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ADMINISTRATIVE PROCEEDING
FILE NO. 3-18165

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **GARY YIN,** **Respondent.**	**The Honorable Carol Fox Foelak**

DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION

October 26, 2017

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I. INTRODUCTION

Respondent Gary Yin was a registered representative at Merrill Lynch. He was fired by the firm in 2013 and criminally convicted of conspiracy in 2015. This follow-on administrative proceeding poses a single question. Should respondent Yin – having admitted in his guilty plea that he corruptly obstructed an SEC investigation by taking extraordinary measures to conceal his client's illegal insider trading, and having "piggy-backed" (in glaring violation of Merrill Lynch's internal compliance policies) those illegal trades in order to profitably trade for his own account – be permanently barred from the securities industry?

The short answer is yes. The Commission has "consistently held that deliberate deception of regulatory authorities justifies the severest of sanctions." *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *7 (Comm. Op. Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010). And so the Division of Enforcement now moves for summary disposition under Rule 250(b) of the SEC's Rules of Practice because: (i) Yin has been criminally convicted of an offense enumerated by Exchange Act Section 15(b) and Advisers Act Section 203(f); and (ii) the facts admitted in Yin's criminal plea irrefutably show that a permanent associational bar is in the public interest.

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

A. Yin's Criminal Prosecution and the Commission's Civil Injunctive Action

On September 24, 2013, Yin pled guilty to a conspiracy to commit offenses against the United States, 18 U.S.C. § 371, admitting that he had obstructed justice and laundered money for Jing Wang ("Wang"), a former high-ranking corporate executive at Qualcomm, Inc. ("Qualcomm"). Leung Decl.¶ 2, Ex. 1 (Criminal Information); Ex. 6 (S.D. Cal. USAO 9/24/13 press release). Yin was sentenced on September 25, 2015, and on the following day, the U.S. District Court for the Southern District of California entered a criminal judgment against him

ordering: (i) imprisonment for a term of time served; (ii) that Yin pay a $5,000 penalty; and (ii) that Yin pay restitution, jointly and severally with Wang, in the amount of $1,428,287 to Merrill Lynch, representing the cost of Merrill Lynch's internal investigation into Yin's and Wang's misconduct. *Id.*,¶ 4, Ex. 3 (Criminal Judgment).

Also on September 23, 2013, the Commission filed a civil injunctive action against Yin and Wang in the U.S. District Court for the Southern District of California, charging them with violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"). *See SEC v. Wang, et al.*, Case No. 13-cv-2270-L-WVG, Dkt. No. 1 (S.D. Cal. Sept. 23, 2013). The district court entered a final judgment against Wang on December 22, 2014. *Id.* at Dkt. No. 30. The Commission's civil injunctive action against Yin was stayed for a period of time by the district judge pending resolution of his criminal case; the matter is now in discovery.

B. Yin's Factual Admissions in His Criminal Plea Agreement

Yin's criminal plea agreement provides that he had "fully discussed the facts of [his criminal case] with defense counsel," and admits that there is a factual basis for his guilty plea. Leung Decl., ¶ 3, Ex. 2 at p. 3, § II(B). The plea agreement further states that the following facts "are true and undisputed" (with the exception noted at fn. 1, *infra*):

1. Gary Yin and Jing Wang

From July 1994 until April 2013, Yin was a registered representative with Merrill Lynch in San Diego, California. Leung Decl., ¶ 3, Ex. 2 at p. 3, § II(B)(1). In time, Yin rose to the position of Senior Vice President and International Wealth Management Advisor, ultimately managing over $200 million in client assets. *Id.* He was a Certified Financial Manager and held Series 7, 31, 63, and 65 securities licenses. *Id.*

Yin became Wang's Merrill Lynch Financial Advisor in 2005. *Id.* at p. 3, § II(B)(2). Wang was then a senior vice president at Qualcomm. *Id.* at pp. 3-4, § II(B)(3). In the time that

Yin worked as his financial advisor from 2005 to 2013, Wang was promoted within Qualcomm, eventually becoming the company's Executive Vice President and President of Global Business Operations. *Id.* at pp. 3-4, § II(B)(3). Yin considered Wang to be one of his most important and valued clients – Wang was a senior executive at Qualcomm, enjoyed a high net worth, and held an esteemed position in the local community. *Id.* Yin also knew that Wang was subject to certain restrictions on his purchase and sale of Qualcomm securities given his access to the company's confidential business information. *Id.*

In March 2006, Wang planned to sell certain of his Qualcomm stock options and wanted to transfer the sales proceeds to individuals in China. *Id.* at p. 4, § II(B)(4). He asked Yin for advice on how to disguise his involvement in that funds transfer. *Id.* Yin told Wang that if he created an offshore entity in the British Virgin Islands that would act as a nominee account holder of Wang's funds, Wang could conceal his true ownership and control of those assets and transfers from U.S. tax authorities and any third-parties. *Id.* Wang told Yin to effectuate that plan, which Yin then did. *Id.*

Yin presented Wang with a list of available shelf companies in the British Virgin Islands; Wang selected Unicorn Global Enterprises, Ltd. ("Unicorn") as his nominee shelf company. *Id.* at p. 4, § II(B)(5). Wang told Yin to form Unicorn and make it appear that Wang's brother, Bing Wang ("Bing Wang"), was the beneficial owner of the entity. *Id.* Using documents that created the false impression that Bing Wang would be the Unicorn account's beneficial owner, Yin opened a Merrill Lynch brokerage account for Unicorn. *Id.* at p. 5, § II(B)(6). Although it appeared that Wang had no interest in the Unicorn account, in truth, he had funded the account by transferring money into it for his own benefit, and he controlled all transactions effected in that account. *Id.* Specifically, Wang transferred $360,000 in proceeds from the sale of his

Qualcomm stock-options on or about April 26, 2006. *Id.* Over the next several years, Wang instructed Yin to conduct transactions in the Unicorn account, including several large wire transfers of funds to a Qualcomm employee located in China. *Id.* at p. 5, § II(B)(7).

For his part, Yin decided to create his own nominee British Virgin Islands entity, called Pacific Rim Investment Services, Ltd. ("Pacific Rim"). *Id.* at p. 5, § II(B)(8). He then opened up a Merrill Lynch brokerage account in the name of Pacific Rim, in April 2006, because Yin knew such an account could be used to conceal his stock transactions from Merrill Lynch and others. *Id.*

2. Wang's March 1, 2010 trading in Qualcomm

On March 1, 2010, Wang asked Yin to buy as many shares of Qualcomm stock as possible for Wang's Unicorn account. *Id.* at p. 6, § II(B)(9). Yin did so, buying 7,700 shares of Qualcomm stock at $36.07, for a total price of $277,739. *Id.* Wang was prohibited from executing trades in Qualcomm at that time since the company's trading window was closed; as a result, the Unicorn account's March 1, 2010 trade violated Qualcomm's Insider Trading policy. *Id.* In addition, Yin knew that: (i) he and Wang were required – pursuant to corporate policy – to report Wang's trades in Qualcomm stock to the company; and (ii) he and Wang were required – pursuant to the federal securities laws – to report Wang's trades in Qualcomm stock to the Commission. *Id.* Yin, however, concealed Wang's March 1, 2010 purchase of Qualcomm stock in the Unicorn shell account by not reporting it to either Qualcomm or the Commission. *Id.*

3. Yin "piggy-backs" Wang's concealed trading in Qualcomm

On the same day that Wang bought Qualcomm stock for the Unicorn shell account, Yin himself purchased 1,280 shares of Qualcomm stock in his Pacific Rim and personal trust account, for a total price of about $45,984. *Id.* at p. 6, § II(B)(10). During discovery in the Commission's civil injunctive action against Yin, Yin admitted that he "piggy-backed" Wang's

March 1, 2010 Qualcomm trade. *See* Leung Decl., ¶ 6, Ex. 5 (Yin Resp. to SEC's Requests for Admission) at pp. 5-6.[1] Yin further admitted that Merrill Lynch's compliance policies stated, in relevant part, that: "[E]mployees must not 'piggyback' by patterning his or her own trading after a client's trading" and "information regarding client orders must be kept confidential and must not be used in any way to effect trades in employee accounts[.]" *Id.*

At market close on March 1, 2010, Qualcomm stock traded at approximately $35.56 per share. Leung Decl., ¶ 3, Ex. 2 at p. 6, § II(B)(11). Following the close of trading, Qualcomm publicly announced an increase in its quarterly cash dividend and a $3.0 billion stock repurchase program. *Id.* at pp. 6-7, § II(B)(11). That newly-disclosed information was material and by the end of the trading day on March 2, 2010, Qualcomm's stock price had risen to $37.93 per share. *Id.* Come the end of the week, Qualcomm's stock had traded at prices as high of $39.50, an increase of over 10% from the pre-announcement price. *Id.* Yin liquidated the Qualcomm stock he bought for his Pacific Rim shell account in March, November, and February of the following year, realizing gross proceeds of about $17,565 from the "piggy-backed" trade. *Id.* at p. 7, § II(B)(11).

4. Wang's December 6, 2010 trading in Atheros

Later that year, Yin met Wang at a restaurant in La Jolla, California, on November 1, 2010. *Id.* at p. 7, § II(B)(12). Wang told Yin that he was interested in buying the stock of a company called Atheros Communications, Inc. ("Atheros"). *Id.* At the time, Atheros was a technology company headquartered in California and traded on the NASDAQ. *Id.* Wang said to Yin that if Atheros' and Qualcomm's stock reached certain prices, Yin should sell all of the

[1] The Division cites to Yin's discovery responses in the district court action because Yin's criminal plea agreement does not address whether Yin "piggybacked" Wang's illegal trading.

Qualcomm stock Wang held in the Unicorn shell account, and then use those sales proceeds to buy as many shares of Atheros stock as possible. *Id.* Yin followed Wang's instructions and placed appropriate limit orders for Qualcomm and Atheros stock. *Id.* at pp. 7-8, § II(B)(12). Those limit orders were cancelled, however, before Qualcomm's and Atheros' stocks reached the specified prices. *Id.* at p. 8, § II(B)(12).

Yin and Wang again met in-person on December 1, 2010, at another restaurant in the San Diego area. *Id.* at p. 8, § II(B)(13). This time, Wang told Yin to sell all of the Qualcomm stock in Wang's Unicorn shell account without waiting for Qualcomm's stock to reach a certain price, and to get ready to use those proceeds to buy as many shares of Atheros as he could. *Id.* Wang told Yin he would contact him in the near future to tell him when to buy the Atheros shares. *Id.* Wang also suggested that Yin should consider buying shares of Atheros for himself. *Id.*

Following Wang's instruction, Yin sold the 7,700 shares of Qualcomm stock held in Wang's Unicorn shell account at 48.36 per share, for sales proceeds of $372,448 (Wang's March 1, 2010 Qualcomm trade thus netted him $94,709 in stock profits). *Id.* at p. 8, § II(B)(14). Once again, Yin and Wang concealed that Qualcomm stock sale by failing to notify Qualcomm or the Commission, in violation of Qualcomm's corporate policy and the federal securities laws. *Id.*

Four days later, on December 6, 2010, Yin received a call from Wang directing him to reinvest those funds in Atheros by going ahead with the plan they had discussed at the restaurant. *Id.* at p. 8, § II(B)(15). Yin then bought 10,800 shares of Atheros stock for Wang's Unicorn shell account – 100 shares at $34.16 per share ($3,416), and 10,700 shares at $34.27 per share ($366,766). *Id.* at pp. 8-9, § II(B)(15).

