UNITED STATES OF AMERICA
Before the
SECURITES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15928

In the Matter of

SIMING YANG,

Respondent.

ANSWER AND AFFIRMATIVE DEFENSES

Siming Yang ("Yang") in accordance with Rule 220 of the Commission's Rules of Practice, in Answer to the allegations of the Division of Enforcement ("Division"), states as follows:

After an investigation, the Division of Enforcement alleges that:

1. 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").

RESPONSE: Yang he admits he is a citizen of the People's Republic of China and that at the time the OIP was entered, he was 37 years old. Yang admits he maintained a residence in New York from January 2008 through April 2012. Yang denies that BAMCO was a registered broker/dealer.

Additionally, relating to BAMCO, in the civil action titled, *SEC v. Yang, Prestige Trade Investments Limited, Fan, and Chang*, No. 12-cv-2473, (the "Litigation"), the Division claimed Yang was employed by entities other than BAMCO, as follows:

A. In its complaint, the Division claimed Yang was employed by Baron Capital Management, a different entity from BAMCO. (SEC Complaint, ¶ 17, relevant portion of which are attached as "Exhibit A.")

B. In the Statement of Facts submitted to the court in the Litigation, the Division asserted that Yang's employer was Baron Capital Group, Inc., a different entity from BAMCO that was not a registered broker-dealer or investment adviser. (SEC's Statement of Facts, attached as "Exhibit B," Fact No. 17.)

C. The Division submitted to the court in the Litigation three affidavits from Yang's colleagues, including Michael Kass, Yang's direct supervisor. Each of the affidavits represented under penalty of perjury that Yang was employed by Baron Capital, Inc., a different entity from BAMCO that was not a registered investment adviser. (Kass Declaration, ¶¶ 1, 3; Mayorga Declaration, ¶¶ 1, 4; Susman Declaration, ¶¶ 1, 5, all attached as "Exhibit C.") Baron Capital, Inc. is not an investment adviser and is an entirely different entity than Baron Capital Group, Inc., and both are different entities from BAMCO. Yang was not a registered person with any of those entities and none ever submitted a Form U4 or Form U5 for Yang.

In light of the above, Yang lacks sufficient information to respond to the allegation that he was employed by BAMCO and, therefore, denies that allegation.

Yang further states as an affirmative defense that the Division should not be permitted to take conflicting positions in different legal forums about Yang's employer and, therefore, should be prohibited from alleging in this proceeding that Yang worked for BAMCO for multiple reasons, including but not limited to the doctrines of judicial estoppel and res judicata,

2. On May 27, 2014, a final judgment was entered against Yang, permanently enjoining him from future violations of Sections 10(b) and 13(d) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5, 13d-1 and 13d-2 thereunder, and Sections 206(1) and 206(2) of the Advisers Act, in the civil action entitled Securities and Exchange Commission v. Siming Yang, Prestige Trade Investments Limited, Caiyin Fan, Shui Chong (Eric) Chang, Civil Action Number 12-cv-2473, in the United States District Court for the Northern District of Illinois.

RESPONSE: Yang admits the allegations and states further that he prevailed in the insider trading claim, which the court determined was "the centerpiece of the case," that was "the primary focus of the dispute prior to and during the trial." (Memorandum Opinion and Order, p. 2, attached as "Exhibit D.") The court declined to order Yang to pay any disgorgement. *Id.*, at p. 4. The court found further that "there was no significant harm to investors." (*Id.*, at p. 2.) The court additionally held that "the Schedule 13D violations [...] were not terribly significant to the investing public given that Yang accurately disclosed on the forms the purchases of vastly greater amounts of stock by Prestige [a codefendant]. And it is unlikely that Prestige experienced any quantifiable harm from Yang's front-running." *Id.*

3. The Commission's complaint alleged that, among other things, Yang engaged in a fraudulent front-running scheme, whereby he sought to personally profit by purchasing Zhongpin

