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 REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION AND BRIEF IN SUPPORT

Jonathan Polish
Tim Leiman
Emily Heller
Jedediah B. Forkner
Division of Enforcement
U.S. Securities and Exchange Commission
175 West Jackson Boulevard, Suite 900
Chicago, IL 60604

COUNSEL FOR
DIVISION OF ENFORCEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

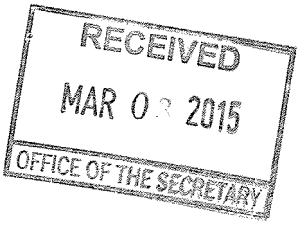
ADMINISTRATIVE PROCEEDING
File No. 3-15928

HARD COPY

In the Matter of

Siming Yang,

Respondent.



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

In his brief, respondent Siming Yang tries manufacturing a genuine issue of material fact. He seeks to re-litigate the district court case; to spin the jury's finding that he engaged in securities fraud; and to downplay the Court's subsequent imposition of an antifraud injunction. But the Commission has repeatedly cautioned that summary disposition isn't the proper venue to rehash matters litigated before a jury and adjudicated before a federal district court.

Elsewhere in his brief Yang assures this Tribunal that he has no intention of working in the securities industry ever again – or of even staying in the United States. Were that the case, though, one would assume he would have simply consented to a collateral bar. Instead he has chosen to fight the imposition of one. Given this reality, one could be forgiven for questioning the sincerity of his assurances.

His brief throws more against the wall, including *Morrison*-type arguments and the like. But no amount of red herrings can mask the scent of the jury verdict rendered against him for violations of Section 10(b) and Rule 10b-5—among other claims—and the district

court's imposition of an antifraud injunction. These and other realities establish that, absent a collateral bar, the likelihood of future violations of the securities laws is high, with the concomitant risks to the investing public. This Court should act accordingly, grant the Division's motion for summary disposition, and impose a collateral bar against respondent Siming Yang.

ARGUMENT

A. The Jury Found That Yang Acted As An Investment Adviser.

Yang's first red herring concerns whether or not he was an investment adviser or associated with a registered broker/dealer. But the jury's finding of Yang's liability for front-running required it to find that he "act[ed] as an investment adviser[,]" that is, that he "receive[d] compensation for engaging in the business of advising others in purchasing or selling securities." (Div. Opening Brief, Ex. B, Jury Instructions, pp. 11-12.) Yang is collaterally estopped from arguing otherwise.

Yang dedicates the first half of his brief to a shell game of sorts. He keeps the Court guessing about which Baron entity he was employed by – BAMCO, Inc. ("BAMCO"), Baron Capital, Inc., Baron Capital Management, Inc., or some other entity. Incredibly, he fails to provide an answer, preferring instead to obfuscate and misdirect, hoping that doing so will conjure a genuine issue of material fact. Yang cannot obscure the unequivocal testimony he provided to the jury under oath: "I was hired by Baron Asset Management Company, BAMCO." (Div. Opening Brief, Ex. N, Excerpt of Jan. 8, 2014 Trial Tr., at

764:2-3.) "I was employed and paid by BAMCO." (*Id.*, at 764:21-22.) And Yang does not and cannot dispute that BAMCO is a registered investment adviser.[1]

Yang also attempts to disavow his role as investment adviser to Prestige. But his attempts are futile—the jury found that Yang acted as an investment adviser to Prestige. (Jury Instructions at 11, ¶ 1.)

B. This Court Has The Authority To Impose A Bar Against Yang.

Yang's appeal of the district court judgment is currently pending before the Seventh Circuit. In that appeal, Yang argues that the district court lacked subject matter jurisdiction given its international elements, or that under *Morrison* the allegations are predominantly extraterritorial in nature such that the SEC did not state a viable claim under Section 10(b) of the Exchange Act.