5. Yin "piggy-backs" Wang's concealed trading in Atheros

Yin decided to "piggy-back" Wang's concealed trading a second time. The very next day, Yin bought 1,000 shares of Atheros for himself, using his Pacific Rim shell account, at

$34.80 per share for a total price of $34,800. *Id.* at p. 9, § II(B)(15). Yin admitted in the Commission's civil injunctive action that when purchasing Atheros, he had "piggy-backed" Wang's December 6, 2010 purchase of Atheros using his Unicorn shell account. *See* Leung Decl., ¶ 6, Ex. 5 (Yin Resp. to SEC's Requests for Admission) at pp. 5-6. Because he had engaged in prohibited piggy-backing, Yin's Atheros trade likewise violated Merrill Lynch's internal compliance policies. *Id.*

A month later, on January 4, 2011, the New York Times reported that "[Qualcomm] Is Said to be Set to Buy [Atheros] for $3.5 Billion." *Id.* at p. 9, § II(B)(16). From January 3, 2011 (the trading day prior to the news report) and January 5, 2011 (the first full day of trading after publication), Atheros' stock price jumped from $37 to $44 per share – roughly a 20% increase. *Id.* On January 12, 2011, Yin sold all 1,000 shares of Atheros in his Pacific Rim shell account at $44.68 for proceeds of $44,680, thus realizing a $9,880 profit on his own Atheros trade. *Id.* at p. 10, § II(B)(18).

6. Wang's January 25, 2011 trading in Qualcomm

On January 25, 2011, Wang told Yin to sell all 10,800 shares of Atheros stock in his Unicorn shell account. *Id.* at p. 10, § II(B)(19). Yin executed a sale at $44.60 per share for sales proceeds of $481,680, and Wang realized a profit of $111,498 on his Atheros trade. *Id.* Wang also told Yin to use those proceeds to buy Qualcomm stock, an instruction that Yin followed, buying 9,450 shares of Qualcomm for Wang's Unicorn shell account at $50.87 per share ($482,596). *Id.* This stock purchase was again in violation of Qualcomm's Insider Trading Policy. *Id.* For a third time, Yin and Wang concealed Wang's trading by not reporting it to either the company or the Commission, in violation of Qualcomm's corporate policy and the federal securities laws. *Id.*

7. Yin's and Wang's conspiracy to corruptly obstruct an official proceeding

Yin recognized that Wang's Atheros trade had been illegal insider trading. *Id.* at p. 9, § II(B)(16). Yin spoke to Wang about his trading in Atheros on January 10, 2011, and in that conversation, Yin discussed with Wang the fact that they could get in trouble because of Wang's Atheros trade. *Id.* at p. 9, § II(B)(17). Wang inquired if Yin could "erase" his insider trades; Yin explained that he couldn't delete Merrill Lynch's transaction records. *Id.* Wang said to Yin that he'd need to think about what he should do next, and that he would later contact Yin to give him instructions. *Id.*

From 2011 through February 2013, Yin conspired with Wang and Wang's brother, Bing Wang, to conceal Wang's illegal activity and Wang's control of the proceeds of illegal activity. *Id.* at pp. 10-11, § II(B)(21). Yin did so knowingly and willfully. *Id.* To carry out their conspiracy, Yin agreed with Wang to: (i) corruptly obstruct an SEC investigation of Qualcomm and its executives, a group that included Wang; and (ii) knowingly conduct illegal transactions with the proceeds of Wang's unlawful activities. *Id.*

a. Yin and Wang concoct a false cover story with Bing Wang

First, Yin and Wang falsely claimed that Bing Wang – and not Wang – had opened, controlled, and traded in the Unicorn shell account. *Id.* at p. 11, § II(B)(22). Wang asked Yin in January 2011 to help him by concealing Wang's control of the Unicorn shell account and his purchase of Atheros stock. *Id.* at p. 12, § II(B)(26)(a). And so in January and February 2011, Yin lied to Merrill Lynch's compliance department, falsely representing to them that the nominal owner of the Unicorn shell account (Bing Wang) had no relation to anyone at Qualcomm. *Id.* at p. 12, § II(B)(26)(b).

The following year, in April 2012, Wang met with Yin and told him that the Commission

was investigating Qualcomm in connection with corrupt payments to foreign officials. *Id.* at p. 14, § II(B)(26)(n). Wang explained to Yin that he was worried the Commission would learn of his control of the Unicorn shell account and his insider trading. *Id.* Given those concerns, Wang embellished his and Yin's false cover story about the Unicorn account to claim that his brother Bing Wang owned and controlled the Unicorn shell account and had ordered all of its trades. *Id.* Wang asked Yin to tell this false story if he was ever asked about the Unicorn shell account or about the trades made in that account. *Id.*

Wang removed documents relating to Unicorn and the Unicorn shell trading account from his office at Qualcomm and gave them to Yin in April 2012. *Id.* at p. 14, § II(B)(26)(o). When passing that documentation to Yin, Wang instructed him to take the materials with him the next time Yin traveled to China, and to make arrangements to meet with Bing Wang during that overseas trip. *Id.* Wang wanted Yin to give the Unicorn documents to Bing Wang, review them with him, and discuss their false cover story – that Bing Wang had opened, controlled, and placed the trades in the Unicorn shell account. *Id.* Wang also told Yin to coordinate with Bing Wang for the purpose of making future stock trades in the Unicorn account, so that it would seem as if Bing Wang had opened and always controlled the Unicorn account. *Id.*

Yin traveled to Beijing, China in May 2012, and brought the Unicorn documents with him. *Id.* at pp. 14-15, § II(B)(26)(p). While in China, Yin found Bing Wang, meeting him for the first time. *Id.* The two men discussed the plan and false cover story that Wang had devised, and Yin gave Bing Wang the Unicorn materials. *Id.* at p. 15, § II(B)(26)(p). After meeting with Yin, Bing Wang agreed to assist him and Wang with obstructing any investigation into Wang's insider trading, including by writing false and misleading emails to Yin for the purpose of fabricating evidence. *Id.* Bing Wang followed through, and in May 2012, Bing Wang and Yin

exchanged several emails with each other that contained false and misleading statements about Wang's Unicorn shell trading account. *Id.* at p. 15, § II(B)(26)(q).

In July 2012, in order to further conceal Wang's ownership and control of the Unicorn account, Yin accessed Merrill Lynch's internal computer system and removed the Unicorn account from its list of "household accounts" associated with Jing Wang. *Id.* at p. 15, § II(B)(26)(r). Finally, Yin traveled to China at Yin's instruction on a second occasion in October 2012, again for the purpose of discussing with Bing Wang the false story that Wang had concocted to conceal his insider trading. *Id.* at p. 15, § II(B)(26)(s).

b. Yin and Wang attempt to launder Wang's trading profits

Second, Yin and Wang transferred the proceeds of Wang's illegal trading to another nominee account – *i.e.*, laundering the funds – in an effort to conceal Wang's control of that money. *Id.* at p. 11, § II(B)(23). In January 2012, Wang forged his mother's signature and used her means of identification to create a set of false documents in order to set up another British Virgin Islands shell company; Wang wanted to call that company "Clearview Resources, Ltd." ("Clearview"). *Id.* at p. 12, § II(B)(26)(d). Wang then enlisted Yin, who used those false documents to form Clearview in the British Virgin Islands. *Id.* at p. 12, § II(B)(26)(e).

Yin next created, at Wang's direction on January 23, 2012, a nominee brokerage account at Merrill Lynch in the name of Clearview. *Id.* at p. 13, § II(B)(26)(f). Separately, Wang installed Bing Wang as a representative of Clearview. *Id.* at p. 13, § II(B)(26)(g). Yin then moved, in February and March 2012, all funds in the Unicorn account to the Clearview account. *Id.* at p. 13, § II(B)(26)(i) – (l). Having now emptied the account, Yin closed out the Unicorn shell account at Wang's direction on March 22, 2012. *Id.* at p. 13, § II(B)(26)(m). Yin and Wang did all of this to obscure any connection between Wang and the proceeds of Wang's insider trading. *Id.* at p. 12, § II(B)(26)(e).

Yin was interviewed by the FBI about a year later, on February 20, 2013. *Id.* at p. 16, § II(B)(26)(u). At that first interview, and acting consistently with previous requests from Wang to conceal Wang's connection to the Unicorn account if ever investigated, Yin lied to the FBI. *Id.* He lied when he told them Wang had no involvement in the Unicorn account. *Id.* He lied when he told them Bing Wang controlled the Unicorn shell account. And he lied when he told them that he did not know why the Unicorn shell account had invested in Atheros stock. *Id.*

All of these efforts came to naught. Yin and Wang were criminally charged by the U.S. Attorney's Office for the Southern District of California on September 23, 2013. Leung Decl., ¶¶ 7-8, Ex. 6 (S.D. Cal. USAO 9/23/13 press release); Ex. 7 (S.D. Cal. USAO 9/23/13 press release).

C. Yin's Follow-On Administrative Proceeding

The Division instituted this proceeding with an Order Instituting Proceedings ("OIP") on September 11, 2017, pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act. Yin was deemed served with the OIP on September 14. By agreement of the parties, Yin timely answered the OIP on October 25. In his answer, Yin admitted all allegations in the OIP. Leung Decl., Ex. 9 (Yin Answer). At the October 12 prehearing conference, the Presiding Judge granted the Division leave to file the instant Rule 250 motion for summary disposition.

III. ARGUMENT

A. Summary Disposition Is Warranted Here

This matter is ripe for summary disposition. Rule 250(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.250(b), provides that after a respondent's answer has been filed and documents have been made available to the respondent for inspection and copying, a party may move for summary disposition of any or all allegations of the OIP. A hearing officer may grant

the motion for summary disposition if the "undisputed pleaded facts, declarations, affidavits, documentary evidence or facts officially noted pursuant to Rule 323 show that there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law." SEC Rule of Practice Rule 250(b), 17 C.F.R. § 201.250(b).

Summary disposition is "generally proper in 'follow-on' proceedings like this one, where the administrative proceeding is based on a criminal conviction or a civil injunction." *George Charles Cody Price*, Initial Dec. Rel. 1018, 2016 WL 3124675 (June 3, 2016); *accord Omar Ali Rizvi*, Initial Dec. Rel. No. 479, 2013 WL 64626 (Jan. 7, 2013) (the "Commission has repeatedly upheld use of summary disposition in cases where the respondent has been enjoined and the sole determination concerns the appropriate sanction."), *notice of finality*, 105 S.E.C. Docket 3126, 2013 WL 772514 (Mar. 1, 2013); *Daniel E. Charboneau*, Initial Dec. Rel. No. 276, 84 S.E.C. Docket 3476, 2005 WL 474236 (Feb. 28, 2005) (summary disposition granted and penny stock bar issued based on injunction), *notice of finality*, 85 S.E.C. Docket 157, 2005 WL 701205 (Mar. 25, 2005); *Currency Trading Int'l Inc.*, Initial Dec. Rel. No. 263, 83 SEC Docket 3008, 2004 WL 2297418 (Oct. 12, 2004) (same), *notice of finality*, 84 S.E.C. Docket 440, 2004 WL 2624637 (Nov. 18, 2004).