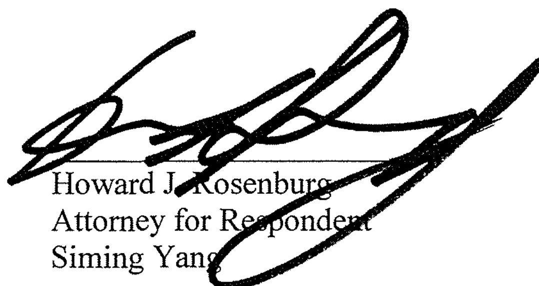
Inc. ("Zhongpin") securities in his joint personal account when he knew that he would soon complete massive, market moving purchases of Zhongpin stock on behalf of his own start-up investment firm, Prestige Trade Investments Limited ("Prestige"). The complaint alleged that while still employed with BAMCO, Yang secretly created Prestige and acted as the firm's investment adviser. Yang was responsible for creating Prestige's investment strategy and directed all trades on Prestige's behalf. Between March 15 and March 21, 2012, Yang used $29.8 million of Prestige's funds to purchase over 3 million shares of Zhongpin stock. On March 14, prior to Prestige's purchases, Yang purchased 50,000 shares of Zhongpin stock and 1,978 Zhongpin call options in his personal brokerage account.

RESPONSE: Yang denies that the complaint alleged that Yang ever was employed with BAMCO. Yang states further that the Division's original complaint alleged that Yang was employed by Baron Capital Management, which is not BAMCO. (See Exhibit A.) Additionally, that complaint included no allegations of front-running and, thus Yang denies that allegation. Yang further states that the Division's later iterations of the complaint, i.e., the first and second amendments of the complaint, in which the front-running allegations surfaced, the SEC did not allege that Yang was employed by BAMCO. Yang denies the remaining allegations in the paragraph.

The Complaint also alleged that 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. Yang failed to disclose in either Schedule 13D his purchases of Zhongpin securities in his personal account. The complaint alleged that Yang knew or recklessly disregarded that the Schedules 13D contained material misrepresentations and omissions regarding Yang's personal transactions in Zhongpin securities.

RESPONSE: The original complaint makes no mention of Schedule 13D claims and, thus, Yang denies the allegations.

Respectfully submitted,



Howard J. Rosenburg
Attorney for Respondent
Siming Yang

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EXHIBIT A

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S. SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	
	)	Case No. 12-C-2473
v.	)	
	)	Hon. Matthew F. Kennelly
SIMING YANG, PRESTIGE TRADE, INVESTMENTS LIMITED, CAIYIN FAN, AND SHUI CHONG (ERIC) CHANG,	)	
Defendants.	)	

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S LOCAL RULE 56.1 STATEMENT OF ADDITIONAL MATERIAL FACTS

Plaintiff U.S. Securities and Exchange Commission (the "SEC") pursuant to Rule 56.1(b)(3) of the Local Rules of the District Court for the Northern District of Illinois respectfully submits the following Statement of Additional facts in response to Defendant Siming Yang's and Defendant Prestige Trade Investments Limited's ("Prestige's") Motion for Summary Judgment:

Defendant Siming Yang Opens a Joint Account at Sogotrade With Caiyin Fan

1. Yang had a personal e-mail account through Google with an address of [redacted]. (*E.g.*, Dkt.#161-8, Yang Decl. at exhibts D, E and F.)

2. On November 21, 2011, account opening documents for account #5****135 were sent to Sogotrade (a division of Wang Investments) from Siming Yang's personal e-mail address [redacted]. The account opening documents listed Caiyin Fan and Siming Yang as account holders. That account was formally opened on November 25,

15. As of the close of the market on March 27, 2012 – the first day after Zhongpin's announcement – Prestige had unrealized gains of $7,672,632 on its Zhongpin stock position. (Ex. 43, Kustusch Decl. ¶¶ 9-10.)

16. In a presentation to Prestige investors, Yang represented that Prestige's portfolio would be "properly diversified…by industry…by sector and country." (Ex. 24, February 2012 Prestige Presentation V4 (Translated) at 8.)

