UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15928

In the Matter of

Siming Yang,

Respondent.

DIVISION OF ENFORCEMENT'S
MOTION FOR SUMMARY DISPOSITION AND BRIEF IN SUPPORT

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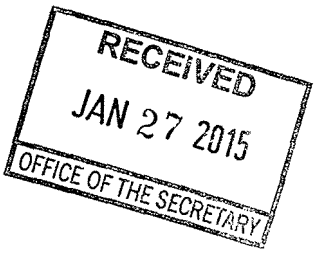

DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION

The Division of Enforcement ("Division"), pursuant to Rule 250 of the Securities and Exchange Commission's Rules of Practice, 17 C.F.R. § 201.250, and with leave of this Court, hereby moves for summary disposition against Respondent Siming Yang.

The Division respectfully submits that summary disposition is appropriate, that the Court should resolve this proceeding in favor of the Division and against Siming Yang, and should impose a collateral bar against Respondent Siming Yang in the manner set forth below.

In support of this Motion, the Division offers the accompanying Memorandum of Law and Supporting Declaration.

Dated: January 26, 2014

Respectfully submitted,

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January 26, 2015

VIA UPS
Brent J. Fields
Commission Secretary
100 F Street NE, Mail Stop 1090
Washington, D.C. 20549

Re: In the Matter of Siming Yang (File No. 3-15928)

Dear Mr. Fields:

For filing in the above referenced matter, enclosed please find the original of the (1) Motion for Summary Disposition and Brief in Support, and (2) the Certificate of Service.

Please note that today I also faxed one set of documents to the attention of the Commission Secretary at fax number (202) 772-9324.

Sincerely,

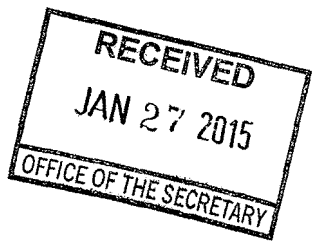
Emily A. Heller

Enclosure

HARD COPY

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15928



In the Matter of

Siming Yang,

Respondent.

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

Pursuant to Rule 250 of the Securities and Exchange Commission's Rules of Practice, the Division of Enforcement ("the Division") respectfully submits this Memorandum of Law in Support of its Motion for Summary Disposition against Respondent Siming Yang ("Yang" or "Respondent"). The Division respectfully requests that the Court issue an Order barring Yang from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent or nationally recognized statistical rating organization based on the permanent injunction entered against him in *SEC v. Yang*, 12-CV-2473 (N.D. Ill.).

STATEMENT OF UNDISPUTED FACTS

A. Allegations in the Complaint

On February 6, 2013, the U.S. Securities and Exchange Commission ("Commission") filed a second amended complaint ("Complaint") against Yang and others alleging that Yang

engaged in front-running in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Rule 10b-5 thereunder and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act"). (Ex. A, Compl. Counts III –IV.) The Commission further alleged that Yang filed false Schedule 13D forms with the Commission in violation of Sections 10(b) and 13(d) of the Exchange Act and Rules 10b-5, 13d-1 and13d-2 thereunder. (*Id.* at Counts V-VI.) The Commission also alleged that Yang engaged in insider trading in violation of Section 10(b) of the Exchange Act. (*Id.* at Counts I-II.)[1]

In its Complaint, the Commission alleged that in January 2012, while working for a New York-based registered broker-dealer and investment adviser, Yang secretly started his own investment firm, Prestige Trade Investments Limited ("Prestige"). (Compl. ¶ 4.) Yang acted as an investment adviser to Prestige. (*Id.* ¶ 39.) He created Prestige's investment strategy and directed all trades on its behalf. (*Id.*) In exchange for his services as Prestige's investment adviser, Prestige agreed to pay Yang a management fee and a salary equal to .5% of Prestige's net asset value, as well as a bonus tied to Prestige's investment gains. (*Id.*)

The Commission also alleged that Yang engaged in front-running by purchasing shares of Zhongpin, Inc. ("Zhongpin")[2] for his personal account immediately before placing orders to buy large, market-moving amounts of the same security for Prestige. In February 2012, Yang traveled to China and raised approximately $30 million from investors for

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[1] At trial, Yang prevailed on the insider trading claim.