When facts have been litigated and determined in an earlier judicial proceeding, a respondent may not revisit them in an administrative proceeding. *See, e.g., Peter J. Eichler, Jr.*, Initial Dec. Rel. No. 1032, 2016 WL 4035559 (July 8, 2016) ("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 by summary judgment, by consent, or after a trial") (collecting cases); *accord Robert Burton*, Initial Dec. Rel. No. 1014, 2016 WL 3030850 (May 27, 2016); *James E. Franklin*, Exchange Act Release No. 56649 (Oct. 12, 2007),

91 S.E.C. Docket 2708, 2713 & n.13, 2007 WL 2974200, petition for review denied, 285 F. App'x 761 (D.C. Cir. 2008).

Here, Yin is precluded from relitigating his criminal conviction, as well as the facts forming the basis for his conviction. That Yin engaged in a years-long, protracted effort to hide the insider trading of his client – a senior executive of a publicly-traded company being investigated by the SEC – is not subject to dispute. That Yin lied to federal investigators in order to corruptly obstruct an SEC investigation is not subject to dispute. That Yin himself profited from his client's insider trading by wrongly "piggy-backing" those trades is not subject to dispute, given his discovery admissions in the Commission's civil injunctive action. And so for the reasons given below, summary disposition is an appropriate vehicle to bring this administrative proceeding to resolution.

B. Yin Should Be Permanently Barred

Because Yin was criminally convicted of conspiring to obstruct an SEC investigation, the Commission has ample cause to permanently bar him from associating with an investment adviser, broker dealer, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock. Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act authorize the Commission to censure, place limitations on, suspend, or bar a person associated with a broker, dealer, or investment adviser when such sanctions are in the public interest, and when such a person has been convicted within the past ten years of certain enumerated offenses. *Kornman*, 95 S.E.C. Docket 601, 2009 WL 367635, *3; *Evelyn Litwok*, 101 S.E.C. Docket 2925, 2011 WL 3345861 (Aug. 4, 2011); *Kenneth Ko*, 90 S.E.C. Docket 1941, 2007 WL 1574059 (May 30, 2007). For purposes here, those offenses include: (i) any felony that the Commission finds "involves the purchase or sale of any security, the taking of a false oath, the making of a

false report, ... perjury, ... or conspiracy to commit any such offense"; (ii) any felony that the Commission finds "arises out of the conduct of the business of a broker, dealer, [or] investment adviser"; or (iii) "any crime that is punishable by imprisonment for 1 or more years." 15 U.S.C. §§ 78o(b)(6); 78o(b)(4)(B)(i) and (ii); 80b-3(f); 80b-3(e)(2)(A) and (B); and 80b-3(e)(3). Exchange Act Section 15(b)(6) and Advisers Act 203(f) further require that Yin be associated with a broker, dealer, and investment adviser at the time relevant to his criminal conviction. *See* 15 U.S.C. §§ 78o(b)(6); 80b-3(f).

1. Yin's conviction meets the statutory requirements

Yin was criminally convicted, under 18 U.S.C. § 371, of a conspiracy to commit offenses against the United States, specifically, obstruction of an official proceeding (18 U.S.C. § 1512(c)) and money laundering (18 U.S.C. §§ 1956, 1957). Leung Decl., ¶ 3, Ex. 2 at p. 2, §§ I and II(A)(1). That criminal conviction meets the statutory requirements of Exchange Act Section 15(b) and Advisers Act Section 203(f).

First, Yin's and Wang's conspiracy to commit obstruction of justice and launder the proceeds of Wang's insider trading is a felony that involves "the purchase or sale of any security, the taking of a false oath, the making of a false report, ... perjury, ... or conspiracy to commit any such offense." *See, e.g., Richard P. Callipari*, 81 S.E.C. Docket 633, 2003 WL 22250402, *5 (Sept. 30, 2003) ("In itself, the conviction, for endeavoring to obstruct a Commission proceeding by lying under oath, could form the basis of an administrative proceeding, as it 'involves ... the taking of a false oath' within the meaning of Sections 15(b)(4)(B) and 15(b)(6)(A)(ii) of the Exchange Act."); *Kenneth Ko*, 90 S.E.C. Docket 1941, 2007 WL 1574059 (imposing permanent bar where respondent pled guilty to "knowingly making false statements under oath to Commission staff members" investigating respondent's broker-dealer employer); *Lisa A. Jones*, 49 S.E.C. Docket 493, 1991 WL 284819 (July 1, 1991) (imposing permanent bar

on basis of perjury and obstruction of justice convictions); *Marion D. Sherrill*, 88 S.E.C. Docket 106, 2006 WL 1387476 (May 18, 2006) (imposing permanent bar in light of obstruction of justice conviction under 18 U.S.C. § 1512(c)(2)).

Second, Yin's conviction also arose out of the conduct of Merrill Lynch's broker-dealer business since the very object of Yin's and Wang's conspiracy was to conceal insider trading by Wang in a Merrill Lynch nominee account set up and managed by Yin in his role as Wang's Merrill Lynch financial advisor. And finally, Yin's violation of 18 U.S.C. § 371 was punishable by imprisonment for one or more years. *See* 18 U.S.C. § 371 (providing for up to five years' imprisonment for conspiring to commit any offense against the United States).

Yin's criminal conviction therefore subjects him to sanctions under Exchange Act Section 15(b)(6) and Advisers Act Section 203(f).

2. Yin was associated with a broker, dealer, and investment adviser

From July 1994 until April 2013, Yin was a registered representative with Merrill Lynch, a dually-registered broker-dealer and investment adviser. *See* Leung Decl., ¶ 9, Ex. 8. Consequently, Yin was an associated person of a broker, dealer, and investment adviser within the meaning of the Exchange Act and Advisers Act. *See* 15 U.S.C. § 78c(a)(18) (defining person associated with a broker or dealer as "any person directly or indirectly controlling a broker or dealer or any employee of such broker or dealer"); 15 U.S.C. § 80b-2(a)(17) (defining a person associated with an investment adviser as "any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser").

3. The public interest factors warrant a permanent bar

Permanently barring Yin from the securities industry would advance the public interest. Whether an administrative sanction based upon an injunction is in the public interest turns on 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, recognition of the wrongful conduct, and the likelihood that the respondent's occupation will present future opportunities for violations. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *Lonny S. Bernath*, Initial Dec. Rel. No. 993 at 4, 2016 SEC LEXIS 1222 *10-11 (April 4, 2016) (*Steadman* factors used to determine whether a bar is in the public interest, in a case where sanctions were imposed by summary disposition). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation, and the deterrent effect of administrative sanctions. *Id.* at **4, 11. "[N]o one factor is dispositive." *Michael C. Pattison, CPA*, No. 3-14323, 2012 WL 4320146, at *8 (Comm. Op. Sept. 20, 2012); *ZPR Investment Management, Inc.*, No. 3-15263, 2015 WL 6575683, at *27 (Comm. Op. Oct. 30, 2015) (inquiry into the public interest is "flexible"). Here, every one of the considerations articulated in *Steadman* weighs in favor of a permanent industry bar.

a. Yin's actions were egregious

The egregiousness of Yin's actions cannot be plausibly disputed. The depth, span, and continuity of Yin's wrongful conduct are remarkable. At the very beginning, Yin helped Wang set up a shell trading account at Merrill Lynch, held in the name of an off-shore entity under Wang's control, for the express purposes of concealing Wang's trading activity. Yin then effectuated three sets of suspicious trades for Wang, and in each case: (i) Yin saw that Wang had auspiciously traded ahead of public announcements that Wang would have been privy to by reason of his executive position at Qualcomm; and (ii) Yin purposefully concealed these trades by not reporting them to either Qualcomm or the Commission. For two of these trades, Yin even "piggy-backed," profitably, Wang's trading in violation of Merrill Lynch's internal compliance policies. And so in his plea agreement, Yin admitted what should have been obvious to any

registered representative – following the January 2011 announcement of Qualcomm's plans to acquire Atheros, Yin knew that Wang's December 2010 trading in Atheros had been illegal insider trading. Even granting Yin the benefit of the doubt, Yin had by this point in time absolutely no excuse for continuing to perpetrate his and Wang's scheme. Yin's wrongful course of action did not, however, end there.

Over the next two years, Yin doubled-down on his earlier misbehavior. Once he and Wang became worried that Wang's insider trading would come to light, Yin lied to Merrill Lynch's compliance department when they inquired about the trades. Yin created false entries in Merrill Lynch's internal systems that removed the Unicorn account from any designation associated with Wang. Yin also got on a plane (twice), flew to China, found a man that he had never spoken to before (Wang's brother, Bing), gave that man a lengthy tutorial on a series of manufactured reasons for why Bing – and not Wang – had decided to make the subject trades in the Unicorn shell account, all the while knowing that none of the things he was telling this stranger to recount as the truth (if ever asked), were in fact true. Last, Yin assisted Wang in his effort to launder the illegal proceeds of his insider trading by setting up a second nominee account in the name of another off-shore entity, one purportedly under the control of Bing Wang, and then transferring all of the funds in the Unicorn shell account to that new account, all for the purpose of further obscuring any connection between Wang and his illegal trading.

After being confronted by the FBI in February 2013, Yin continued to lie, falsely representing to federal agents that Wang had no connection to the Unicorn account, and that he knew nothing of the account's illegal trading in Atheros. Yin did all of this for the admitted and express purpose of corruptly obstructing an investigation of the Commission into Qualcomm, Wang, and corrupt payments to foreign officials. Yin's conduct was egregious and on that point,

this proceeding is on all fours with the facts of *Kornman*.

Kornman was a registered representative of a broker-dealer who had been convicted of making a false statement to the Commission. According to his plea agreement, Kornman lied to SEC investigators when asked, during a voluntary telephone interview, about who had trading authority for a brokerage account suspected of illegal trading activity (Kornman had authority to trade for the account). Although he had also been criminally charged at the outset with securities fraud, Kornman was ultimately convicted of only obstruction of justice and sentenced to two years' probation pursuant to his plea deal. Even so, the Commission found on appeal that this criminal conviction was a sufficient basis by itself to impose a permanent associational bar:

> The securities industry presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants ... Here, the egregiousness of Kornman's dishonest behavior is compounded because he made his false statement to Commission staff during an ongoing investigation into possible insider trading violations. Providing information to investigators is important to the effectiveness of the regulatory system, and the information provided must be truthful. We have consistently held that deliberate deception of regulatory authorities justifies the severest of sanctions.

Kornman, 2009 WL 367635, *7 (internal quotations omitted) (affirming permanent associational bar). The same outcome is mandated here.

As with Kornman, Yin's long-running, knowing, and willful effort to "corruptly obstruct[] ... an SEC investigation of Qualcomm and its executives, including Jing Wang," Leung Decl., Ex. 2 at p. 11, § II(B)(21), "indicates a lack of honesty and integrity, as well as a fundamental unfitness to transact business associated with a broker or dealer and to advise clients as a fiduciary." *Kornman*, 2009 WL 367635, *7; *see also Peter J. Kisch*, 25 S.E.C. Docket 1242, 1982 WL 529109, *6 (Aug. 24, 1982) (permanently barring president and vice-president of registered broker-dealer who deceived NASD examiners into believing firm was in compliance with net capital and customer protection provisions – "[t]he deliberate deception that respondents

practiced on regulatory authorities reflects just as strongly on their fitness to serve in any capacity in the securities business, and clearly indicates that their continued presence in that business poses a substantial threat to the investing public").