Yang Violates His Employer's Insider Trading Policies

17. Defendant Siming Yang was retained by Baron Capital Group, Inc. – a New York-based holding company that included broker-dealer and investment adviser subsidiaries – as a Research Analyst beginning in October 2008 to conduct company and market research on behalf of two of Baron's registered mutual funds: (1) the Baron Emerging Markets Fund, and (2) the Baron International Growth Fund. He remained employed with Baron until he was terminated effective March 30, 2012. (Ex. 1, P. Patalino Decl. ¶ 2, 4; Ex. 2, Kass Decl. ¶¶ 3-4.)

18. At all times during his employment at Baron, Siming Yang was subject to Baron's written policies which – among other goals – was designed to prevent even the appearance of insider trading by Baron employees. (Ex. 1, P. Patalino Decl. ¶¶ 5-11; Ex. 7, 2/12/2008 Baron's Code of Ethics at 15-20; Ex. 8, Baron's 2/14/2012 Amended and Restated Code of Ethics at 5.)

19. Among other things, Baron's policies (a) required Yang to pre-clear all personal securities trades, (b) barred Yang from placing trades in publicly traded companies, (c) required Yang to submit periodic reports to Baron identifying all personal brokerage accounts in which he had a beneficial or controlling interest, all securities holdings and all

291-293.)

36. Yang and the other Reporting Persons stated on the Schedule 13D that they shared voting and dispositive power over the shares and that none of them held sole voting or dispositive powers over any other shares. Further, they stated that during the previous sixty days "no transactions in the Common Stock were effected by any Reporting Person" other than those disclosed on the form. (Ex. 27, 4/2/2012 Schedule 13D at 2-5, 7.)

37. The Schedule 13D reflected only those shares acquired by Prestige and did not disclose the shares that were purchased in the Yang/Fan account. (Ex. 27, 4/2/2012 Schedule 13D at 3.)

Yang's Prestige Salary:

38. In exchange for managing the investments of Prestige, Yang was to receive a salary of .5% of assets under management and a bonus equal to a percentage of Prestige's investment gains. (Ex. 26, Prestige Articles of Association at 8-9.)

Dated: July 12, 2013

Respectfully submitted by:

s/Timothy S. Leiman
Robert J. Burson (IL#3126909)
Timothy S. Leiman(IL#6270153)
Jedediah B. Forkner (IL#6299787)
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Attorneys for Plaintiff
U.S. Securities and Exchange Commission

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS EASTERN
DIVISION

U.S. SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	Case No. 12-C-2473
v.	)	Hon. Matthew F. Kennelly
SIMYING YANG, PRESTIGE TRADE, INVESTMENTS LIMITED, CAIYIN FAN, AND SHUI CHONG (ERIC) CHANG,	)	
Defendants.	)	

DECLARATION OF MICHAEL KASS

I, Michael Kass, do hereby declare under penalty of perjury, in accordance with 28 U.S.C. § 1746, that the following is true and correct and that, if called to do so, I could competently testify as follows:

1) I am a Portfolio Manager and Vice President for Baron Capital, Inc. ("Baron") and have served in those positions since 2007.

2) In those capacities, I manage the investment portfolios of two registered, diversified mutual funds: (1) the Baron Emerging Markets Fund, and (2) the Baron International Growth Fund.

3) From October 2008 until March 2012, Siming Yang worked for Baron as a Research Analyst under my direct supervision. During that time, Mr. Yang was based out of Baron's offices in New York and spent the majority of his work days at that office.

4) In that capacity, Mr. Yang was responsible for researching companies based in

the People's Republic of China as well as other emerging and developed international markets - primarily in Asia.

5) Mr. Yang never presented Zhongpin, Inc. to me – or to my knowledge, anyone else at Baron – as a good investment opportunity for Baron's funds. However, Zhongpin is a company that would have been in Mr. Yang's research universeduring his employment at Baron.