[2] Zhongpin is a Delaware Corporation headquartered in Changge City, Henan Province, China. Zhongpin is a meat and food processing company that specializes in pork and processed pork products. The company's common stock is registered under Section 12(b) of the Exchange Act and trades on the NASDAQ (under the ticker symbol "HOGS"). Its options trade on the Chicago Board Options Exchange and other options markets. (Compl. ¶ 24.)

Prestige. (*Id.* ¶ 4.) Between March 15 and March 21, 2012, Yang used $29.8 million of Prestige's funds to purchase over 3 million shares of Zhongpin securities. (*Id.* ¶ 71.) On March 14, prior to Prestige's purchases, Yang purchased for himself 50,000 shares of Zhongpin stock and nearly 2,000 Zhongpin call options in his personal brokerage account. (*Id.* ¶ 6.)

The Commission alleged that Yang caused Prestige to fraudulently file false Schedule 13D forms with the Commission that failed to report his personal transactions in Zhongpin securities. On April 2, 2012, Yang caused Prestige to file a Schedule 13D and later an amended Schedule 13D disclosing Prestige's acquisition of Zhongpin stock. (*Id.* ¶¶ 85, 92.) Yang failed to disclose in either filing his purchases of Zhongpin securities. (*Id.* ¶¶ 88, 89, 92.) In fact, Yang affirmatively stated that he had not purchased shares of Zhongpin in the preceding 60 day period. (*Id.* ¶ 88.)

B. Jury Trial and Final Judgment

In January 2014, the Commission and Yang participated in a six-day jury trial. At the conclusion of the trial, the district court instructed the jury that in order to find Yang liable for front-running, they must find (among other things) that:

(a) Yang acted as an investment advisor to Prestige, that is, that he was "someone who receives compensation for engaging in the business of advising others in purchasing or selling securities";

(b) Yang knowingly purchased stock for his personal account before purchasing the same stock for Prestige; and

(c) Yang "did so to obtain a personal financial benefit without disclosing to Prestige the purchases and the conflict of interest created by the purchases."

(Ex. B, Jury Instructions at 11-12.) The jury found Yang liable for front-running. (Ex. C, Jury Verdict.)

The district court instructed the jury that in order to find Yang liable for fraudulently filing a false Schedule 13D form with the Commission, they must find that:

(a) Yang filed or caused someone else to file the form;

(b) The form contained false information; and

(c) Yang knew the information was false.

(*Id.* at 14.) The jury found Yang liable for filing false Schedules 13D. (Jury Verdict.)

On May 27, 2014, the district court entered a final judgment against Yang, permanently enjoining him from future violations of Sections 10(b) and 13(d) of the Exchange Act, Rules 10b-5, 13d-1 and 13d-2 thereunder and Sections 206(1) and 206(2) of the Advisers Act. (Ex. D, Final Judgment.)

In its accompanying opinion, the district court explained that a permanent injunction was appropriate, largely because "Yang was shown to have the level of scienter required to prove the violations" and because of Yang's further misconduct following the initiation of the SEC's suit against him. (Ex. E, Memorandum Opinion and Order at 3.)