Yang has essentially cut-and-pasted chunks of those arguments into his brief opposing summary disposition in this proceeding. This Court already rejected his efforts to stay this proceeding pending his Seventh Circuit appeal. Should he prevail on appeal, that may impact the relief ordered by this Tribunal. Assuming the Seventh Circuit clears those

---

[1] Even if – counterfactually – Yang was associated with an ***unregistered*** broker/dealer, it makes no difference since "[i]t is well established that we are authorized to sanction an associated person of an ***unregistered*** broker-dealer or investment adviser in a follow-on administrative proceeding." *In the Matter of Tzemach David Netzer Korem*, Securities Exchange Release No. 70044, at 12 (July 26, 2013) (collecting cases; emphasis added).*See also In the Matter of Toby G. Scammell*, Investment Advisers Act Release No. 3961, at 9, n. 29 (Oct. 29, 2014) ("We can impose sanctions for wrongdoing committed by persons associated with an investment adviser, even if the adviser is not registered under the Advisers Act"); *In the Matter of John J. Bravata, Richard J. Trabulsy, and Antonio M. Bravata*, Initial Decision Release No. 737, at 5 (Jan. 16, 2015) ("Although Antonio Bravata was not a registrant or associated with a registrant, the Commission has authority to bar persons from the securities industry based on their association with unregistered brokers.") (citations omitted).

roadblocks—an assumption this Court has properly made for present purposes[2]—what remains is an antifraud injunction against Yang by a federal district court resulting from his conduct or practice in connection with the purchase or sale of a security. That simple and undisputed fact, standing alone, confers the Commission with the authority to bar Yang from serving in myriad capacities within the U.S. securities industry, pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act. That is the Commission's right—indeed, it is the Commission's obligation—as expressly conferred upon it by Congress. Moreover, there is nothing "extraterritorial" about the Commission barring someone's professional participation in the United States securities market.

C. Yang's Complaints That He's Been Punished Enough Ignores The Only Relevant Considerations: Promoting The Public Interest And Protecting The Investing Public.

Yang complains that he's been punished enough, both in the district court, and in the court of public opinion. These pleas reflect a fundamental misunderstanding of the purpose served by a collateral bar. It's not about him. It's about the public. A collateral bar exists to serve the public interest, to protect the investing public. Thus, the propriety of a collateral bar depends upon an assessment of whether such a bar is in the public interest; whether it is necessary or appropriate to protect investors and markets; and specifically whether such a remedy will protect the trading public from further harm. *See In the Matter of Ross Mandell*, Securities Exchange Act Release No. 71668, at 3-4 (Mar. 7, 2014). In this regard, when considering a bar the Commission's focus "is on the welfare of investors generally and the threat one poses to investors and the market in the future." *In the Matter of Tzemach David*

---

[2] *See In the Matter of Joseph P. Galluzzi*, Securities Exchange Act Release No. 46405 (Aug 23, 2002), 55 S.E.C. 1110, 1116 n. 21; *In the Matter of John Francis D'Acquisto*, Investment Advisers Act Release No. 1696 (Jan. 21, 1998), 53 S.E.C. 440, 444 n.9.

Netzer Korem, Securities Exchange Release No. 70044, at 8 (July 26, 2013) (quoting *Gary M. Kornman*, Exchange Act Release No. 59403 (Feb. 13, 2009)).

Set against this backdrop, the need for a collateral bar against Yang is readily apparent. As the Commission found in another case in terms entirely applicable here: "[w]hile the sanctions imposed by the district court—the permanent injunction, disgorgement, and third-tier civil penalties—are severe, this simply underscores the seriousness of Respondents' misconduct." *In the Matter of Vladimir Boris Bugarski, et al.*, Securities Exchange Act Release No. 66842, at 8 (Apr. 20, 2012). Imposing a bar from participation in the securities industry, the Commission found, "provides an additional layer of protection to the public beyond the sanctions imposed by the district court." *Id.*