6) During his employment at Baron, Siming Yang never disclosed to me that he was raising funds for a private investment vehicle and never mentioned the name, Prestige Trade Investments, Ltd. ("Prestige").

7) In late 2011, I noticed that Siming Yang's productivity was declining and that he was increasingly unresponsive and detached. My conclusion was that he was no longer providing significant contributions to Baron or its mutual funds.

8) In January 2012, I discussed Mr. Yang's lack of production with Baron's senior management.

9) On February 14, 2012, I sent an e-mail to Siming Yang stating my opinion that it looked like a publicly-traded Chinese company called AsiaInfo had "chunked the qtr. in advance of the fairness opinion." I was indicating to Mr. Yang that it appeared to me that the company may have reported disappointing earnings in order to make the price they were offering to take the company private more attractive, which would make obtaining a favorable fairness opinion from an independent financial adviser more likely. A true and correct copy of that e-mail to Mr. Yang was produced to the Commission by Baron and bears Bates-number SEC-BC-0059374.

10) In mid-February 2012, Siming Yang left for a trip to China. He explained to me

that his grandmother had died and that he was travelling so that he could be with his family. Mr. Yang did not indicate that there was any business purpose to this trip.

11) Mr. Yang remained in China through mid-March.

12) After further discussion with Baron senior officers, the decision was made to terminate Siming Yang's employment based on his lack of productivity and lack of communication with Baron about his status during his absence.

13) On or about March 19, 2012, I attended Siming Yang's exit interview along with Siming Yang and two other Baron officers –Ronald Baron (Chairman and Chief Executive Officer) and and Linda S. Martinson (President and Chief Operating Officer) – to discuss his termination.

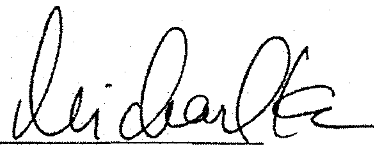
14) During the meeting, Mr. Yang indicated that he was interested in raising money from investors in China so that he could start his own hedge fund. He specifically mentioned that, in the future, he wanted to raise approximately $30 million for a hedge fund.

15) Mr. Yang never disclosed to me that he had already started work on a private investment vehicle called Prestige or that Prestige had purchased stock in Zhongpin.

16) Mr. Yang never disclosed to me that he had purchased any securities in publicly traded Chinese companies, including the securities of Zhongpin.

I, Michael Kass, do hereby declare under penalty of perjury, in accordance with 28 U.S.C. § 1746, that the following is true and correct.

Executed on the 17th day of June 2013



Michael Kass

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS EASTERN
DIVISION

U.S. SECURITIES AND EXCHANGE COMMISSION,	)	
	)	
Plaintiff,	)	
	)	Case No. 12-C-2473
v.	)	
	)	Hon. Matthew F. Kennelly
SIMYING YANG, PRESTIGE TRADE, INVESTMENTS LIMITED, CAIYIN FAN, AND SHUI CHONG (ERIC) CHANG,	)	
	)	
Defendants.	)	

DECLARATION OF HENRY MAYORGA

I, Henry Mayorga, do hereby declare under penalty of perjury, in accordance with 28 U.S.C. § 1746, that the following is true and correct and that, if called to do so, I could competently testify as follows:

1) I am Manager of Network Technology for Baron Capital, Inc. ("Baron") and have served in that position since 2008.

2) I graduated from Columbia University in 1990 with a B.S. in Computer Science and I have worked in the Information Technology ("IT") and network infrastructure field since 1991.

3) In that position I am responsible for overseeing Baron's entire IT infrastructure, including Baron's Blackberry Enterprise Server and IT equipment issued to Baron employees. At Baron Capital, I manage a staff of 4 IT specialists.

4) From October 2008 until March 2012, Siming Yang was employed with Baron. During that period, Baron assigned Mr. Yang a desktop computer and a Blackberry device.

He also was assigned the e-mail address syang@baronfunds.com.