The misconduct referenced by the district court concerned a March 27, 2013 agreement between Yang and Prestige. In the agreement, Yang and Prestige agreed to suspend Yang's salary and any money owed to him under his service contract. (Ex. F, March 27, 2013 Prestige Board Resolution.) The district court found that this agreement "ran afoul of the stipulated asset freeze order" and "had both the purpose and anticipated effect of making it difficult if not impossible for the SEC to collect any disgorgement or civil penalties . . ." (Memorandum Opinion and Order at 3.) The court was particularly troubled by Yang's "intent to evade legal sanctions and the rather obvious implication this has regarding the likelihood of future violations." (*Id.*)

The district court also considered Yang's ongoing illegal trading activity during the trial. In May 2013—well after the SEC initiated charges and after the court froze Yang's assets—Yang opened a new personal brokerage account at Fidelity Investments ("Fidelity") and transferred $90,000 into the account. (Ex. G, Account Opening Documents and Account Statements at 1, 10.)

Yang failed to disclose this new account to the SEC and the district court, even though he had several opportunities and the responsibility to do so. Yang failed to disclose the account in response to a specific interrogatory requesting that Yang identify all of his brokerage accounts. (Ex. H., Yang's Response to Interrogatory #1.) Yang also had a continuing duty to supplement discovery. And, his transfer, withdrawal, removal, and concealment of assets violated the asset freeze order which expressly barred such activity.

The district court found that this trading activity likely violated the asset freeze order and reflected "an ongoing intention to trade on U.S. markets, despite Yang's protestations to the contrary." (Memorandum Opinion and Order at 3-4.)

C. The Follow-on Administrative Proceeding

The Commission issued an Order Instituting Proceedings in this matter on June 12, 2014, which alleged as follows:

> Yang, age 37, is a citizen of the People's Republic of China. From January 2008 through at least April 2012, Yang maintained a residence in New York, New York. From 2008 until March 30, 2012, Yang was employed as a research analyst with a New York-based registered broker/dealer and investment adviser, BAMCO, Inc. ("BAMCO").

(June 12, 2014, OIP ¶ 1.)

On July 22, 2014, Yang filed an answer denying that he worked for BAMCO, a registered investment adviser. (July 22, 2014 OIP Answer.) Respondent's counsel reiterated

this denial during a telephonic prehearing conference on September 5, 2014, stating: "[w]e contest that [Yang] was working for an investment advisor. BAMCO was the investment advisor." (Ex. I, Prehearing Conference Transcript at 4:15-16.)

In response, the Division filed a motion to amend the OIP on September 18, 2014. On November 19, 2014, the Commission granted the Division's motion to amend. (Ex. J, Order Granting Motion to Amend OIP.) The Amended OIP alleges:

> Yang, age 37, is a citizen of the People's Republic of China. From January 2008 through at least April 2012, Yang maintained a residence in New York, New York. From 2008 until March 30, 2012, Yang was employed as a research analyst with New York-based registered investment adviser, BAMCO, Inc. ("BAMCO"), and/or registered broker-dealer Baron Capital, Inc., and/or registered investment adviser Baron Capital Management, Inc., all affiliated subsidiaries of investment management holding company, Baron Capital Group, Inc. Yang also acted as the investment adviser to his own investment firm, Prestige Trade Investments Limited ("Prestige").

(November 19, 2014 Amended OIP ¶ 1.) The Amended OIP also added Exchange Act 15(b) as an alternative statutory basis for instituting the OIP. (*Id.*)

On December 9, 2014, Yang filed an answer to the Amended OIP in which he continued to deny any association with BAMCO,[3] and denied that he acted as an investment adviser to Prestige. (December 9, 2014 Answer to Amended OIP.)

ARGUMENT

A. Standard for Summary Disposition

Rule 250(a) of the Commission's Rules of Practice permits a party, with leave of the hearing officer, to move for summary disposition on any or all of the OIP's allegations. On

[3] In his answer to the Amended OIP, Respondent incorrectly stated that the Division alleged that BAMCO was a registered broker-dealer. (December 9, 2014 Answer to Amended OIP.) In fact, the Division alleged that BAMCO was a registered investment adviser. (November 19, 2014 Amend OIP.)

September 5, 2014, the Court granted the Division leave to file a motion for summary disposition against Yang. (September 5, 2014 Prehearing Order.)