Even when a registered representative's criminal conviction for making false statements to government officials has nothing to do with the securities industry, and results in no tangible harm to a third-party, the Commission has nonetheless stressed that the egregious nature of the offense will still factor when weighing the public's interest. In *Edmond M. Kilbourn*, Funding Capital and Kilbourn appealed NASD's denial of the member firm's application to continue Kilbourn's employment following his criminal conviction for filing a false statement with the U.S. Department of Housing and Urban Development ("HUD"). *Kilbourn*, 49 S.E.C. Docket 549, 1991 WL 284878 (Jul. 10, 1991). Kilbourn began employment at Funding Capital in 1985. *Id.* at *1. Neither he nor the firm had been the subject of prior disciplinary action by any self-regulatory organization or the Commission. *Id.* When previously working as a real estate broker in 1983, however, Kilbourn had falsely certified to HUD that a purchaser had made a down payment when in truth the purchaser had only provided a promissory note. *Id.* Kilbourn was later prosecuted and pled guilty to filing a false statement with HUD in violation of 18 U.S.C. § 1010. *Id.*

After NASD denied Funding Capital's application to retain its NASD membership with Kilbourn as an employee, Kilbourn and the firm appealed to the Commission, arguing that NASD's determination was inconsistent with the public interest since "his conviction did not involve the sale of securities" and "he gained little financially as a result of the transaction [and] there was no financial loss or gain for any other party." *Id.* at *2. The Commission was not persuaded by Kilbourn's suggestion that his conviction had no relevance to the subject at hand:

> The fact that Kilbourn's misconduct did not occur in the securities industry does not militate in his favor. On the contrary, a criminal conviction involving the submission of a false statement to a government body raises a serious question as to whether the perpetrator will engage in similar misconduct in the securities business, an industry that presents numerous opportunities for abuses of a similar nature.

Id. at *2; *see also Evelyn Litwok*, 101 S.E.C. Docket 2925, 2011 WL 3345861, *5 (Aug. 4, 2011) ("the Commission has long barred individuals based on convictions involving dishonesty that are not securities-related") (collecting cases). The Commission was just as dismissive of Kilbourn's contention that his by-then dated lies, as a realtor, to HUD had caused no actual harm, concluding that Kilbourn had "ignore[d] the nature of his offense." *Id.* Rather, the Commission stressed that Kilbourn's crime in fact had a victim, and that victim was the government: "We have repeatedly held that deliberate deception practiced on a regulatory authority reflects strongly on the perpetrator's fitness to work in the securities industry in any capacity." *Id.*

Those same considerations are even more evident here, where Yin's conspiracy to obstruct justice conviction was inextricably intertwined with his work as a registered representative, and where the victim of his misconduct was the Commission itself. Any effort by Yin to white-wash his actions as the innocent mistake of an honest man only seeking to do right by his brokerage client should be rejected by this Court.

b. Yin's misconduct was not isolated, it was recurrent

Yin's criminal conspiracy spanned from 2011 through February 2013. In his plea agreement, Yin admits to no less than 21 overt acts in furtherance of that conspiracy to corruptly obstruct an SEC investigation and launder money. At multiple points in time, Yin could have come clean by bringing Wang's trading to the attention of Merrill Lynch and the relevant authorities, yet he didn't. Yin's sustained course of conduct is deserving of a permanent bar.

c. Yin acted with a high degree of scienter

According to his plea agreement, "[b]eginning in 2011 and continuing through February 2013, [Yin] knowingly and willfully agreed with Jing Wang and Bing Wang to conceal Jing Wang's illegal activity and control of the proceeds of illegal activity by (a) corruptly obstructing an official proceeding – that is, an SEC investigation of Qualcomm and its executives, including Jing Wang – and (b) knowingly conducting unlawful transactions with proceeds of specified unlawful activity." Leung Decl., Ex. 2 at p. 10-11, § II(B)(21). Yin's "knowing," "willful," and "corrupt" *mens rea* is the textbook definition of scienter. *Kornman*, 2009 WL 367635, *7 ("Kornman's conduct also exhibited a high degree of scienter. He admitted to the district court that he made his false statement "intentionally, knowing it was false .. and ... for the purpose of misleading the [] Commission.") (internal quotations omitted).

d. Yin's assurances against future violations and recognition of his wrongful conduct

Yin will no doubt provide this Court with a *mea culpa* and assurances against future violations. But even if this Court were to find them sincere, this factor should not outweigh the Commission's concern that Yin will present a threat if permitted to remain in the securities industry. *See Kornman*, 2009 WL 367635, *7 (finding that sincere expressions of remorse and assurances against future violations insufficient to preclude permanent bar given need for high ethical standards in securities industry); *Batemen Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 315 (1985) ("The primary objective of the federal securities laws [is the] protection of the investing public and the national economy through the promotion of 'a high standard of business ethics ... in every facet of the securities industry.") (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-87 (1963)).

e. It is likely that if employed in the industry, Yin will have future opportunities for violations

The final *Steadman* factor also supports this Court's imposition of a permanent associational bar. "The securities industry presents continual opportunities for dishonest and abuse and depends heavily on the integrity of its participants and on investors' confidence." *Kornman*, 2009 WL 367635, *7. "The securities business is 'a field where opportunities for dishonesty recur constantly.'" *Litwok*, 2011 WL 3345861, *5 (quoting *Ahmed Mohamed Soliman*, 52 S.E.C. 227, 231 (1995) (imposing permanent bar based on misdemeanor conviction for submitting false documents to the IRS)). Consequently, there is a strong likelihood that Yin's continued employment in the securities industry will present future opportunities for violations.

* * *

On the balance of the *Steadman* factors, Yin should be permanently barred from the industry. It is undisputed that he engaged in a conspiracy to obstruct an SEC investigation. Because "[p]roviding information to investigators is important to the effectiveness of the regulatory system," the "deliberate deception of regulatory authorities justifies the severest of sanctions." Yin's conduct warrants nothing less than permanent exclusion.

IV. CONCLUSION

For all the reasons stated, the Division respectfully requests that its motion for summary disposition be granted, and that Yin be permanently barred pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act.

Dated: October 26, 2017

Respectfully submitted,

DIVISION OF ENFORCEMENT

Gary Y. Leung (323.965.3213)
Lynn M. Dean (323.965.3245)
Securities and Exchange Commission
444 S. Flower St., 9th Floor
Los Angeles, CA 90071
(323) 965-3998 (*telephone*)
(323) 965-3908 (*facsimile*)

Counsel for the Division of Enforcement

Certificate of Service

I certify that on October 26, 2017, I caused the foregoing to be served on the following persons by the method of delivery indicated below.

Brent J. Fields, Secretary Securities and Exchange Commission 100 F. Street, N.E., Mail Stop 1090 Washington, D.C. 20549	(by facsimile to (703) 813-9793 and United Parcel Service) (original and three copies)
Honorable Carol Fox Foelak Administrative Law Judge 100 F Street, N.E., Mail Stop 2557 Washington, D.C. 20549-2557	(by United Parcel Service and email)
Dennis A. Stubblefield, Esq Shustak Reynolds and Partners, P.C. 401 West "A" Street, Suite 2250 San Diego, CA 92101 Email: dstubblefield@shufirm.com *Counsel for Respondent*	(by United Parcel Service and email)
Frank T. Vecchione, Esq Law Office of Frank T. Vecchione 105 West "F" Street, Suite 215 San Diego, CA 92101 Email: ftvlaw@gmail.com *Counsel for Respondent*	(by United Parcel Service and email)

Gary Y. Leung

 ADMINISTRATIVE PROCEEDING
FILE NO. 3-18165

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **GARY YIN** **Respondent.**	**The Honorable Carol Fox Foelak**

DECLARATION OF GARY Y. LEUNG IN SUPPORT OF DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT GARY YIN PURSUANT TO COMMISSION RULE OF PRACTICE 250

October 26, 2017

Division of Enforcement
Securities and Exchange Commission
Gary Y. Leung
Los Angeles Regional Office
444 South Flower Street, Suite 900
Los Angeles, CA 90071
Telephone: (323) 965-3998
Facsimile: (213) 443-1904

I, Gary Y. Leung, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am an attorney at law admitted to practice law in the State of California. I am employed as a Senior Trial Counsel for the Division of Enforcement ("Division") at the Los Angeles Regional Office of the U.S. Securities and Exchange Commission ("SEC"), 444 S. Flower Street, Suite 900, Los Angeles, California 90071, Telephone: (323) 965-3998, Extension 53213. I have personal knowledge of each of the facts set forth in this Declaration and, if called as a witness, could and would competently testify thereto.

2. Attached as **Exhibit 1** is a true and correct copy of the criminal information document filed on September 24, 2013, in the matter *USA v. Gary Yin.*, Case No. 13CR3488 WQH (S.D. Cal.) (the "DOJ Action" or "Crim. Dkt."), Crim. Dkt. No. 1.

3. Attached as **Exhibit 2** is a true and correct copy of the Plea Agreement, filed on September 24, 2013, in the DOJ Action.

4. Attached as **Exhibit 3** is a true and correct copy of the Judgment In A Criminal Case, entered on August 26, 2015, in the DOJ Action, Crim. Dkt. No. 91.

5. Attached as **Exhibit 4** is a true and correct copy of Plaintiff Securities and Exchange Commission's First Set of Requests for Admissions to Defendant Gary Yin, served on June 21, 2017, in the matter *SEC v. Gary Yin et al.*, Case No. 13-cv-02270-L-WVG (S.D. Cal.) (the "SEC Action").

6. Attached as **Exhibit 5** is a true and correct copy of Defendant Gary Yin's Responses to Securities and Exchange Commission's First Set of Requests for Admissions received on August 4, 2017 in the SEC Action.

7. Attached as **Exhibit 6** is a true and correct copy of the news release issued by the Department of Justice titled "Former Merrill Lynch Stock Broker Pleads Guilty in

Connection to Qualcomm Insider Trading Scheme" issued on September 24, 2013 in connection with the DOJ Action.

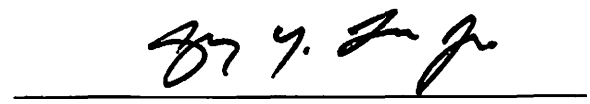
8. Attached as **Exhibit 7** is a true and correct copy of the news release issued by the Department of Justice titled "Former President of Qualcomm's Global Business Operations Indicted for Insider Trading" issued on September 23, 2013 in connection with the matter *USA v. Jing Wang and Bing Wang*, Case No. 13CR3487 H (S.D. Cal.) (the "Wang DOJ Action").

9. Attached as **Exhibit 8** is a true and correct copy of a printout of the "IAPD – Investment Adviser Firm Summary – MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED" webpage, located at https://www.adviserinfo.sec.gov/IAPD/IAPDFirmSummary.aspx?ORG_PK=7691.

