act even though Petitioners were only involved in primary market transactions between an issuer and an investor and were not involved in any secondary market trading.

D. Petitioners Primary Market Activities Place them Squarely in the Category of an "Underwriter" Under the Securities Act not a "Broker" Under the Exchange Act

Petitioners' conduct in working with issuers and investors in the primary market places them squarely within the category "underwriters" as that term is defined in the Securities Act. Section 2(a)(11) of the Securities Act defines an "underwriter" as follows:

> "The term "underwriter" means any person who . . .offers or sells **for an issuer** in connection with, the distribution of any security,"

The text of Section 2(a)(11) clearly covers a person who works directly with an issuer in primary market transactions. The terms "underwriter" in the Securities Act and "broker" in the Exchange Act are two distinct terms regulating two very different types of activities. While both an "underwriter" and a "broker" may generally be involved in the purchase or sale of securities, an "underwriter" helps issuers sell or distribute securities through primary market transactions directly between the issuer and investors, while a "broker" effects purchases and sales of securities for clients through secondary market transactions on exchanges and in the over the counter market.[4]Importantly, there is no requirement in the federal securities laws for underwriters to register with the SEC.[5]

This Court must give effect to Congress's well thought out statutory scheme that comprehensively regulates brokers and underwriters. The SEC's overly broad interpretation of who is required to register as a broker has improperly swallowed up those who act as underwriters, at great cost not only to those who must register but also to millions of entrepreneurs and businesses who are unnecessarily deprived of growth capital. Holding that the SEC may not require underwriters who act solely in the primary market between issuers and investors to register as brokers would enforce the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." (*Liu*, 140 S. Ct. 1936, 1948). The *Liu* court wrestled with difficult questions of statutory interpretation and complex questions about where the limits lay for traditional equitable remedies. In contrast, this case involves clearly defined statutory terms contained in the federal securities

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[4] Some large financial firms have both underwriting departments and brokerage departments. While underwriting and brokerage departments may work together for a particular transaction, they play different functions in the transaction with the underwriting department working directly with the issuer and primary investors and the brokerage department facilitating aftermarket trading on exchanges and in the over-the-counter markets between investors.

[5] Although not at issue here, the Securities Act imposes other regulatory requirements on certain underwriters that purchase securities from issuers and then resell the securities to investors. These requirements include the underwriter's obligation under Section 5 of the Securities Act to register the resale of their securities with the SEC, with certain frequently used exceptions that are set forth in SEC Rule 144 [17 C.F.R. § 230.144].

statutes. The SEC and the lower courts' blatant disregard of such clearly written statutory language is a direct challenge and insult to the cardinal principle of interpretation that this Court has repeatedly recognized and quoted above. If the opinion of the Supreme Court of the United States still carries any authority, this Court must correct the SEC and the lower courts' misreading and misunderstanding of the distinction between a "broker" and an "underwriter" as they are written in the securities law statutes.

The inapplicability of the broker registration provisions of Section 15(a) of Exchange Act to "underwriters" or persons not using any exchange or over-the-counter markets does not come at the expense of investor protection. The broad anti-fraud provisions contained in both Securities Act and Exchange Act are applicable to all persons who commit fraud in securities transactions. Only the burden of the broker registration requirement, an onerous and costly administrative process, will be removed and lifted for all legitimate small businesses and entrepreneurs.

E. The 9th Circuit's Holding That Feng Was A Broker Under the Exchange Act Would Invalidate a Key Part of the Investment Advisers Act of 1940

It is well established that courts should not read statutory texts "in a way that makes part of it redundant." *See Corley v. United States*, 556 U.S. 303, 314 (2009); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007). The 9th Circuit failed to consider the entire federal statutory scheme when determining whether Feng needed to register with the SEC as a broker. Upholding the District Court's finding that Feng was required to register with the SEC as a broker ignores the comprehensive statutory scheme that Congress set out in the Advisers Act concerning attorneys whose practice of law touches on investment advice and the sale of securities.

When Congress passed the Investment Advisers Act of 1940 it specifically regulated the standards under which attorneys practicing law could provide investment advice that was incidental to their practice of law. Section 202(a)(11) of the Advisers Act states that the term "Investment adviser" means

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include… any lawyer whose performance of such services is solely incidental to the practice of his profession.

Feng's actions clearly fall under providing advisory (and *not* brokerage) services to clients incidentally to his practice of law. Feng's relationship with his clients bear none of the hallmarks of a broker relationship. For example, Feng had a long term consultative relationship with his clients that involved all facets of the immigrant visa program and the I-526 petition. Feng's work with EB-5 clients typically spanned from 3 to as long as more than 10 years in some cases from initial immigration application to conditional green card and then to final permanent green card due to long waiting time for immigration quota.