5) Under Baron's IT policies, all documents and communications created or stored on Siming Yang's Baron-issued computer and Blackberry were Baron's property. In addition, aside from *de minimus* personal use, Baron-issued devices were to be used only for purposes of Baron-related business. Siming Yang received training on Baron's IT policies, and, like all Baron employees, was informed that he had no right to privacy in documents and communications created or maintained on his Baron-issued devices and that all such documents and communications were the property of Baron.

6) When Mr. Yang's employment was terminated in March 2012, he was informed that he would have to turn over his Baron-issued computer and his Blackberry.

7) Siming Yang did not inform me – or to my knowledge anyone under my supervision – that he had documents on his Baron-issued devices related to research into Zhongpin, Inc. or his work for Prestige Trade Investments, Ltd. ("Prestige"). In fact, prior to this litigation, I had not heard of either entity. While Mr. Yang would have been allowed to retain copies of purely personal documents (such as personal photographs or personal financial information) Mr. Yang did not ask for – and the Baron IT department did not give – permission to delete, alter, copy or transfer any documents related to Zhongpin, Prestige, or research into any public company.

8) Mr. Yang turned over his Baron-issued computer to Baron's IT department on March 30, 2012.

9) In searching for documents responsive to requests from the SEC, I (and Baron IT staff, acting at my direction) examined Siming Yang's hard drive for deleted documents. In doing so, I discovered that a number of documents had been deleted from Siming Yang's

desktop on March 30, 2012 – just before Mr. Yang left the company and turned over his computer.

10) The deleted documents had been removed from Siming Yang's desktop and, therefore, (a) were not visible to users through the desktop interface without further examination and (b) were designated to be overwritten which means that – with further use of the computer – the files could have been partially or entirely destroyed without the possibility of recovery. Because the Baron IT department preserved Siming Yang's hard drive and examined it we were able to preserve and recover the deleted documents from Mr. Yang's hard drive and prevent them from being permanently destroyed.

11) Among the documents that had been deleted from Mr. Yang's computer on March 30, 2012 was a pdf file titled "HSBC." A true and correct copy of that deleted document was produced to the SEC in response to their document requests in this matter (a paper copy of which has been Bates-stamped SEC-BC-0127991 through SEC-BC-0128033).

12) After Baron's IT department examined Siming Yang's hard drive and recovered the documents deleted on March 30, 2012, the hard drive was preserved so that SEC computer forensics personnel could make a forensic copy of all data on the drive.

13) Siming Yang did not return his Blackberry on March 30, 2012 as he was instructed to do. He did not return the Blackberry until April 3, 2012 – after several additional requests by Baron IT staff.

14) When the Blackberry was returned, I (and Baron IT staff working at my direction) examined the device.

15) Upon examining the device, I discovered that the Subscriber Identification Module ("SIM") card for Siming Yang's Blackberry had been altered. The SIM card is a

removable plastic card in the Blackberry device that is used to identify and authenticate users to the network (in this case, Baron's Blackberry Enterprise Server). The security features of the SIM card for Siming Yang's Blackberry had been bypassed and the configuration of the SIM card had been changed so that the Blackberry no longer received e-mail at syang@baronfunds.com, but rather, received e-mail addressed to syang08@gsb.columbia.edu.

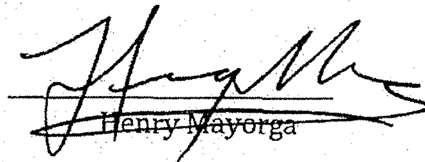
16) In addition, the phone number for Siming Yang's Baron-issued Blackberry had been transferred without permission to a different service provider – from Verizon (Baron's service provider) to Sprint.

17) Based on my knowledge of Baron's IT infrastructure, including Baron's Blackberry Enterprise Server, I believe that someone with technical proficiency altered Siming Yang's Baron-issued Blackberry – bypassing several security features of the device and Baron's Blackberry Enterprise Server – so that the device could receive e-mail at another address and could continue to be used outside of Baron's network infrastructure.