So it is here. The jury's determination that he engaged in securities fraud goes a long way towards establishing that the public interest is best served by imposing a collateral bar. The Commission has "consistently found that antifraud violations" are "especially serious and subject to the severest sanctions." *In the Matter of Martin A. Armstrong*, Investment Advisers Act Release No. 2926, at 6 (Sept. 17, 2009) (quoting *Jose P. Zollino*, Exchange Act Rel. No. 55107 (Jan. 16, 2007); *Marshall E. Melton*, 56 S.E.C. 695, 713 (2003)). "'Fidelity to the public interest'" requires severe sanctions for fraudulent conduct because the 'securities business is one in which opportunities for dishonesty recur constantly.'" *In the Matter of Toby G. Scammell*, Investment Advisers Act Release 3961, at 10 (Oct. 29, 2014) (quoting *Chris G. Gunderson*, Exchange Release No. 61234, n. 39 (Dec. 23, 2009)); *In the Matter of Martin A. Armstrong*, Investment Advisers Act Release No. 2926, at 6 (Sept. 17, 2009) (quoting *Richard C. Spangler, Inc.*, 46 S.E.C. 238, 252 (1976)).

Thus, "ordinarily, and in the absence of evidence to the contrary, it will be in the public interest to... bar from participation in the securities industry... a respondent who is enjoined from violating the antifraud provisions." *In the Matter of Toby G. Scammell*, Investment Advisers Act Release 3961, at 10 (Oct. 29, 2014); *In the Matter of Martin A. Armstrong*, Investment Advisers Act Release No. 2926, at 6 (Sept. 17, 2009) (quoting *Melton*, 56 S.E.C. at 713). In this regard, the Commission has found that "an antifraud injunction can, in the first instance, indicate the appropriateness in the public interest of... [a] bar from participation in the securities industry." *Id.* (quoting *Melton,* 56 S.E.C. at 710).[3]

As these Commission pronouncements make clear, it would be highly unusual, if not unprecedented, for a collateral bar not to flow from the issuance of an antifraud injunction by a federal district court. This is all the more true given the jury's finding that Yang knowingly engaged in securities fraud. Tellingly, neither Yang nor the Division has found a

---

[3] Given the integrity expected and required of a securities professional, this effective presumption—that a respondent who has been enjoined by a federal court from violating the antifraud provisions of the securities laws should presumptively receive a collateral bar—stands to reason. As the Commission has observed, "[t]he proper functioning of the securities industry and markets depends on the integrity of industry participants and their commitment to transparent disclosure. Securities industry participation by persons with a history of fraudulent conduct is antithetical to the protection of investors." *In the Matter of John W. Lawton*, Investment Advisers Act Release No. 3513, at 18 (Dec. 13, 2012). The Commission has further held in this regard:

> "[a]s we have stated, '[t]he securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence.' A fundamental purpose common to all federal securities laws and, in turn, applicable to all securities professionals bound by them is 'to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.' It is therefore essential that the 'highest ethical standards prevail in every facet of the securities industry.'"

In the Matter of Tzemach David Netzer Korem, Securities Exchange Release No. 70044, at 10 (July 26, 2013) (collecting cases).

single instance in which the Commission failed to impose a permanent bar following a jury finding of securities fraud.

As discussed below, Yang vociferously attacks the jury verdict, arguing that both his front-running and the Section 13(d) nondisclosure were immaterial or otherwise *de minimis*. The Commission has made it abundantly clear, however, that this is not the venue for such a challenge. "Follow-on proceedings are not an appropriate forum to 'revisit the factual basis for,' or an order issued by a federal court, and challenges to such orders do not present genuine issues of material fact in our follow-on proceedings." *In the Matter of John W. Lawton*, Investment Advisers Act Release No. 3513, at 7 (Dec. 13, 2012) (collecting cases).

D. Yang's Lack Of Contrition Is Poignantly Manifested In His Futile Efforts To Downplay The Jury Verdict and Permanent Injunction.