In addition, Feng's services to clients did not involve any other typical services a broker who is effecting the sale of securities would perform such as conducting a suitability analysis for the EB-5 investments, becoming familiar with a client's overall financial situation and determining a client's risk thresholds (*Thomas v. Met. Life Ins. Co.*, 2009 WL 2778663 (W.D.Okla. 2009).[6] The absence of these typical brokerage services in this case demonstrates that whatever services Feng provided in reviewing EB-5 investments with his clients was solely incidental to his practice of immigration law.

By ignoring the statutory scheme that Congress set out in the Advisers Act and instead proceeding with a claim under the Exchange Act by arguing that Feng was a broker the SEC has impermissibly invalidated a central provision of the Advisers Act, namely that attorneys who provide investment related services that are solely incidental to their practice of law do not have to register with the SEC.[7]

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[6] The absence of these typical brokerage services is also strong evidence that Petitioners do not come within the definition of a broker under the Exchange Act.

[7] The contingent nature of the compensation Feng received from the regional centers does not transform him from an adviser into a broker. *See SEC v. Kramer*, 778 F.Supp.2d 1320, 1339 (M.D. Fl. 2011). In this case the success fee is even more removed from the sale of securities because the success fee was paid only upon approval of the I-526 petition by the USCIS and not upon the sale of the interests in the regional center.

II. The SEC's Improper Expansion of the Exchange Act's Broker Registration Requirements to Primary Offerings of Securities Significantly Limits the Ability of Our Nation's Businesses to Raise Capital, Grow and Create Jobs

The SEC's position that people who work exclusively in the primary markets have to register as brokers has created significant regulatory uncertainty. This regulatory uncertainty effects not only individuals and businesses like Petitioners but also the businesses who are looking for investor introductions in order to grow their businesses and create jobs. This is particularly important for small business owners "who do not have access to many highly affluent accredited investors. (Burton, *supra*). In fact, those who introduce investors to businesses, which is exactly what Petitioners did here, "play an important role in introducing entrepreneurs to potential investors, thus helping them to raise the capital necessary to launch or grow their businesses." (*Id.*) The American Bar Association (ABA) Task Force on Private Placement Broker–Dealers has noted that the activities of those who introduce investors to businesses seeking capital "is of critical importance to the efforts of a vast number of small businesses, and without their assistance it is unlikely that a great percentage of such businesses would ever be successful in raising early stage funding." (ABA Report at 2)

The SEC's unjustified regulatory position that those who operate in primary market transactions between issuers and investors must register as brokers under the Exchange Act "impedes small firms' ability to access needed capital both by restricting the availability of finders and by causing potential problems when successful small firms later seek venture capital or public financing and encounter counsel-raising questions about their prior use of finders." (Burton, *supra*). "The current SEC stance makes the market less efficient by increasing transaction costs considerably—and has a disproportionately adverse effect on small firms trying to raise small amounts of capital." (*Id.*)

According to the SEC's Division of Economic and Risk Analysis (DERA), total capital raised through private placement offerings was more than $3.5 trillion each year from 2014 to 2017.[8] The Financial Industry Regulatory Authority (FINRA), a self-regulatory organization for the securities industry, states that, there are only about 3,800 registered brokerage firms nationwide.[9] According to a 2018 Small Business Profile issued by Office of Advocacy of U.S. Small Business Administration, there are total 30.2 million small businesses in the United States.[10]. If the current misinterpretation of the law by the SEC stands, only these 3,800 brokerage firms can provide capital raising services to these30.2 million small businesses, which means on average each registered brokerage will need to serve

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[8] *Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings*, 2009-2017, Scott Bauguess, Rachita Gullapalli, and Vladimir Ivanov, Division of Economic and Risk Analysis (DERA), U.S. Securities and Exchange Commission, August 2018, Table 1. Number of offerings by type of offering and year.

[9] https://www.finra.org/investors/brokercheck-faq, Paragraph 2 ("What is FINRA**?** FINRA regulates all securities firms doing business in the United States. We oversee approximately 3,800 brokerage firms, 160,000 branch offices and 630,000 registered securities representatives. Our chief role is to protect investors by maintaining the fairness of the U.S. capital markets.")

[10] Available at https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf

approximately 8,000 small business clients. At the same time significant numbers of business professionals are currently shut out from helping companies raise money from investors because they have not gone through the cumbersome and expensive process of registering as a "broker" with the SEC. As a result, the competition to provide capital raising services is significantly curtailed, which results in higher costs of raising capital for those few businesses lucky enough to be able to work with a registered broker.