18) After Baron's IT department examined Siming Yang's Blackberry, the device was preserved and turned over to the SEC's computer forensics personnel upon their request.

I, Henry Mayorga, do hereby declare under penalty of perjury, in accordance with 28 U.S.C. § 1746, that the following is true and correct.

Executed on the 17th day of June 2013



Henry Mayorga

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS EASTERN
DIVISION

U.S. SECURITIES AND EXCHANGE COMMISSION,	)	
	)	
Plaintiff,	)	
	)	Case No. 12-C-2473
v.	)	
	)	Hon. Matthew F. Kennelly
SIMYING YANG, PRESTIGE TRADE, INVESTMENTS LIMITED, CAIYIN FAN, AND SHUI CHONG (ERIC) CHANG,	)	
	)	
Defendants.	)	

DECLARATION OF ROBERT SUSMAN

I, Robert Susman, do hereby declare under penalty of perjury, in accordance with 28 U.S.C. § 1746, that the following is true and correct and that, if called to do so, I could competently testify as follows:

1) I worked as a Research Analyst at Baron Capital, Inc. ("Baron") from September 2007 to January 2013.

2) I have never been able to speak any dialect of the Chinese language and have never taken any classes in the Chinese language.

3) I have never been able to read or write the Chinese language.

4) While at Baron, I was primarily responsible for conducting research in the financial and business services sectors. I did not generally conduct research into Chinese companies for Baron and have no particular expertise in that geographical region.

5) Defendant Siming Yang worked as a Research Analyst at Baron while I had the

same position there.

6) Although we occasionally exchanged pleasantries when passing each other in the hallway, I did not know Siming Yang well and we never socialized outside of the workplace.

7) I have never worked with Siming Yang on any business projects outside of Baron, never assisted Mr. Yang in setting up business meetings with individuals in China and never heard of the entity Prestige Trade Investments, Ltd. before the events of this litigation.

8) I have never registered or used an e-mail account with the address [redacted]. In fact, before the events of this litigation, I had never heard of that e-mail address.

9) I do not know, and have never communicated with, the following individuals:

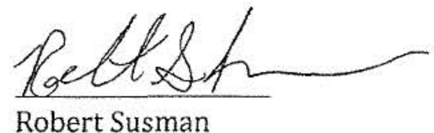
(a) Li Ji;

(b) Qiming Li; or

(c) Hu Dajiang.

I, Robert Susman, do hereby declare under penalty of perjury, in accordance with 28 U.S.C. § 1746, that the foregoing statements are true and correct.

Executed on the 17th day of June 2013



Robert Susman

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	
vs.	)	**Case No. 12 C 2473**
SIMING YANG, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

After a six-day trial, a jury found in favor of defendant Siming Yang on the SEC's claim of insider trading but in favor of the SEC against Yang on its claims of "front running" and filing false Schedule 13D forms with the SEC. The Court later denied Yang's motion for judgment as a matter of law or a new trial on the latter claims. In this order, the Court determines the appropriate remedies and the nature of the appropriate final judgment. This order assumes familiarity with the background of the case. *See SEC v. Yang,* No. 12 C 2473, 2014 WL 1303457 (N.D. Ill. Mar. 30, 2014) (decision denying Yang's post-trial motions); *SEC v. Yang*, ___ F. Supp. 2d ___, 2013 WL 6049074 (N.D. Ill. Nov. 14, 2013) (decision denying Yang's motion for summary judgment).

1. Permanent injunction

A permanent injunction is appropriate if the SEC shows a reasonable likelihood of future violations by the defendant. *See SEC v. Holschuh*, 694 F.2d 130, 144 (7th Cir.

1982). In making this determination, a court considers all of the circumstances involving the defendant and the violations, including factors such as –

- the gravity of harm caused by the violations;

- the extent of the defendant's participation and his degree of scienter;

- whether the violations were isolated or recurrent;

- whether the defendant's usual business activities might involve him in such transactions in the future;

- the defendant's recognition of his culpability; and

- the sincerity of his assurances against future violations.