A motion for summary disposition should be granted when there is "no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." Rule of Practice 250(a). To defeat such a motion, the opposing party must demonstrate with specificity a genuine issue for a hearing and "may not rest upon the mere allegations or denials of its pleadings." *See In the Matter of Currency Trading Int'l, Inc., et al.*, Initial Dec. Rel. No. 263, 2004 WL 2297418, at *2 (Oct. 12, 2004).

Summary disposition is particularly well-suited to proceedings based on the entry of an injunction against a respondent, such as the injunction entered against Yang. *See In the Matter of Jeffery L. Gibson*, Exchange Act Rel. No. 57266, Advisers Act Rel. No. 2700, 2008 WL 294717, at *5 (Feb. 4, 2008) ("Use of the summary procedure has been repeatedly upheld in cases such as this one where respondent has been enjoined or convicted, and the sole determination concerns the appropriate sanction.") (citations omitted), *aff'd, Gibson v. SEC*, 561 F.3d 548 (6th Cir. 2009); *In the Matter of Marshall E. Melton*, Advisers Act Release No. 2151, 2003 WL 21729839, at *3 (July 25, 2003) ("[T]he Commission has concluded that a consent injunction, 'no less than one issued after trial upon a determination of the allegations, may furnish the ***sole*** basis for remedial action . . . if such action is in the public interest.'") (citation omitted) (emphasis added).

B. The Undisputed Material Facts Compel Summary Disposition in Favor of the Division

Based on the record before it, this Court should conclude as a matter of law that remedial sanctions are in the public interest and for the protection of investors. The district

court enjoined Yang from future violation of Sections 10(b) and 13(d) of the Exchange Act and Section 206(1) and 206(2) of the Advisers Act.

The permanent injunction that the Court imposed against Yang is all but outcome dispositive. *See Currency Trading Int'l*, 2004 WL 2297418, at *3 (citing *Melton*, 2003 WL 21729839, at *9 ("[W]e believe that ordinarily, and in the absence of evidence to the contrary, it will be in the public interest to revoke the registration of, or suspend or bar from participation in the securities industry . . . a respondent who is enjoined from violating the antifraud provisions.")). This Court routinely – if not uniformly – bars respondents whom district courts have permanently enjoined from violating the antifraud provisions of the federal securities laws. *See In the Matter of Stefan H. Benger*, Exchange Act Rel. No. 499, Advisers Act Rel. No. 2840, 2013 WL 3832276, at *4 (Jul. 15, 2013) (collecting cases). Respondent admits that the district court enjoined him from violating the federal securities laws, including the antifraud provisions. (Answer to Amended OIP ¶ 2.)

Yang tries manufacturing an issue of material fact by denying that he was employed by a registered entity, either BAMCO, a registered investment adviser, or Baron Capital, Inc. a registered broker-dealer. But the record is clear on this point; Yang was affiliated with a registered entity. BAMCO submitted Yang's H-1B petition for his work visa. (Ex. K, Application for H-1B; Ex. L, Letter from BAMCO in Support of H-1B Application.) BAMCO is listed as the petitioner – that is, his employer – on the approval from the Department of Homeland Security for his visa. (Ex. M, Approval of H-1B Petition.)

Yang's own sworn trial testimony is also unequivocal on this score: "I was hired by Baron Asset Management Company, BAMCO." (Ex. N, Excerpt of Jan. 8, 2014 Trial Transcript at 764: 2-3.) And in case there was any lingering doubt in the minds of the jurors

about who employed him, Yang then reiterated to the jury: "I was employed and paid by BAMCO." (*Id.* at 764:21-22.) Having provided such sworn testimony, Yang is now foreclosed from denying employment with BAMCO. *See Essick v. Yellow Freight Systems, Inc.*, 965 F.2d 334, 335 (7th Cir.1992) ("[I]f we allowed a party to create a genuine issue of material fact by changing his prior testimony: the very purpose of the summary judgment motion-to weed out unfounded claims, specious denials, and sham defenses-would be severely undercut.")