III. The 9th Circuit Erroneously Upheld the Lower Court's Finding that Petitioners Violated the Antifraud Provisions of the Federal Securities Laws

A. The Ninth Circuit Erroneously Held that a Violation of an Attorney Ethics Rule Can Support a Securities Fraud Claim Under Section 17(a)(2) and Rule 10b-5(b))

In *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), the Court held that absent manipulation, deception or fraud, a state law fiduciary duty claim is not an actionable federal securities law claim. Not all alleged failures to disclose are actionable under Section 10(b) of the Exchange Act or Section 17(a)(2) of the Securities Act. *See Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1222 (9th Cir.1980) (citing *Santa Fe Industries*). Consequently, the SEC cannot "bootstrap" a claim for breach of an attorney ethics rule or a state law breach of fiduciary duty claim into a federal securities fraud claim. Yet that is exactly what the SEC tries to do by alleging that the disclosure philosophy of the New York Rules of Professional Conduct obligate attorneys to disclose certain conflicts of interest, even if those conflicts of interest are immaterial and standard industry practice outside the scope of the Securities Act. *See Panter v. Marshall Field & Co.*, 646 F.2d 271, 288 (7th Cir.1981) (securities plaintiffs may not "bootstrap" a breach of fiduciary duty claim under SEC Rule 10b-5 into a Section 10(b) fraud claim "by alleging that the disclosure philosophy of the statute obligates defendants to reveal either the culpability of their activities, or their impure motives for entering the allegedly improper transaction.") (citing *Santa Fe Industries*). *See also, Jacobson v. AEG Capital Corp.*, 50 F. 3d 1493 (9th Cir. 1995) ("The Supreme Court has explicitly refused to allow Section 10(b) claims for what are normally state law questions of fairness, business purpose, and breach of fiduciary duty related to freeze-outs and mergers.").

Here, the Ninth Circuit's decision, in effect, disavows the rule of *Santa Fe Industries* by citing the obligation to disclose conflicts of interest pursuant to New York Rules of Professional Conduct as grounds for Petitioners' violation of the antifraud provisions of the federal securities laws. By permitting a state law fiduciary duty claim to be bootstrapped into a federal securities claim, the Ninth Circuit's decision conflicts with *Santa Fe Industries* and should be vacated.

B. The Ninth Circuit's Holding that Petitioners Engaged in Schemes to Defraud Under Section 17(a)(1) and (3) of the Securities Act and Rules 10b-5(a) and (c) is Inconsistent with the Court's Precedent.

The Ninth Circuit upheld the District Court's finding that Petitioners defrauded the regional centers that refused to pay commissions to U.S.-based attorneys not registered as brokers. But such conduct cannot form the basis of a securities fraud claim because it is not sufficiently connected to the purchase or sale of a security. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). The Court has rejected similar scheme based claims of securities fraud when the alleged misconduct is not sufficiently connected to the purchase or sale of securities. *Stoneridge Investment Partners v. Scientific-Atlanta*, 552 U.S. 148 (2008). Moreover, here the Petitioners' conduct is even more removed from the sale of securities because Petitioners' receipt of a commission was not based upon the sale of the regional centers' securities but on the approval of an investor's I-526 petition by the USCIS.

The Ninth Circuit also upheld the District Court's finding that Petitioners engaged in a scheme to defraud clients who sought a reduction in their administrative fees. However, the Ninth Circuit's holding is inconsistent with their finding that when asked to do so Feng negotiated with the regional centers to reduce the administrative fee. The Ninth Circuit found "[w]hen a client asked Feng to negotiate with the regional center to reduce his administrative fee, Feng arranged with the regional center to lower the administrative fee by reducing the commission." (App. 28)

C. The Ninth Circuit's Holding that Petitioners Acted with Scienter is <u>Clearly Erroneous</u>.

"Scienter" is a required element for any SEC civil enforcement action under Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act. *Aaron v. SEC*, 446 US 680 (1980). "The words 'manipulative or deceptive' used in conjunction with "device or contrivance" strongly suggest that § 10 (b) was intended to proscribe knowing or intentional misconduct." *Ernst & Ernst v. Hochfelder*, 425 US

185 (1976) (citing 15 U.S.C. § 78j). Stated simply, Petitioners must have knowledge of their actions wrongful, deceptive or illegal to meet the "scienter" requirement. Scienter has been defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst*, 425 U.S. at 193(1976)

Routine corporate objectives such as a desire to obtain good financing terms and expand, without more, is insufficient to support a finding of scienter. *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1038. (9th Cir. 2002). Additionally, fraudulent intent may not be inferred merely because an executive's compensation is partly based upon the executive's success in achieving corporate goals. *In re Rigel Pharmaceuticals*, 697 F.3d 869 (9th Cir. 2012). *See also Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1166 (9th Cir.2009) (holding that allegations of motive and opportunity were not enough to create a strong inference of scienter).