See id.

There was no significant harm to investors from Yang's violations. In the scheme of things, the Schedule 13D violations (which involved Yang's nondisclosure of his own stock purchases) were not terribly significant to the investing public given that Yang accurately disclosed on the forms the purchases of vastly greater amounts of stock by Prestige. And it is unlikely that Prestige experienced any quantifiable harm from Yang's front-running. The market was harmed in the sense that Yang traded based on information (regarding Prestige's impending large purchases) to which only he had access, but the degree of harm was not great due to Yang's limited purchases.

Yang fought and continues to fight the SEC's claims, but in the Court's view, he should not be penalized for this. *See SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1229 (D.C. Cir. 1989). In this regard, it is important to keep in mind that Yang prevailed on the SEC's insider trading claim, which was the centerpiece of the case. That claim was the primary focus of the dispute prior to and during the trial.

On the other hand, Yang was shown to have the level of scienter required to prove the violations, and he was the sole participant (at least the sole direct participant). These factors tilt in favor of imposition of an injunction.

The SEC also contends, and the Court agrees, that Yang has engaged in further misconduct following the conclusion of the trial. First of all, as the Court previously found, 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 order that the Court entered. This had both the purpose and anticipated effect of making it difficult if not impossible for the SEC to collect any disgorgement or civil penalties that the Court ordered. The Court took steps necessary to prevent Yang and Prestige from effectuating this transaction, but what is significant here is the intent to evade legal sanctions and the rather obvious implication this has regarding the likelihood of future violations.

Second, the SEC has shown that Yang engaged in further trading via a separate account (at Fidelity) in May 2013, while the litigation was under way, that he did not disclose in responses or amended responses to interrogatories from the SEC that sought disclosure of his brokerage accounts. Yang says that he opened this account and conducted the trading after the close of discovery, but the applicable rules quite clearly required him to supplement his interrogatory responses when they became incorrect, and the fact that discovery had closed did not absolve him of that responsibility. *See* Fed. R. Civ. P. 26(e)(1). The trading also likely violated the stipulated asset freeze order, which (contrary to Yang's suggestion) was not limited to the accounts in which he had conducted the Prestige trading. Yang also made a profit

trading in the Fidelity account, purchasing 23,000 shares of a company just before it announced it was going private and selling the shares at a significantly higher price just a few days later, just after the company made the announcement. *See* Pl.'s Reply, Exs. C & D. This suggests, if nothing else, an ongoing intention to trade on U.S. markets, despite Yang's protestations to the contrary.

Were it not for these post-lawsuit incidents, the Court might be inclined not to impose an injunction against Yang; his violations of the securities laws were non-recurrent and were limited to a brief period of time in 2013. But these incidents and the other injunction-favoring factors noted above indicate a reasonable likelihood of future violations, making an injunction appropriate.

2. Disgorgement

The Court declines to order disgorgement in this case. The purpose of disgorgement is to prevent unjust enrichment. *See, e.g., SEC v. Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 95, 102 (2d Cir. 1978); *SEC v. McDonald*, 699 F.2d 47, 54 (1st Cir. 1983). Yang was not, in fact, enriched by the trading that constituted front-running. He purchased Zhongpin options but then let them expire; he bought some Zhongpin stock and sold it at a loss; and he did not sell even more Zhongpin stock that he had purchased. *See* Pl.'s Motion for Remedies, Ex. 1 (Kustusch Affid.) ¶ 10.

The SEC says, and Yang does not dispute, that if one calculates the value of the stock and options as of a relevant date, March 23, 2012, Yang had unrealized gains with a net total of about $151,000. The SEC also argues, and the Court acknowledges that it has the authority to order "disgorgement" of paper "profits" that existed at one time but were not realized. According to the SEC, the lack of profit was a matter of

choice on Yang's part, and he should not get the benefit of that choice for purposes of disgorgement.