10. Attached as **Exhibit 9** is a true and correct copy of respondent Gary Yin's answer in the above-captioned administrative proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 26, 2017, in Los Angeles, California.



Gary Y. Leung

In the Matter of Gary Yin
Administrative Proceeding File No. 3-18165
Service List

Pursuant to Commission Rule of Practice 151 (17 C.F.R. §201.151), I certify that the attached:

DECLARATION OF GARY Y. LEUNG IN SUPPORT OF DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENT GARY YIN PURSUANT TO COMMISSION RULE OF PRACTICE 250

was served on October 26, 2017, upon the following parties as follows:

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 1090
Washington, DC 20549-1090

(By Facsimile and UPS)
(Original and three copies)

Honorable Carol Fox Foelak
Administrative Law Judge
Securities and Exchange Commission
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Washington, DC 20549-2557
Email: alj@sec.gov

(By Email and UPS)

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Frank T. Vecchione, Esq.
Law Office of Frank T. Vecchione
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San Diego, CA 92101
Email: ftvlaw@gmail.com

(By Email and UPS)

Dated: October 26, 2017

Kim L. Haack

EXHIBIT 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GARY YIN, Defendant.	Case No. '13CR3488 WQH I N F O R M A T I O N Title 18, U.S.C., Sec. 371 - Conspiracy to Commit Offenses Against the United States (Felony)

The United States Attorney charges:

1. Beginning in or about January 2011, and continuing through in or about February 2013, in the Southern District of California and elsewhere, Defendant GARY YIN knowingly and willfully conspired and agreed together with Jing Wang and Bing Wang (charged elsewhere) to commit offenses against the United States, to wit: (1) to corruptly obstruct, influence, and impede any official proceeding, and attempt to do so, in violation of Title 18, United States Code, Section 1512(c); and (2) to knowingly conduct unlawful transactions with proceeds of specified unlawful activity, in violation of Title 18, United States Code, Sections 1956 and 1957.

2. In furtherance of this agreement, and to carry out its objects, Defendant and his co-conspirators committed the following overt acts within the Southern District of California and elsewhere:

a. In or about January 2011, Defendant, while employed as broker with Merrill Lynch, agreed to assist his client and co-conspirator Jing Wang in concealing Jing Wang's control of a Merrill Lynch account in the name of "Unicorn Global Enterprises, Ltd." ("Unicorn") that Jing Wang had used to engage in illegal insider trading.

b. In or about January 2011, Defendant falsely represented to Merrill Lynch compliance employees that the nominal owner of the Unicorn Account, co-conspirator Bing Wang, had no relation to anyone at Qualcomm.

c. In or about January 2012, Defendant registered a British Virgin Island ("BVI") nominee company called "Clearview Resources, Ltd." ("Clearview"), using documents he knew had been forged by Jing Wang.

d. In or about January 2012, Defendant opened a Merrill Lynch brokerage account for Jing Wang in the name of Clearview (the "Clearview Account"), in part to further distance Jing Wang from Jing Wang's insider trading in the Unicorn Account.

e. On or about February 23, 2012, Defendant transferred $200,000 from the Unicorn Account to the Clearview Account.

f. On or about February 28, 2012, Defendant transferred $200,000 from the Unicorn Account to the Clearview Account.

g. On or about March 5, 2012, Defendant transferred $125,481 from the Unicorn Account to the Clearview Account.

h. On or about March 19, 2012, Defendant transferred $47,468 from the Clearview Account to an account in China.

i. In or about April 2012, Jing Wang told Defendant that he was concerned that his insider trading would be discovered by the U.S. Securities and Exchange Commission ("SEC").

j. In or about April 2012, Jing Wang asked Defendant to conceal evidence of Jing Wang's illegal activity and help him procure false testimony and other evidence from his brother in China, Bing Wang.

k. In or about April 2012, Jing Wang gave to Defendant an envelope of documents related to Unicorn, and told Defendant to deliver these documents to Bing Wang in China.

l. In or about May 2012, Defendant traveled from San Diego to China and met with Bing Wang for the first time. Defendant and Bing Wang discussed the plan and false cover story devised by Jing Wang, and Defendant gave to Bing Wang the Unicorn documents provided by his brother.

m. In or about May 2012, Defendant sent several emails to Bing Wang that contained false and misleading statements about the Unicorn and Clearview accounts.

n. In or about July 2012, Defendant accessed Merrill Lynch's computer system and removed the Unicorn and Clearview Accounts from the list of accounts associated with Jing Wang.

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o. In or about October 2012, Defendant met with Bing Wang in China to discuss the false story that Jing Wang had concocted to conceal his insider trading.

All in violation of Title 18, United States Code, section 371.

DATED: 9/23/13.

JEFFREY H. KNOX
Chief, Fraud Section
Criminal Division

JAMES P. MCDONALD
Trial Attorney, Fraud Section
Special Assistant U.S. Attorney

LAURA E. DUFFY
United States Attorney

ERIC J. BESTE
JOHN N. PARMLEY
TIMOTHY C. PERRY
Assistant U.S. Attorneys

EXHIBIT 2

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JOHN N. PARMLEYe
TIMOTHY C. PERRY
Assistant U.S. Attorneys
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Attorneys for the United Statese

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,e Plaintiff, v. GARY YIN, Defendant	Case No.: 13CR 3488 WQH **PLEA AGREEMENT**

IT IS HEREBY AGREED between the plaintiff, UNITED STATES OF AMERICA, through its counsel, Laura E. Duffy, United States Attorney, and Assistant United States Attorneys Eric J. Beste, John N. Parmley, and Timothy C. Perry, and Jeffrey H. Knox, Chief, U.S. Department of Justice, Criminal Division, Fraud Section, and Trial Attorney James P. McDonald, and Defendant, GARY YIN, with the advice and consent of Frank T. Vecchione, Esq., counsel for Defendant, as follows:

I

THE PLEA

Defendant agrees to waive indictment and plead guilty to a one-count Information charging him with Conspiracy to commit offenses (Obstruction of Official Proceeding, and Conducting Transactions with Proceeds of Specified Unlawful Activity) in violation of Title 18, United States Code, Section 371.

The Government agrees to not prosecute Defendant thereafter for any conduct described in the "Factual Basis" section of this Plea Agreement unless Defendant breaches the plea agreement or the guilty plea entered pursuant to this plea agreement is set aside for any reason. Defendant expressly waives all constitutional and statutory defenses to the reinstatement of any charges dismissed or not initiated pursuant to this agreement.

In addition, Defendant agrees that the provisions of the attached forfeiture addendum shall govern forfeiture in this case.

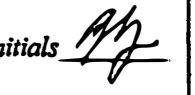
II

NATURE OF THE OFFENSE

A. ELEMENTS EXPLAINED

Defendant understands that Count 1, the offense of Conspiracy, has the following elements:

1. Two or more persons entered into an agreement to commit at leaste one crime as charged in the Information, that is, Obstruction ofe Official Proceeding in violation of Title 18, United States Code,e Section 1512(c), and Conducting Transactions with Proceeds ofe Specified Unlawful Activity, in violation of Title 18, United Statese Code, Sections 1956 and 1957;e
2. Defendant knowingly and willfully became a member of thise conspiracy knowing at least one of its objects and intending to help accomplish it; and

Def's Initials 

3.e At least one of the members of the conspiracy performed at leaste one overt act for the purpose of carrying out the conspiracy.e

B. ELEMENTS UNDERSTOOD AND ADMITTED – FACTUAL BASIS

Defendant has fully discussed the facts of this case with defense counsel. Defendant has committed each of the elements of the crime, and admits that there is a factual basis for this guilty plea. The following facts are true and undisputed:

1. Defendant Gary Yin was born in the People's Republic of Chinae and became a naturalized United States citizen on December 10,e 1999. From July 1994 until April 2013, Yin was a registerede representative with Merrill Lynch. Between 2007 and April 2013, Yin held several significant positions at Merrill Lynch in San Diego, California, including Vice President, Senior Vice President and International Wealth Management Advisor, and ultimately managed over $200 million in assets. Yin was a Certified Financial Manager and held Series 7, 31, 63, and 65 securities licenses.

2.e Beginning in or about 2005, Defendant became the Merrill Lynche Financial Advisor for Jing Wang, then a senior vice president ate Qualcomm, Inc. ("Qualcomm") in San Diego, California. e Qualcomm was one of the world's largest technology companies,e and an "issuer" of securities under the federal securities laws.e Qualcomm's shares of common stock were traded on thee NASDAQ Stock Exchange under the symbol "QCOM."e

3.e Defendant worked as Jing Wang's Financial Advisor from 2005e until 2013. During that period, Jing Wang was promoted to ane executive position at Qualcomm and eventually became ane Executive Vice President and President of Global Businesse

Def's Initials GY

Operations. Because of Jing Wang's senior position at Qualcomm, Defendant was aware that he was subject to certain restrictions involving the purchase and sale of Qualcomm securities, in part due to his access to Qualcomm's confidential business information. Defendant believed that Jing Wang was one of his most important and valued clients because of Jing Wang's senior executive position at Qualcomm, his high net worth, and his esteemed position in the San Diego community.

4. In or about March 2006, Jing Wang discussed with Defendant how to use the proceeds from a planned sale of Jing Wang's Qualcomm stock options, and discussed setting up an account that would allow Jing Wang to disguise his involvement in transferring funds to people in China. Defendant advised Jing Wang that an offshore entity in the British Virgin Islands ("BVI") could be created to act as a nominee account holder of Jing Wang's funds. This would allow Jing Wang to disguise his true ownership and control of these assets and transfers from U.S. tax authorities and third parties. Jing Wang instructed Defendant to begin the process of setting up such an offshore, nominee account.

5. In or about March 2006, Defendant presented Jing Wang with a list of available BVI "shelf companies," and Jing Wang selected "Unicorn Global Enterprises, Ltd." ("Unicorn") as his nominee shelf company. Jing Wang instructed Defendant to set up Unicorn in the BVI, and make it appear that Jing Wang's brother in China, Bing Wang (aka Bin Wang), was the beneficial owner of the company.

Def's Initials 

6. In or about March and April 2006, Jing Wang provided documents to Defendant that gave the false impression that Bing Wang would be the beneficial owner of the Unicorn account. Defendant used these documents to open a Merrill Lynch brokerage account fore Unicorn, thereby making it appear that Jing Wang had no interest in the Unicorn account. In truth, however, Jing Wang funded the Unicorn account, controlled all transactions in the account, and transferred funds in the account for his own benefit. At this time Defendant had not spoken with, met, or communicated with Bing Wang, and had no intention of doing so. Indeed, documents purportedly bearing Bing Wang's signature or other means of identification came to Defendant not from Bing Wang, but from his brother Jing Wang.

7. On or about April 26, 2006, Jing Wang transferred $360,000 in Qualcomm stock-option proceeds from a Merrill Lynch account in his name to the Unicorn brokerage account. Over the next several years, Jing Wang directed Defendant to conduct transactions in the Unicorn account, including sending large wire transfers to a Qualcomm employee in China. When directing these transfers, eJing Wang informed Defendant that the funds were to be used,e among other things, for Jing Wang while he was in China.e

8. In addition to creating a BVI shell company for Jing Wang, Defendant created his own nominee BVI entity called "Pacific Rime Investment Services, Ltd." ("Pacific Rim"). In or about Aprile 2006, Defendant opened up a Merrill Lynch account for Pacifice Rim, in part, because BVI shell companies such as Pacific Rim ande

Def's Initials _____

Unicorn could be used to conceal stock transactions from Merrill Lynch and others.

