

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of :
: INITIAL DECISION
SIMING YANG : May 6, 2015

APPEARANCES: Jonathan Polish, Timothy Leiman, Emily Heller, and Jedediah B. Forkner
for the Division of Enforcement, Securities and Exchange Commission

James L. Kopecky and Howard J. Rosenberg of Kopecky Schumacher
Bleakley Rosenberg, PC, for Respondent Siming Yang¹

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Siming Yang (Yang) from the securities industry. He was previously enjoined against violations of the antifraud and reporting provisions of the securities laws.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding on June 12, 2014, with an Order Instituting Proceedings, which it amended on November 19, 2014 (Amended OIP). The proceeding is authorized pursuant to Sections 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and 203(f) of the Investment Advisers Act of 1940 (Advisers Act). It is a follow-on proceeding based on *SEC v. Yang*, No. 12-cv-2473 (N.D. Ill. May 27, 2014), *appeal docketed*, No. 14-2636 (7th Cir. July 24, 2014), in which Yang was enjoined against violations of the antifraud and reporting provisions of the federal securities laws. The Division of Enforcement (Division) filed a motion for summary disposition, pursuant to 17 C.F.R. § 201.250(a), in accordance with leave granted. *Siming Yang*, Admin. Proc. Rulings Release Nos. 2124, 2014 SEC LEXIS 4796 (A.L.J. Dec. 12, 2014); 1768, 2014 SEC LEXIS 3224 (A.L.J. Sept. 5, 2014). Yang timely filed an opposition, and the Division, a reply.

¹ Appearances withdrawn effective April 14, 2015.

This Initial Decision is based on the pleadings and Yang's Answer to the Amended OIP. There is no genuine issue with regard to any fact that is material to this proceeding. All material facts that concern the activities for which Yang was enjoined were decided against him in the civil case on which this proceeding is based. Any other facts in his pleadings have been taken as true, pursuant to 17 C.F.R. § 201.250(a). All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

B. Allegations and Arguments of the Parties

The Amended OIP alleges that Yang was enjoined against violations of the antifraud and reporting provisions of the federal securities laws in *SEC v. Yang*. The Division urges that he be barred from the securities industry. Yang opposes this, arguing that he was not associated with a registrant, did not act as an investment adviser, and was not found to have violated the most serious charge that he faced – insider trading. Further, he argues that the Commission does not have extraterritorial jurisdiction over him. Additionally, he argues that a collateral bar is unnecessary and inappropriate.

C. Procedural Issues

1. Official Notice

Official notice pursuant to 17 C.F.R. § 201.323 is taken of the docket report and the court's orders in *SEC v. Yang*.

2. Collateral Estoppel

It is well established that the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent, whether resolved after a trial, by consent, or by summary judgment. *See James E. Franklin*, Exchange Act Release No. 56649, 2007 SEC LEXIS 2420, at *11 & nn.13-14 (Oct. 12, 2007) (injunction entered after trial), *pet. denied*, 285 F. App'x 761 (D.C. Cir. 2008); *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *9-11 (Feb. 4, 2008) (injunction entered by consent), *pet. denied*, 561 F.3d 548 (6th Cir. 2009); *John Francis D'Acquisto*, Advisers Act Release No. 1696, 1998 SEC LEXIS 91, at *1-2 & n.1, *7 (Jan. 21, 1998) (injunction entered by summary judgment); *Demitrios Julius Shiva*, Exchange Act Release No. 38389, 1997 SEC LEXIS 561, at *5-6 & nn.6-7 (Mar. 12, 1997); *see also Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at *2-10, *22-30 (July 25, 2003).

II. FINDINGS OF FACT

Yang, age 37 at the time of the Amended OIP, is a citizen of the Peoples Republic of China. Answer at 1. He resided in New York City from January 2008 through April 2012. *Id.* He now resides outside the United States and does not plan to live in the United States. Opposition at 12.

Yang was enjoined against violations of the antifraud and reporting provisions of the federal securities laws, in *SEC v. Yang*. *SEC v. Yang*, ECF Nos. 304, 305. The court also imposed second-tier civil penalties totaling \$150,000 on Yang. *Id.* These sanctions were imposed after a jury trial in which he was found to have engaged in front-running and to have been responsible for a false disclosure in a Commission filing in violation of Sections 10(b) and 13(d) of the Exchange Act and Rules 10b-5 and 13d-1 thereunder and of Sections 206(1) and 206(2) of the Advisers Act. He was cleared of the charge of insider trading. *SEC v. Yang*, ECF Nos. 136, 242, 243.

Yang was the general manager and a director of Prestige Trade Investments Limited (Prestige), an investment firm registered in the British Virgin Islands and located in China. Opposition at Exhibit G at Prestige 001049-51. The conduct underlying his injunction involved his purchase of Zhongpin, Inc. (Zhongpin), securities for his own account before purchasing Zhongpin stock for Prestige, essentially a single course of conduct in 2012. Answer, *passim*; Opposition, *passim*; *SEC v. Yang*, ECF Nos. 198, 288, 304. There was no specific harm to investors or Prestige, and the degree of harm to the market was not great due to Yang's limited purchases. *SEC v. Yang*, ECF No. 304 at 2. Yang did not profit from his violative conduct. *SEC v. Yang*, ECF No. 304 at 4-5. Yang asserts that there is a material question of fact as to whether he was employed, during the time of the conduct underlying his injunction, with registered investment advisers Baron Capital Management, Inc., or BAMCO, Inc.; with registered broker-dealer Baron Capital, Inc.; or with a holding company that is neither a broker-dealer or investment adviser, Baron Capital Group, Inc.² Opposition at 2-7. However, he acted as an investment adviser to Prestige. *SEC v. Yang*, ECF Nos. 242, 243 at 11.