Above and beyond Yang's association with BAMCO, there is ample evidence of Yang's affiliation with Baron Capital, Inc., a registered broker-dealer. Yang signed a Background Investigation Consent form that gave Baron Capital, Inc. authority to conduct a background check. (Ex. O, Background Investigation Consent Form.) Yang completed an "Employee Questionnaire" for Baron Capital Inc. (Ex. P, Baron Capital Inc. Employee Questionnaire.) Baron Capital, Inc. supplied Yang his offer letter, paychecks, and the new employee handbook. (Ex. Q, Offer Letter; Ex. R, Paychecks from Baron Capital, Inc.; Ex. S, New Employee Handbook Acceptance.)

In a futile effort to defeat summary disposition, Yang also denies that he was working as an investment adviser for Prestige. But again, this is belied by his own sworn testimony at trial that he was "the investment manager for Prestige." (Jan. 8, 2014 Trial Transcript. at 777:14-15.) Yang further testified that he selected Prestige's investment strategy and directed Prestige to purchase shares of Zhongpin securities. (*Id.* at 777-779.)

Yang's service contract supports his sworn testimony to the jury. The contract states that Yang was compensated to "select, engage, conduct relations, structure, negotiate, purchase and dispose of Investments" on behalf of Prestige. (Ex. T, Service Contract at 3-4.) According to the Advisers Act, an investment adviser is "any person who, for

compensation, engages in the business of advising others . . . as to the advisability of investing in, purchasing, or selling securities." Advisers Act § 202(a)(11). Yang's conduct on behalf of Prestige falls squarely within the statutory definition of an investment advisor: he was being paid to offer investment advice to Prestige.

Yang's revisionist attempts to distance himself from Prestige are also thwarted by the jury's findings. Judge Kennelly instructed the jury that in order to find Yang liable for front-running ***the SEC had to prove that Yang was acting as investment adviser to Prestige***. (Jury Instructions at 11 ¶ 1.) Given the jury's verdict finding Yang liable for front-running, these issues are uncontested for purposes of summary disposition. *In the Matter of Gregory Bartko, Esq.* Initial Decision Release No. 467, 2012 WL 3578907, at *2 (Aug. 21, 2012) ("The findings and conclusions made in the underlying action are immune from attack in a follow-on administrative proceeding."). Moreover, Yang is estopped from relitigating the issue of his role with Prestige. *See id.* ("The Commission does not permit a respondent to relitigate issues that were addressed in a previous proceeding against the respondent."); *In the Matter of Rita J. McConville,* Release No. 2271, 2005 WL 1560276, at *14 (June 30, 2005) ("The doctrine of collateral estoppel protects litigants from relitigating an identical issue with the same party.") (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979)).

C. A Collateral Bar Is Appropriate Against Respondent

Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act authorize the Commission to bar a person from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization if the person has been, among other things, enjoined from any conduct or practice in connection with the purchase or sale of a security. *See Vladimir Boris*

Bugarski, Exchange Act Rel. No. 66842, 2012 WL 1377357, at *6 (Apr. 20, 2012) (imposing collateral bar).

To determine what sanctions are in the public interest, the Commission considers the factors enumerated in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).[4] The inquiry is a flexible one, and no one factor is dispositive. The *Steadman* factors weigh heavily in favor of barring Yang.