One will look in vain for anything in Yang's brief smacking of contrition or remorse. In place of such *Steadman* factors, Yang instead fills his brief with excuses, indignation, and a fundamental ignorance both of the significance of the jury's verdict and of the district court's subsequent antifraud injunction. He characterizes the jury's verdict against him for front-running as "in form, not in substance." (Yang's Response at 16.) Of course, the jury made no such distinction when it found that Yang knowingly (a) "employed a device, scheme, or artifice to defraud Prestige or its clients, or (b) engaged in transactions, practices, or courses of business that operated as a fraud or deceit upon Prestige or its clients." (Div. Opening Brief, Ex. B, Jury Instructions, p. 11.)

Yang similarly discounts the jury's Section 13(d) verdict, stating that "[o]nly [a] comparatively tiny number of purchases were not disclosed on the Schedule 13D." This was the same tired argument Yang trotted out to the jury and the district court. The jury

apparently appreciated the significance of Yang's Schedule 13D omission, and accordingly found him liable on these counts.

Perhaps most telling—and inexplicable—is Yang's assertion that the securities law violations for which he was found liable involved only a "slight" degree of scienter. (Yang's Response at 16-18.) Such a statement reflects Yang's willful ignorance of the jury's actual verdict and finding. In the course of finding Yang liable for front-running, the jury found that "Mr. Yang acted knowingly." (Div. Opening Brief, Ex. B, Jury Instructions, p. 11.) For one of the claims relating to the false SEC filing, the jury found that "Mr. Yang knew that this statement was false." (*Id.,* at 14.) There's nothing "slight" about the jury's finding that Yang knowingly made false statements and engaged in deceptive conduct.

The Commission has consistently construed such attempts to minimize adjudicated misconduct as powerful evidence of a respondent's failure to appreciate the seriousness of such malfeasance and "how such conduct violated the duties of a securities professional." *In the Matter of John W. Lawton*, Investment Advisers Act Release No. 3513, at 20 (Dec. 13, 2012). *See also In the Matter of Toby G. Scammell*, Investment Advisers Act Release 3961, at 12 (Oct. 29, 2014) ("Moreover, Scammell has not fully acknowledged his wrongful conduct. In his opening brief on appeal, for example, he characterizes his egregious insider trading as a mere 'lapse in judgment.' Scammell's failure to recognize meaningfully the seriousness of his insider trading offense indicates there is a significant risk that, given the opportunity, he would commit further misconduct in the future."); *In the Matter of Ross Mandell*, Securities Exchange Act Release No. 71668, at 8 (Mar. 7, 2014) ("Mandell's attempts to deflect responsibility for his fraudulent scheme demonstrate either a fundamental misunderstanding of his responsibilities as a securities professional or that he 'hold[s] those obligations in

contempt.' In either case, these attempts reveal a serious risk he would commit further misconduct if permitted in any area of the industry.") (quoting *Barr Fin. Group, Inc.*, Advisers Act Release No. 2179 (Oct. 2, 2003)).

Elsewhere, Yang argues that a collateral bar is unwarranted since "this case did not result in significant harm to any investors." (Yang's Response at 9.) This argument misapprehends both the purpose of a collateral bar and the Commission's focus on the wellbeing of the securities market as a whole. As the Commission noted in the course of rejecting precisely such an argument: "[a]lthough the record does not contain evidence of direct investor harm, 'our focus is on the welfare of investors generally and the threat one poses to investors and the market in the future.'" *In the Matter of Tzemach David Netzer Korem*, Securities Exchange Release No. 70044, at 8 (July 26, 2013) (quoting *Gary M. Kornman*, Exchange Act Release No. 59403 (Feb. 13, 2009)).

Then there's Yang's mid-litigation misconduct that earned him the ire of the district court. Such violations of court orders and Yang's discovery obligations were indisputable factors in the court's imposition of a permanent injunction. Yang attempts to re-litigate these issues in this forum. But as noted above, the time to do so has passed.