Jing Wang's insider trading in Qualcomm and Atheros stock

9.e On or about March 1, 2010, Jing Wang directed Defendant toe purchase as many shares of Qualcomm stock as possible in Jing Wang's Unicorn account. Following Jing Wang's instructions,e Defendant purchased 7,700 shares of Qualcomm stock in thee Unicorn account at $36.07 per share, for a total price of $277,739.e This trade by Jing Wang violated Qualcomm's Insider Tradinge policy, as the company's "trading window" was closed and Jinge Wang was not permitted to execute trades in Qualcomm stocke during this time. In addition, Defendant knew that he and Jinge Wang were required to report Jing Wang's trades in Qualcomme stock to the company (pursuant to corporate policy) and to the U.S.e Securities and Exchange Commission ("SEC") (pursuant to federale securities law). Both Defendant and Jing Wang concealed thise trade by not reporting it to Qualcomm or the SEC.e

10.e On the same day Jing Wang purchased Qualcomm stock, Defendant himself purchased a total of 1,280 shares of Qualcomme common stock in his Pacific Rim and personal trust account, for ae total price of approximately $45,984. Specifically, Defendant purchased 500 shares at $35.99 ($17,995), 180 shares at $35.89e ($6,461), and 600 shares at $35.88 ($21,528).e

11.e When the market closed on March 1, 2010, Qualcomm stocke traded at approximately $35.56 per share. After the close ofe trading, Qualcomm publicly released material informatione

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regarding an increase in the quarterly cash dividend that Qualcomm would pay shareholders, as well as a $3.0 billion stock repurchase program. By the end of the day on March 2, 2010, Qualcomm's stock price had appreciated to $37.93 per share. By the end of the week, Qualcomm stock had traded as high as $39.50 – an increase of over 10% from the pre-announcement price. Defendant eventually sold all 1,280 shares of Qualcomm: on March 30, 2010, Defendant sold 100 shares in the Pacific Rim account at $42.49 per share ($4,249); on November 4, 2010, Defendant sold 1,000 shares in the Pacific Rim account at $48.68 per share ($48,680); and on February 18, 2011, Defendant sold 180 shares in his trust account at $59.00 per share ($10,620). All told, Defendant obtained gross proceeds of approximately $17,565 from the purchase and sale of this Qualcomm stock.

12. On or about November 1, 2010, Jing Wang met Defendant at a restaurant in La Jolla, California, and told Defendant of his interest in purchasing shares in a company called Atheros Communications, Inc. ("Atheros"). At the time, Atheros was a technology company headquartered in California that was an "issuer" of securities under the federal securities laws and listed on the NASDAQ Stock Exchange under the symbol "ATHR." Defendant was unfamiliar with Atheros, and did not know the reasoning behind Jing Wang's interest in the stock. Jing Wang told Defendant that if Atheros and Qualcomm stock reached certain prices, Defendant should sell all the Qualcomm stock Jing Wang held in the Unicorn account and use the proceeds to purchase as many shares of Atheros stock as possible. Defendant

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followed Jing Wang's instructions, but the orders to sell Qualcomm and purchase Atheros were cancelled before these stocks reached the specified prices.

13.o On or about December 1, 2010, Jing Wang again met Defendant ato a restaurant in the San Diego area. At this meeting, Jing Wango directed Defendant to sell all of the Qualcomm stock held in theo Unicorn account and to use the proceeds to purchase as manyo shares of Atheros common stock as possible. Jing Wang toldo Defendant to make preparations for the purchase of Atheros, buto not to buy it yet; rather, Jing Wang would contact Defendant again in the near future and tell him when to purchase the Atheroso shares. Jing Wang suggested that Defendant should also considero purchasing shares of Atheros.o

14.o On or about December 2, 2010, as instructed by Jing Wang,o Defendant sold all 7,700 shares of Qualcomm stock held in Jingo Wang's Unicorn account at 48.36 per share ($372,448), resultingo in gross proceeds to Jing Wang of $94,709 from his purchase ando sale of Qualcomm stock. Defendant and Jing Wang concealed theo sale by failing to notify Qualcomm or the SEC of Jing Wang's saleo of Qualcomm stock.o

15.o On or about December 6, 2010, while in the San Diego area,o Defendant received a call from Jing Wang in China. Jing Wango instructed Defendant to go ahead with the plan they had discussedo at the restaurant a few days earlier – that is, the plan to purchase aso many shares of Atheros stock as possible in Jing Wang's Unicorno account. Defendant followed Jing Wang's instructions ando

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purchased a total of 10,800 shares of Atheros stock in Jing Wang's Unicorn account: 100 shares at $34.16 per share ($3,416), and 10,700 shares at $34.27 per share ($366,766). The next day, using his Pacific Rim account, Defendant also purchased 1,000 shares of Atheros at $34.80 per share ($34,800).

16.e On or about January 4, 2011, at 3:00 p.m. Eastern Time, the Newe York Times published an on-line article entitled "QCOM Is Said toe be Set to Buy ATHR for $3.5 Billion." Between January 3, 2011e (the day prior to the announcement) and January 5, 2011 (the firste full day of trading after the public announcement), the price ofe Atheros stock jumped from approximately $37 to $44 – an increasee of approximately 20%. Defendant recognized that Jing Wang'se purchase of Atheros was illegal insider trading – that is, that Jinge Wang had traded based on material, nonpublic information aboute Qualcomm's acquisition of Atheros; that Jing Wang had gainede this inside information through his employment as a seniore Qualcomm executive; and that in so doing, Jing Wang hade knowingly and willfully breached a duty of trust or confidence.e

17.e On or about January 10, 2011, Defendant spoke to Jing Wange about Jing Wang's purchase of Atheros stock, and the fact thate both men could get in trouble because of this trade. Jing Wange asked Defendant if he could "erase" his insider trades. Defendante explained that he could not delete the records of the transactione existing at Merrill Lynch. Jing Wang told Defendant that hee would need to think about what he should do next, and woulde contact Defendant later to give him instructions.e

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18.e On or about January 12, 2011, Defendant sold all 1,000 shares ofe Atheros in his Pacific Rim account at $44.68 per share, for a totale sales price of $44,680, and yielding Defendant gross proceeds ofe $9,880.e

19. On or about January 25, 2011, Jing Wang told Defendant to sell alle 10,800 shares of Atheros stock in Jing Wang's Unicorn account.e Defendant executed the trade at $44.60 per share ($481,680), resulting in gross proceeds to Jing Wang of $111,498. Jing Wang also instructed Defendant to use the proceeds of the Atheros sale toe purchase shares of Qualcomm stock. Defendant followed thise instruction, buying 9,450 shares of Qualcomm stock in the Unicorne account, at $50.87 per share ($482,596). This purchase by Jinge Wang was also prohibited by Qualcomm's Insider Trading policy.e Once again, both Defendant and Jing Wang concealed this trade bye not reporting it to Qualcomm or the SEC.e

20. On or about January 26, 2011, Qualcomm issued a press releasee announcing "Record First Quarter Fiscal 2011 Results" and "Raising Fiscal 2011 Guidance" for the company. The next daye Qualcomm's stock price reacted positively to the disclosure of thise material information, opening at $54.20 per share and closing ate $54.90 per share. Jing Wang later sold his 9,450 shares of Qualcomm stock at $54.90 per share ($518,818), yielding hime gross proceeds of $36,222.e

<u>The Conspiracy</u>

21.e Beginning in 2011 and continuing through February 2013,e Defendant knowingly and willfully agreed with Jing Wang ande

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Bing Wang to conceal Jing Wang's illegal activity and control of the proceeds of illegal activity by (a) corruptly obstructing an official proceeding – that is, an SEC investigation of Qualcomm eand its executives, including Jing Wang – and (b) knowinglye conducting unlawful transactions with proceeds of specifiede unlawful activity.e

22. It was part of the conspiracy that the conspirators would attempt toe conceal evidence of Jing Wang's illegal insider trading by falselye claiming that Bing Wang had authorized the opening of the Unicorn account, had controlled the account, and had placed the illegal trades in Atheros.

23. It was further part of the conspiracy that the conspirators woulde transfer the proceeds of Jing Wang's insider trading to anothere nominee account in a manner designed to conceal Jing Wang'se control of these funds.e

24.e It was further part of the conspiracy that the conspirators woulde attempt to wire transfer sums in excess of $10,000 to othere accounts – including an account in China – in order to furthere conceal Jing Wang's control of these funds.e

25.e It was further part of the conspiracy that the conspirators would e create and send false emails between each other in order to supporte the fake story that Jing Wang had concocted concerning the illegale trades in the Unicorn account.e

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26. On or about the dates set forth below, in the Southern District of California and elsewhere, Defendant and others committed the following overt acts in furtherance of the conspiracy:

a. In or about January 2011, Jing Wang asked Defendant to assist him by concealing Jing Wang's control of the Unicorn account and his purchase of Atheros stock.

b. In January and February 2011, following Jing Wang's request, Defendant falsely represented to Merrill Lynch compliance employees that the nominal owner of the Unicorn account (Bing Wang) had no relation to anyone at Qualcomm.

c. In February and March 2011, Jing Wang repeatedly questioned Defendant about whether Merrill Lynch had discovered Jing Wang's illegal trades in the Unicorn account.

d. In or about January 2012, Jing Wang forged the signature of his mother, and used other means of identification of his mother, to create false documents to be used to set up another BVI shell company called "Clearview Resources, Ltd." ("Clearview").

e. In or about January 2012, Jing Wang directed Defendant to use the false documents to set up Clearview in the BVI, in part to obscure any connection between Jing Wang and the proceeds of Jing Wang's insider trading.

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f. On or about January 23, 2012, at Jing Wang's direction, Defendant created a nominee brokerage account for Jing Wang in the name of Clearview, in part to further distance Jing Wang from the illegal trades in the Unicorn account.

g. In or about February 2012, Jing Wang caused Bing Wang to be added as a representative of Clearview to further conceal Jing Wang's control of these funds.

h. In or about February 2012, Jing Wang directed Defendant to contact a friend in China and arrange for a private investment to be made from the Clearview account.

i. On or about February 23, 2012, Jing Wang directed Defendant to transfer $200,000 from the Unicorn account to the new Clearview brokerage account.

j. On or about February 28, 2012, Jing Wang directed Defendant to transfer $200,000 from the Unicorn account to the Clearview account.

k. On or about March 5, 2012, Jing Wang directed Defendant to transfer $125,481 from the Unicorn account to the Clearview account.

l. On or about March 19, 2012, following Jing Wang's instructions, Defendant transferred $47,468 from the Clearview account to an account in China.

m. On or about March 22, 2012, Jing Wang directed Defendant to transfer the remaining balance out of the Unicorn account to the Clearview account and close the Unicorn account.