The Ninth Circuit decision upholds a finding of scienter on the basis that "Feng stated that he did not want to tell clients about his commissions from the regional centers because it would be costly." (App. 27). However, this is nothing more than a routine business objective and cannot be the basis of a finding of scienter. In fact, Feng testified that his reason for not disclosing the industry standard finder's fees was to avoid getting into negotiations of fee rebates with his clients. The rebate, if any, would be paid from Feng's compensation and it was entirely within Feng's discretion whether to agree to a rebate or not. Whether to rebate part of his fee was a business decision that was entirely within Feng's discretion. A rebate of the fee was not something Feng's clients had a right to demand. The Ninth Circuit's decision never explains why Feng's intent to avoid negotiating a rebate to clients is fraudulent and evidence of scienter.

D. The Ninth Circuit Erroneously Affirmed the District Court's Finding that Feng's Compensation Arrangement Was Material

The Ninth Circuit erroneously upheld the District Court's finding that Feng's failure to voluntarily disclose to his clients, prior to February 2015, that he was receiving referral fees from regional centers, constituted a material omission, as a matter of law, in violation of federal securities laws. (App. 27). A fact "is material 'if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.'" *SEC v. Platforms Wireless Int'l Corp*., 617 F.3d 1072, 1092 (9th Cir. 2010) (*quoting SEC v. Phan*, 500 F.3d 895, 908 (9th Cir. 2007). "Determining materiality in securities fraud cases should ordinarily be left to the trier of fact." *Phan*, 500 F.3d at 908.

> Materiality typically cannot be determined as a matter of summary judgment because it depends on determining a hypothetical investor's reaction to the alleged misstatement." Id. "Only if the established omissions are so obviously important to an investor, that reasonable minds cannot differ on the question of materiality is the ultimate issue of materiality appropriately resolved as a matter of law by summary judgment." *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). However, not all compensation arrangements are material. *United States v. Laurienti*, 611 F.3d 530, 541 (9th Cir. 2010) We recognize that brokerages often have complicated compensation systems and that brokers sometimes receive additional compensation on client purchases of particular securities products. Our holding today does not mean that all compensation arrangements are necessarily "material" even within a trust relationship and therefore could lead to criminal (and civil) liability. For example, de minimis variations in compensation among different securities products would be immaterial as a matter of law.

> Additionally, courts have recognized that, depending on the circumstances, even minimal disclosures can meet the broker's obligation to disclose.

Id. (citing *United States v. Szur*, 289 F.3d 200, 211-12 (2d Cir. 2002) (holding that some information "borders on insignificant minutia, the omission of which could never be actionable for fraud"); *Benzon v. Morgan Stanley Distributors, Inc.*, 420 F.3d 598, 612 (6th Cir. 2005) (holding that the brokers met their disclosure obligations because of a prospectus disclosure that brokers "may receive different compensation for selling each Class of share"); *Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 130 (2d Cir. 2000) (holding that the brokers satisfied their disclosure obligations because of "general disclosures" in fund prospectuses and "Statements of Additional Information" filed with the SEC by the managers of the money market funds)) (internal citations omitted).

The facts in this matter are at odds with those in *Laurienti* wherein the court found that a broker commission for selling "house" stock to clients being hundreds of times more than the normal broker commission to be "material" as a matter of law. "The difference between a commission of $50 on the sale of a non-house stock and a commission of thousands of dollars on the sale of a house stock is not a de minimis difference in compensation. And Defendants here did not disclose the bonus commissions in any way whatsoever." *Laurienti*, 611 F.3d at 542.

Here, Appellants presented evidence that the sort of fees paid to Appellants by the regional centers were customary within the EB-5 industry. Several regional center officials testified that the finders' fees and/or marketing fees paid to Appellants are normal industry practice. Dozens of Feng's clients provided declarations that they did not care about any referral fees received by Petitioners which were denied as evidence by the district court for improper translation format without an opportunity to amend. Several of Feng's clients testified during the SEC's depositions that they did not care about the referral fees received by Petitioners. The panel decision even recognizes that "[p]ayment of a commission is an EB-5 industry practice[.]" (App. 8). Accordingly, under *Laurienti*, the fees Appellants received is a customary practice for the industry that should not be material as a matter of law, or at a minimum is a disputed fact for a jury to decide.

Finally, the panel decision acknowledges that the offering materials, also known as private placement memoranda ("PPMs"), expressly disclose that the "administrative fee would be used to defray marketing and operating expenses." (App. 15). Thus, the EB-5 clients who received and signed PPMs were put on notice that those administrative fees could be used to pay for finders that market EB-5 programs for regional centers. As *Laurienti* concludes, "even minimal disclosures can meet the broker's obligation to disclose", 611 F.3d at 542 (citing *Press*, 218 F.3d at 130). Thus the panel decision finding a "material" nondisclosure conflicts with *Laurienti*'s recognition that minimal disclosures, similar to "general disclosures" in fund prospectuses or "Statements of Additional Information" filed with the SEC by the managers of money market funds, are sufficient in satisfying securities laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

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