1. Yang's Conduct was Egregious and He Acted Knowingly or Recklessly

The egregiousness of Yang's conduct and his high degree of scienter militate strongly in favor of the imposition of a permanent bar. "Section 13(d) is not a mere 'technical' reporting provision; it is, rather, the 'pivot' of a regulatory scheme that may represent the only way that corporations, their shareholders and others can adequately evaluate . . . the possible effects of a change in substantial shareholdings." *SEC v. Drexel Burnham Lambert Inc.*, 837 F. Supp. 587, 607 (S.D.N.Y. 1993) (quoting *SEC v. First City Financial Corp, Ltd.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)). Section 13(d) is thus "a crucial requirement in the congressional scheme, and a violator . . . improperly benefits by purchasing stocks at an artificially low price because of a breach of the duty Congress imposed to disclose his investment position." *First City*, 890 F.2d at 1230. Thus, by committing securities fraud and violating Section 13(d) and

[4] As the Commission has previously stated: "[w]hen considering whether an administrative sanction serves the public interest, we consider the factors identified in *Steadman v. SEC*: the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations." *In the Matter of Gary M. Kornman*, Exchange Act Rel. No. 59403, Advisers Act Rel. No. 2840, 2009 WL 367635, at *6 (Feb. 13, 2009).

Rule 13d-1 of the Exchange Act, Yang "caused injury to other market participants who sold stock without knowledge of [his] holdings." *Id.*

In the Schedule 13D filings, Yang not only hid his personal Zhongpin trades, but ***affirmatively represented*** that he did not hold any other Zhongpin securities. The jury found that Yang either knew or at the very least was reckless in not knowing of the false information in the public filings. (Jury Instructions at 13-14.) Given the jury's finding that Yang knowingly or recklessly lied to the SEC in public disclosures, the public interest is best served by barring Yang from the securities industry.

The jury also found Yang liable for front-running, which in turn required a finding by the jurors that he "knowingly purchased stock or options of Zhongpin for his personal account before purchasing Zhongpin stock for Prestige and that Mr. Yang did so to obtain a personal financial benefit without disclosing to Prestige the purchases and the conflict of interest created by the purchases." (Jury Instructions at 11-12.) Again, this finding establishes that the public interest would be furthered by barring Yang from the securities industry.

2. Yang Has Not Acknowledged the Wrongful Nature of His Conduct or Provided Assurances Against Future Wrongdoing.

Rather than acknowledging the wrongful nature of his conduct, Yang has instead steadfastly denied any wrongdoing. An unfortunate corollary to such continued denials is his concomitant inability to meaningfully or sincerely assure the Commission that he will not engage in such misconduct going forward. As the Seventh Circuit has recognized, "the criminal who in the teeth of the evidence insists that he is innocent . . . demonstrates by his obduracy the likelihood that he will repeat his crime." *See SEC v. Lipson*, 278 F.3d 656, 664 (7th Cir. 2002).

Not only has Yang denied any wrongdoing; he has continued to engage in malfeasance. In this regard, the district court noted that Yang's conduct after the initiation of the SEC's suit, including the trading in the Fidelity account, and the contract he entered into with Prestige forfeiting any and all monies owed to him, bespeaks a reasonable likelihood of future violations. The district court found that this factor weighed heavily in favor of imposing a permanent injunction.

3. Yang's Occupation Will Present Opportunities for Future Violations

Yang is 38 years old. His youth and passion for investing further supports the need for a bar. *See Currency Trading Int'l*, 2004 WL 2297418, at *4 ("Although [the Respondent] is not currently involved in the securities industry, he is relative young (age forty-seven) and has a long business life ahead of him."); *SEC v. Olins*, 762 F. Supp. 2d. 1193, 1196 (N.D. Cal. 2011) (the defendant "had an extensive history of securities trading" and was "in a position whereby he will be faced with decisions implicating the securities laws."). Yang's trading activity in May 2013, after the SEC filed its suit, evinces his desire to remain in the investment industry, despite his assertions to the contrary (Ex. U, Excerpt of Yang's Response to Motion for Remedies at 5).

CONCLUSION

For these reasons, the Division hereby respectfully requests that the Court enter an order of summary disposition in the Division's favor and against Yang. The Division respectfully requests that the Court issue an order barring Yang from association with any

broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Dated: January 26, 2015

Respectfully submitted,

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ONE OF THE ATTORNEYS FOR
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