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n. In or about April 2012, Jing Wang met with Defendant and explained that the SEC was investigating Qualcomm regarding corrupt payments to foreign officials. He told Defendant that he was worried that the SEC would learn about his control of the Unicorn account and his insider trading. Due to these concerns, Jing Wang embellished their false cover story about the trading in the Unicorn account – that is, that Bing Wang owned and controlled the Unicorn account and had ordered all of the trades. Jing Wang asked Defendant to tell this false story if he was ever asked about the Unicorn account or the trades in the account.

o. In or about April 2012, Jing Wang gave Defendant an envelope of documents related to Unicorn and the Unicorn account and told Defendant that he had removed the documents from his office at Qualcomm in San Diego. Jing Wang directed Defendant to take the Unicorn documents with him the next time Defendant traveled to China, and to meet with Bing Wang during that trip. Jing Wang further instructed Defendant to give the Unicorn documents to Bing Wang, to review them together, and to discuss the false cover story. Jing Wang also instructed Defendant to coordinate future purchases of securities with Bing Wang, and to fabricate evidence in order to make it appear as if Bing Wang had given permission to open, and had always controlled, the Unicorn and Clearview accounts.

p. In or about May 2012, Defendant traveled with the Unicorn documents from San Diego to Beijing, China, and met with

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Bing Wang for the first time. Defendant and Bing Wang discussed the plan and false cover story that Jing Wang had devised, and Defendant gave Bing Wang the Unicorn documents Jing Wang had removed from his Qualcomm office. Bing Wang agreed to assist Defendant and Jing Wang with obstructing any investigation into Jing Wang's insider trading, and to write false and misleading emails to Defendant in order to fabricate evidence.

q. Between May and June 2012, as Jing Wang had directed, Bing Wang and Defendant sent several emails to each other that contained false and misleading statements about the Unicorn and Clearview accounts.

r. In or about July 2012, in order to further conceal Jing Wang's ownership and control of the Unicorn account, Defendant accessed Jing Wang's "household accounts" on Merrill Lynch's computer system and removed the Unicorn account from the list of accounts associated with Jing Wang.

s. In or about October 2012, at Jing Wang's instruction, Defendant met with Bing Wang in China to again discuss the false story that Jing Wang had concocted to conceal his insider trading.

t. In or about January and February 2013, Defendant discussed with Bing Wang and Jing Wang the transfer of over $10,000 from the Clearview account to China.

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u. On February 20, 2013, acting consistently with previouse requests from Jing Wang to conceal Jing Wang'se involvement in the Unicorn account in response to any investigation, Defendant falsely represented to Speciale Agents from the Federal Bureau of Investigation that:e (1)eJing Wang had no involvement in the Unicorn account;e (2)eBing Wang controlled the Unicorn account; ande (3) Defendant did not know why Atheros stock was e purchased in the Unicorn account. e

III

PENALTIES

Defendant understands that Count 1 (Conspiracy) to which Defendant is pleading guilty carries the following penalties:

A.e a maximum 5 years in prison (18 U.S.C. § 371);e

B.e a maximum $250,000 fine, or twice the gross gain caused from thee offense, or twice the gross loss caused by the offense (18 U.S.C. § 3571);

C. a mandatory special assessment of $100 per count;

D. a term of supervised release of up to 3 years. Defendant understands that failure to comply with any of the conditions of supervised release may result in revocation of supervised release, requiring Defendant to serve in prison, upon any such revocation, all or part of the statutory maximum term of supervised release for the offense that resulted in such term of supervised release;

E. an order from the Court pursuant to 18 U.S.C. § 3663 that Defendant make restitution to the victim(s) of the offense of conviction, or the estate(s) of the victims(s); and

F.e forfeiture of any property, real or personal, which constitutes or ise derived from proceeds traceable to the offense (18 U.S.C. §e981(a)(1)(C) and 28 U.S.C. § 2461(c)).

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IV

DEFENDANT'S WAIVER OF TRIAL RIGHTS

Defendant understands that this guilty plea waives the right to:

A.e Continue to plead not guilty and require the Government to prove thee elements of the crime beyond a reasonable doubt;e

B.e A speedy and public trial by jury;

C.e The assistance of counsel at all stages of trial; e

D.e Confront and cross-examine adverse witnesses;e

E. Testify and present evidence and to have witnesses testify on behalf of Defendant; ande

F.e Not testify or have any adverse inferences drawn from the failure toe testify.

Defendant also knowingly and voluntarily waives any rights and defenses Defendant may have under the Excessive Fines Clause of the Eighth Amendment toe the forfeiture of property in this proceeding or any related civil proceeding.e

V

DEFENDANT ACKNOWLEDGES NO PRETRIAL RIGHT TO BE PROVIDED WITH IMPEACHMENT AND AFFIRMATIVE DEFENSE INFORMATION

The Government represents that any information establishing the factual innocence of Defendant known to the undersigned prosecutor in this case has beene turned over to Defendant. The Government will continue to provide such informatione establishing the factual innocence of Defendant.e

Defendant understands that if this case proceeded to trial, the Government would be required to provide impeachment information relating to any informants ore other witnesses. In addition, if Defendant raised an affirmative defense, the Government would be required to provide information in its possession that supportse such a defense. Defendant acknowledges, however, that by pleading guilty Defendante will not be provided this information, if any, and Defendant also waives the right toe this information. Finally, Defendant agrees not to attempt to withdraw the guilty pleae or to file a collateral attack based on the existence of this information.e

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VI

DEFENDANT'S REPRESENTATION THAT GUILTY PLEA IS KNOWING AND VOLUNTARY

Defendant represents that:

A.e Defendant has had a full opportunity to discuss all the facts ande circumstances of this case with defense counsel and has a clear understanding of the charges and the consequences of this plea. Defendant understands that, by pleading guilty, Defendant may be giving up, and rendered ineligible to receive, valuable government benefits and civic rights, such as the right to vote, the right to possess a firearm, the right to hold office, and the right to serve on a jury. Defendant further understands that the conviction in this case may subject Defendant to various collateral consequences, including but not limited to deportation, removal or other adverse immigration consequences; revocation of probation, parole, or supervised release in another case; debarment from government contracting; and suspension or revocation of a professional license, including a financial professional license. The loss of none of which will serve as grounds to withdraw Defendant's guilty plea.e

B.e No one has made any promises or offered any rewards in return for thise guilty plea, other than those contained in this agreement or otherwise disclosed to thee Court.e

C.e No one has threatened Defendant or Defendant's family to induce thise guilty plea.e

D.e Defendant is pleading guilty because in truth and in fact defendant ise guilty and for no other reason.

VII

LIMITATIONS OF PLEA AGREEMENT

This plea agreement is limited to the United States Attorney's Office for the Southern District of California and the Fraud Section of the Criminal Division of thee

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United States Department of Justice and cannot bind any other federal, state or local prosecuting, administrative, or regulatory authorities, although the Government will bring this plea agreement to the attention of other authorities if requested by the Defendant.

VIII

APPLICABILITY OF SENTENCING GUIDELINES

Defendant understands the sentence imposed will be based on the factors set forth in 18 U.S.C.e§e3553(a). Defendant understands further that in imposing the sentence, the sentencing judge must consult the United States Sentencing Guidelines (Guidelines) and take them into account. Defendant has discussed the Guidelines with defense counsel and understands that the Guidelines are only advisory, not mandatory, and the Court may impose a sentence more severe or less severe than otherwise applicable under the Guidelines, up to the maximum in the statute of conviction. Defendant understands further that the sentence cannot be determined until a presentence report has been prepared by the U.S. Probation Office, and both defense counsel and the Government have had an opportunity to review and challenge the presentence report. Nothing in this plea agreement shall be construed as limiting the Government's duty to provide complete and accurate facts to the district court and the U.S. Probation Office.e

IX

SENTENCE IS WITHIN SOLE DISCRETION OF JUDGE

This plea agreement is made pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B). Defendant understands that the sentence is within the sole discretion of the sentencing judge. The Government has not made and will not make any representation as to what sentence Defendant will receive. Defendant understands that the sentencing judge may impose the maximum sentence provided by statute, and is also aware that any estimate of the probable sentence by defense counsel is a prediction, not a promise, and is not binding on the Court. Likewise, the

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recommendation made by the Government is not binding on the Court, and it is uncertain at this time what Defendant's sentence will be. Defendant also has been advised and understands that if the sentencing judge does not follow any of the parties' sentencing recommendations, Defendant has no right to withdraw the plea.

X

PARTIES' SENTENCING RECOMMENDATIONS

A. SENTENCING GUIDELINE CALCULATIONSe

Although the parties understand that the Guidelines are only advisory and just one of the factors the Court will consider under 18 U.S.C. § 3553(a) in imposing a sentence, the parties will recommend the following Base Offense Level, Specific Offense Characteristics, Adjustments and Departures under the Guidelines effective November 1, 2012:

Conspiracy to commit offenses		
1.e	Base offense level [§§ 2X1.1, 2S1.1(a)(2)]e	8
2.e	Value of funds [§§ 2S1.1(a)(2), 2B1.1(b)(1)(G)]e	+12e
3.e	Obstruction of justice [§ 3C1.1]e	+2
4.	Acceptance of responsibility [§ 3E1.1]	-3e
Departures		
5.e	Departure/variance [§ 5K2.0/§ 3553(a)]e	-3e
6.e	Pre-plea substantial assistance [§ 5K1.1]e	-4

B.e ACCEPTANCE OF RESPONSIBILITY

Notwithstanding paragraph A.4 above, the Government will not be obligated toe recommend any adjustment for Acceptance of Responsibility if Defendant engages in conduct inconsistent with acceptance of responsibility including, but not limited to,e the following:e

1.e Fails to truthfully admit a complete factual basis as stated in thee plea at the time the plea is entered, or falsely denies, or makes a statement inconsistent with, the factual basis set forth in this agreement;

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2. Falsely denies prior criminal conduct or convictions;e

3.e Is untruthful with the Government, the Court or probation officer;e

4.e Materially breaches this plea agreement in any way; ore

5.e Contests or assists any third party in contesting the forfeiture ofe property(ies) seized in connection with this case, and anye property(ies) to which the Defendant has agreed to forfeit as sete forth in the attached forfeiture addendum.e

C.e FURTHER ADJUSTMENTS AND SENTENCE REDUCTIONSe INCLUDING THOSE UNDER 18 U.S.C. § 3553e

The parties agree that Defendant may recommend additional downward adjustments, departures, or sentence reductions under 18 U.S.C. § 3553. The Government is free to oppose any such downward adjustments, departures and sentence reductions.

D. NO AGREEMENT AS TO CRIMINAL HISTORY CATEGORY

The parties have no agreement as to Defendant's Criminal History Category.

E. "FACTUAL BASIS" CONSIDERED "RELEVANT CONDUCT"

The parties agree that the facts in the "factual basis" paragraph of this agreement are true, and may be considered as "relevant conduct" under USSG § 1B1.3 and as the nature and circumstances of the offense under 18 U.S.C.e § 3553(a)(1).e

F.e PARTIES' RECOMMENDATIONS REGARDING CUSTODYe

The parties agree that the Government will recommend that Defendant bee sentenced to the low end of the advisory guideline range as calculated by the Government pursuant to this agreement.

G. SPECIAL ASSESSMENT/FINE/RESTITUTION/FORFEITUREe

1.e Special Assessment.e

The parties will jointly recommend that Defendant pay a special assessment in the amount of $100.00, to be paid forthwith at time of sentencing. The special

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assessment shall be paid through the office of the Clerk by bank or cashier's check or money order made payable to the "Clerk, United States District Court."