In imposing the injunction, the court was influenced by misconduct outside the charged misconduct. Yang participated in a transaction with Prestige that resulted in the denial of compensation that he had coming to him in a way that ran afoul of the stipulated asset freeze that the court had ordered. This had the purpose of making it impossible to collect any money judgment that might be ordered. *SEC v. Yang*, ECF No. 304 at 3. Additionally, while the litigation was underway Yang engaged in further trading via an account at Fidelity that he did not disclose in responses to interrogatories and that also likely violated the stipulated asset freeze order. *Id.* The court found this suggested an ongoing intention to trade in U.S. markets despite Yang's protestations to the contrary. *SEC v. Yang*, ECF No. 304 at 4.

III. CONCLUSIONS OF LAW

Yang has been permanently enjoined "from engaging in or continuing any conduct or practice . . . in connection with the purchase or sale of any security" within the meaning of Exchange Act Sections 15(b)(4)(C) and 15(b)(6)(A)(iii) and Advisers Act Sections 203(e)(4) and 203(f). Yang was an investment adviser within the meaning of the Advisers Act. *See SEC v. Yang*, ECF Nos. 242, 243 at 11; Advisers Act Section 202(a)(11). It cannot be questioned that the Commission has authority to bar persons from association with investment advisers, whether

² He does not deny that he was employed by one of those Baron entities. *See* Answer, Opposition.

registered or unregistered, or otherwise sanction them under Section 203 of the Advisers Act. *Teicher v. SEC*, 177 F.3d 1016, 1017-18 (D.C. Cir. 1999).

Further, Yang was associated with registered broker-dealer Baron Capital, Inc., within the meaning of the Exchange Act. *See* Declaration of Emily A. Heller, Exs. O-S; *SEC v. Yang*, ECF No. 198 at 2; Exchange Act Section 3(a)(18). That he may have also been associated with other entities in the Baron network does not create a genuine issue of material fact. 17 C.F.R. § 201.250(b); *see Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *21 n.24 (Feb. 13, 2009) (“[T]o survive a motion for summary disposition, the non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts.” (internal quotation marks omitted)).

Concerning Yang’s claim of extraterritoriality, this proceeding is based on *SEC v. Yang*, in which such claim was, or could have been addressed, and Yang is precluded from raising it in this proceeding.³ If Yang is successful in overturning his injunction, he can request the Commission to vacate any sanctions ordered in this proceeding (or to dismiss the proceeding, if it is still pending).⁴

IV. SANCTION

As the Division requests, a collateral bar will be ordered.

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. *See* 15 U.S.C. §§ 78o(b)(6)(A), 80b-3(f). The Commission considers factors including:

³ Yang has raised the extraterritoriality argument in his appeal. *See SEC v. Yang*, No. 14-2636, ECF Nos. 19, 29.

⁴ *See Jilaine H. Bauer, Esq.*, Securities Act of 1933 (Securities Act) Release No. 9464, 2013 SEC LEXIS 3132 (Oct. 8, 2013) (dismissing follow-on administrative proceeding after court of appeals, while petition for review was pending before Commission, reversed and remanded district court’s judgment that was basis for OIP); *Richard L. Goble*, Exchange Act Release No. 68651, 2013 SEC LEXIS 129 (Jan. 14, 2013) (dismissing follow-on administrative proceeding after court of appeals, while petition for review was pending before Commission, vacated injunction that was basis for OIP); *Evelyn Litwok*, Advisers Act Release No. 3438, 2012 SEC LEXIS 2328 (July 25, 2012) (dismissing follow-on proceeding after court of appeals, while petition for review was pending before Commission, reversed certain convictions and vacated and remanded other convictions, all of which were basis for OIP), *Kenneth E. Mahaffy, Jr.*, Exchange Act Release No. 68462, 2012 SEC LEXIS 4020 (Dec. 18, 2012) (vacating bar issued in follow-on administrative proceeding where court of appeals, after Commission had issued bar order, vacated criminal conviction that was basis for proceeding).

the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)), *aff'd on other grounds*, 450 U.S. 91 (1981). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. *Marshall E. Melton*, 2003 SEC LEXIS 1767, at *4-5. Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. *Schild Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 & n.46 (Jan. 31, 2006). The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business. *See Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 SEC LEXIS 1267, at *18 n.26 (Apr. 20, 2012); *Richard C. Spangler, Inc.*, Exchange Act Release No. 12104, 1976 SEC LEXIS 2418, at *34 (Feb. 12, 1976).

B. Sanction

As described in detail in the Findings of Fact, Yang's conduct was not recurrent, but it was egregious and involved a high degree of scienter, as shown by his violation of the antifraud provisions. His previous occupation, if he were allowed to continue it in the future, would present opportunities for future violations. Absent a bar, he could re-enter the securities industry in the United States. The violations are recent. Consistent with a vigorous defense of the charges, Yang has not recognized the wrongful nature of his conduct. There was no direct financial harm to investors, but, as the Commission has often emphasized, the public interest determination extends beyond consideration of the particular investors affected by a respondent's conduct to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. *See Christopher A. Lowry*, Investment Company Act of 1940 Release No. 2052, 2002 SEC LEXIS 2346, at *20 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003); *Arthur Lipper Corp.*, Exchange Act Release No. 11773, 1975 SEC LEXIS 527, at *52 (Oct. 24, 1975). Misconduct involving dishonesty requires a bar, and because of the Commission's obligation to ensure honest securities markets, an industry-wide bar is appropriate.

V. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, SIMING YANG IS BARRED from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of

fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Carol Fox Foelak
Administrative Law Judge