The fact of the matter, however, is that even assuming Yang could have made a lot of money if he had sold his stock and options at the opportune time, he chose not to do so, and as a result he made no profits. In the Court's view, it would turn the purpose of disgorgement on its head to require Yang to "give up" profit that he elected not to take.

3. Civil penalties

The Securities Exchange Act and the Investment Advisers Act both authorize imposition of civil penalties for violations of those statutes. *See* 15 U.S.C. §§ 78u(d)(3) & 80b-9(e). The purpose of these civil penalties is to provide a financial disincentive to violate the securities laws over and above the remedy of disgorgement, which simply involves requiring the violator to give back his profits. *See, e.g., SEC v. Moran*, 944 F. Supp. 296 (S.D.N.Y. 1996).

Both statutes provide for three levels (called "tiers") of penalties based on the nature of the violation. The first tier is the base level and provides for a maximum penalty of $7,500 for an individual (higher for an entity) for the period at issue here. The second tier applies where the violation involves "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and provides for a maximum of $75,000 for an individual. The third tier applies when the requirements for the second tier are met and the violation "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons"; it provides for

a maximum of $150,000 for an individual. *See id.* §§ 78u(d)(3)(B)(i-iii) & 80b9(e)(2)(A-C); 17 C.F.R. §§ 201.1004 – 2011005 & Subpart E, Table IV.

The SEC argues that "the jury found that Yang's false 13D filings violated two free-standing statutory provisions: (1) the antifraud provisions of the Exchange Act, Section 10(b); and (2) the disclosure requirements of Exchange Act Section 13(d)" and that "[f]or each statute, there were two violations—one for each of the false Schedules 13D . . . ." Pl.'s Mot. for Remedies at 11. The SEC therefore seeks for these violations a civil penalty of four times the maximum tier two penalty of $75,000, for a total of $300,000. For the front-running claim, the SEC seeks a civil penalty totaling $450,000, "an amount equal to a third tier penalty for three violations." *Id.* at 12. It proposes to group Yang's personal trades in Zhongpin stock and options into three groups for this purpose: his purchase of stock on March 14; his purchase of call options on March 14; and his purchase of call options on March 15. *Id.*

The SEC's proposed breakdown of the front-running claim is artificial and arguably at odds with the jury's findings, because the jury was asked to find only *a violation*, not separate violations. The Court finds it appropriate to maintain that breakdown in determining the appropriate civil penalties.

The Court likewise disagrees with the SEC's proposed breakdown of the Schedule 13D violations. The jury was asked to make two separate findings regarding the Schedule 13D forms, but these were essentially alternative theories for the same wrongdoing (a fraud theory and a false disclosure theory). The Court can find no appropriate basis to treat these as separate violations for the purpose of civil penalties. The Court likewise declines to order separate penalties for the original Schedule 13D

that Yang filed and the amended one he filed later the same day. Among other things, the jury was not asked to find that Yang filed two false Schedule 13D forms; the jury instructions were worded in the singular.

Both sides agree that the Schedule 13D violation is appropriately treated as a tier two violation. They dispute how the front-running violation should be treated. The Court agrees with Yang that this violation is likewise appropriately treated as a tier two violation. In particular, the tier three requirement of "substantial losses or . . . a significant risk of substantial losses" is missing in this case.

The Court finds that, particularly in view of the absence of disgorgement and the Court's decision to treat the violations as singular rather than plural in nature, a penalty for each at the statutory maximum is appropriate. The Court imposes upon Yang a civil penalty of $75,000 for the front-running violation and $75,000 for the Schedule 13D violation, for a total of $150,000.

Conclusion

For the reasons stated above, the Court directs the Clerk to enter judgment in favor of plaintiff and against defendant Siming Yang, imposing civil penalties in the amount of $150,000 as well as a permanent injunction. A separate judgment order embodying these terms will be entered.

MATTHEW F. KENNELLY
United States District Judge

Date: May 27, 2014