Next, Yang urges this Court to ignore his mid-litigation misconduct because "[t]here is no allegation whatsoever, that such acts violated the federal securities laws in any way." (Yang's Response at 13.) While that's true, it's irrelevant. As the Commission noted about another respondent's post-litigation misconduct, in terms every bit as applicable to Yang: "[the respondent's] conduct since the entry of the permanent injunction is further evidence of his lack of remorse and his failure to understand the duties of a securities professional." *In the Matter of John W. Lawton*, Investment Advisers Act Release No. 3513, at 20 (Dec. 13,

2012). So it is here, regardless of whether his misconduct runs afoul of a specific securities law.

Lastly, Yang notes that at the very least he wasn't held in contempt of court. That's hardly a boast-worthy accomplishment. And given the Court's finding that Yang's actions evinced an "intent to evade legal sanctions," it is safe to conclude that the district court could have sanctioned Yang for his misconduct. (Div. Opening Brief, Ex. E, Mem. Opinion and Order at 3.)

E. By Insisting That He Has No Intention of Working In The Securities Industry Ever Again, Yang Protests Too Much.

In an effort to fend off a collateral bar, Yang assures this Court that a bar is unnecessary because "he has no desire to ever trade in US securities, in any securities traded on US exchanges, or service any clients in the US." (Yang's Response at 12.) Presumably Yang hopes such assurances will fare better here than they did before Judge Kennelly, who found that Yang was likely to engage in future securities laws violations and had "an ongoing intention to trade on U.S. markets, despite Yang's protestations to the contrary." (Div. Opening Brief, Ex. E, Mem. Opinion and Order, at 3-4.)

One wonders why, if Yang truly had no interest in participating in the U.S. securities market, he did not default or consent to the requested relief, and instead waged a costly battle to stave off a collateral bar. In this regard, his actions speak louder than his self-serving words. Moreover, even if there's some modicum of sincerity to his assurances, nothing would cause him to reconsider faster than this Court declining to impose such relief. And, at the age of 38, he has plenty of time to reconsider.

It is perhaps for this reason that the Commission has consistently imposed industry bars notwithstanding similar-sounding assurances by other respondents. *See In the Matter of*

Tzemach David Netzer Korem, Securities Exchange Release No. 70044, at 10 (July 26, 2013) ("If, however, Korem's promise to remain out of the securities industry is sincere, a bar imposes no substantial burden on him while prophylactically protecting the investing public."); *In the Matter of Toby G. Scammell*, Investment Advisers Act Release 3961, at 12-13 (Oct. 29, 2014) ("Although he asserts that 'at this time' he has no intention of working in the securities industry, his asserted involvement in 'found[ing] a start-up company and 'helping that company grow,' coupled with his admitted 'fascination' with the markets, indicates that he is likely to return to the securities industry in some capacity and thereby threaten the public interest, if so permitted.").

Yang's lack of disciplinary history preceding this matter during his brief securities career does not help his cause. As the Commission has noted: "lack of disciplinary history is not mitigating for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional." *In the Matter of Alfred Clay Ludlum, III*, Investment Advisers Act Release No. 3628, at 9 (July 11, 2013) (quoting *Philippe N. Keyes,* Exchange Act Release No. 54723 (Nov. 8, 2006)).

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: March 2, 2015

Respectfully submitted,

Jonathan Polish by E.H.

Jonathan Polish
Securities and Exchange Commission
175 West Jackson Boulevard, Suite 900
Chicago, IL 60604

ONE OF THE ATTORNEYS FOR
THE DIVISION OF ENFORCEMENT

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
CHICAGO REGIONAL OFFICE
SUITE 900
175 WEST JACKSON BOULEVARD
CHICAGO, ILLINOIS 60604-2615

EMILY A. HELLER
ATTORNEY
DIVISION OF ENFORCEMENT

HELLERE@SEC.GOV
TELEPHONE: (312) 886-2485
FACSIMILE: (312) 353-7398

March 2, 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) Division of Enforcement's Reply in Support of its 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

Enclosures