2. Fine.

The parties will jointly recommend that Defendant pay a fine within the Guideline range as calculated by the Government pursuant to this agreement.

The fine shall be paid through the Office of the Clerk of the District Court by bank or cashier's check or money order made payable to the "Clerk, United States District Court."

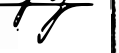
3. Restitution.e

Defendant agrees that the amount of restitution ordered by the Court may include Defendant's total offense conduct, and is not limited to the count(s) of conviction. Accordingly, the parties will jointly recommend that Defendant pay restitution in an amount to be set by the Court at sentencing. Defendant agrees and understands that any payment schedule imposed by the Court is without prejudice to the United States to take all actions and take all remedies available to it to collect the full amount of the restitution.

Defendant agrees that the restitution, restitution judgment, payment provisions, and collection actions of this plea agreement are intended to, and will, survive Defendant, notwithstanding the abatement of any underlying criminal conviction after the execution of this agreement. Defendant further agrees that any restitution collected and/or distributed will survive him, notwithstanding the abatement of any underlying criminal conviction after execution of this agreement.

The restitution described above shall be paid through the Office of the Clerk of the District Court by bank or cashier's check or money order made payable to the "Clerk, United States District Court."

Defendant agrees and consents that, upon execution of this plea agreement, the United States is authorized to run credit reports on the Defendant and to share the reports with the Court and the U.S. Probation Office. In addition, Defendant agrees

Def's Initials 

that, not later than 30 days before sentencing, Defendant shall provide to the United States, under penalty of perjury, a financial disclosure form listing all Defendant's assets and financial interests valued at more than $1,000. Defendant understands that these assets and financial interests include all assets and financial interests in which defendant has an interest (or had an interest prior to February 20, 2013), direct or indirect, whether held in defendant's own name or in the name of another, in any property, real or personal. Defendant shall also identify all assets valued at more than $5,000 which have been transferred to third parties since February 20, 2013, including the location of the assets and the identity of the third party(ies).

The parties will jointly recommend that as a condition of probation or supervised release, Defendant will notify the Collections Unit, United States Attorney's Office, of any interest in property obtained, directly or indirectly, including any interest obtained under any other name or entity after the execution of this plea agreement until the fine or restitution is paid in full.

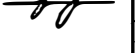
The parties will also jointly recommend that as a condition of probation or supervised release, Defendant will notify the Collections Unit, United States Attorney's Office, before Defendant transfers any interest in property owned directly or indirectly by defendant, including any interest held or owned under any other name or entity, including trusts, partnerships and/or corporations.

4.e Forfeiture.e

Defendant agrees that the provisions of the attached forfeiture addendum shall govern forfeiture in this case.

H. SUPERVISED RELEASE

If the Court imposes a term of supervised release, Defendant agrees that he will not later seek to reduce or terminate early the term of supervised release until he has served at least 2/3 of his term of supervised release and has fully paid and satisfied any special assessments, fine, criminal forfeiture judgment and restitution judgment.

Def's Initials 

In addition to the standard conditions of supervised release, Defendant agrees to file corrected amended tax returns for tax years 2006 to 2012 within the first year of supervised release.

XI

DEFENDANT WAIVES APPEAL AND COLLATERAL ATTACK

In exchange for the Government's concessions in this plea agreement, Defendant waives, to the full extent of the law, any right to appeal or to collaterally attack the conviction and any lawful restitution order, except a post-conviction collateral attack based on a claim of ineffective assistance of counsel. The Defendant also waives, to the full extent of the law, any right to appeal or to collaterally attack his sentence, except a post-conviction collateral attack based on a claim of ineffective assistance of counsel, unless the Court imposes a custodial sentence above the highe end of the guideline range (which, if USSG 5G1.1(b) applies, will be the statutorilye required mandatory minimum sentence) recommended by the Government pursuant toe this agreement at the time of sentencing. If the custodial sentence is greater than the e high end of that range, Defendant may appeal, but the Government will be free toe support on appeal the sentence actually imposed. If Defendant believes thee Government's recommendation is not in accord with this plea agreement, Defendant will object at the time of sentencing; otherwise the objection will be deemed waived.

If at any time Defendant files a notice of appeal, appeals or collaterally attacks the conviction or sentence in violation of this plea agreement, said violation shall be a material breach of this agreement as further defined below.

XII

BREACH OF THE PLEA AGREEMENT

eA. MATERIAL BREACH OF PLEA AGREEMENT

Defendant acknowledges, understands, and agrees that if Defendant violates ore fails to perform any of Defendant's obligations under this agreement, such violation or failure to perform may constitute a material breach of this agreement.

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Defendant acknowledges, understands, and agrees further that the following non-exhaustive list of conduct by Defendant unquestionably constitutes a material breach of this plea agreement:

1.e Failing to plead guilty pursuant to this agreement,
2. Withdrawing the guilty plea or attempting to withdraw the guiltye plea,
3. Failing to fully accept responsibility as established in Section X,e paragraph B, above,
4. Failing to appear in court, e
5. Failing to abide by any lawful court order related to this case,e
6. Appealing or collaterally attacking the sentence or conviction in violation of Section XI of this plea agreement, ore
7. Engaging in additional criminal conduct from the time of arreste until the time of sentencing.e

B. CONSEQUENCES OF BREACHe

In the event of Defendant's material breach of this plea agreement, Defendante will not be able to enforce any of its provisions, and the United States will be relievede of all its obligations under this plea agreement. For example, the United States maye pursue any charges including those that were dismissed, promised to be dismissed, ore not filed as a result of this agreement (Defendant agrees that any statute of limitations relating to such charges is tolled as of the date of this agreement; Defendant also waives any double jeopardy defense to such charges). In addition, the United States may move to set aside Defendant's guilty plea. Defendant may not withdraw the guilty plea based on the United States' pursuit of remedies for Defendant's breach.

XIII

COMPLETE WAIVER OF PLEA-DISCUSSION EXCLUSION RIGHTS

In exchange for the United States' concessions in this agreement, Defendant agrees that: (i) the stipulated factual basis statement in this agreement; (ii) any statements made by Defendant, under oath, at a guilty plea hearing (before either a Magistrate Judge or a District Judge); and (iii) any evidence derived from such statements, are admissible against Defendant in the prosecution's case-in-chief and at

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any other stage of the proceedings in any prosecution of or action against Defendant on the current charges and/or any other charges that the United States may pursue against Defendant. Additionally, Defendant knowingly, voluntarily, and intelligently waives any argument under the United States Constitution, any statute, Federal Rule of Evidence 410, Federal Rule of Criminal Procedure 11(f), and/or any other federal rule, that these statements or any evidence derived from these statements should be suppressed or are inadmissible.

XIV

ENTIRE AGREEMENT/MODIFICATIONS MUST BE IN WRITING

This plea agreement embodies the entire agreement between the parties and supersedes any other agreement, written or oral.

No modification of this plea agreement shall be effective unless in writing signed by all parties.

XV

DEFENDANT AND COUNSEL FULLY UNDERSTAND AGREEMENT

By signing this agreement, Defendant certifies that Defendant has read it (or that it has been read to defendant in Defendant's native language). Defendant has discussed the terms of this agreement with defense counsel and fully understands its meaning and effect.

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XVI

DEFENDANT SATISFIED WITH COUNSEL

Defendant has consulted with counsel and is satisfied with counsel's representation. This is defendant's independent opinion, and counsel did not advise defendant about what to say in this regard.

FOR THE GOVERNMENT:

LAURA E. DUFFY
United States Attorney

JEFFREY H. KNOX
Chief, Fraud Section, Criminal Division

Aug. 8, 2013
ERIC J. BESTE — Date
JOHN N. PARMLEY
TIMOTHY C. PERRY
Assistant U.S. Attorneys

8/8/13
JAMES P. McDONALD — Date
Trial Attorney
Special Assistant U.S. Attorney

FOR THE DEFENDANT:

8/07/13
FRANK T. VECCHIONE — Date
Defense Counsel

IN ADDITION TO THE FOREGOING PROVISIONS TO WHICH I AGREE, I SWEAR UNDER PENALTY OF PERJURY THAT THE FACTS IN THE "FACTUAL BASIS" SECTION ABOVE ARE TRUE.

08/07/2013
GARY YIN — Date
Defendant

Def's Initials GY

EXHIBIT 3

AO 245B (CASD) (Rev. 4/14) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA
v.
GARY YIN (1)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 13CR3488-WQH

FRANK VECCHIONE, RET
Defendant's Attorney

REGISTRATION NO. 40669298

☐

THE DEFENDANT:
☒ pleaded guilty to count(s) 1 OF THE INFORMATION

☐ was found guilty on count(s) _____
after a plea of not guilty.
Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offense(s):

Title & Section	Nature of Offense	Count Number(s)
18 USC 371	CONSPIRACY TO COMMIT OFFENSES AGAINT THE UNITED STATES	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ is ☐ are ☒ dismissed on the motion of the United States.

☒ Assessment: $100.00

☐ Fine waived ☒ Forfeiture pursuant to order filed November 20, 2013, included herein.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

AUGUST 25, 2015
Date of Imposition of Sentence

HON. WILLIAM Q. HAYES
UNITED STATES DISTRICT JUDGE

DEFENDANT: GARY YIN (1)
CASE NUMBER: 13CR3488-WQH

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of
TIME SERVED

☐ Sentence imposed pursuant to Title 8 USC Section 1326(b).

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: GARY YIN (1)
CASE NUMBER: **13CR3488-WQH**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

3 years

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

For offenses committed on or after September 13, 1994:

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as determined by the court. Testing requirements will not exceed submission of more than 4 drug tests per month during the term of supervision, unless otherwise ordered by court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

☒ The defendant shall cooperate in the collection of a DNA sample from the defendant, pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000, pursuant to 18 USC sections 3563(a)(7) and 3583(d).

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution obligation, it is a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in this judgment.

The defendant must comply with the standard conditions that have been adopted by this court. The defendant shall also comply with any special conditions imposed.

STANDARD CONDITIONS OF SUPERVISION

1)o the defendant shall not leave the judicial district without the permission of the court or probation officer;o

2)o the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;o

3)o the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;o

4)o the defendant shall support his or her dependents and meet other family responsibilities;o

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;o

6)o the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;o

7)o the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;o

8)o the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;o

9)o the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;o

10)o the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;o

11)o the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;o

12)o the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; ando

13)o as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.o

DEFENDANT: GARY YIN (1)
CASE NUMBER: **13CR3488-WQH**

SPECIAL CONDITIONS OF SUPERVISION

☑ Submit person, property, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

☐ If deported, excluded, or allowed to voluntarily return to country of origin, not reenter the United States illegally and report to the probation officer within 24 hours of any reentry to the United States; supervision waived upon deportation, exclusion or voluntary departure.

☐ Not transport, harbor, or assist undocumented aliens.

☐ Not associate with undocumented aliens or alien smugglers.

☐ Not reenter the United States illegally.

☐ Not engage in any employment or profession involving fiduciary responsibilities.

☒ Report all vehicles owned or operated, or in which you have an interest, to the probation officer.e

☐ Not possess any narcotic drug or controlled substance without a lawful medical prescription.e

☐ Not associate with known users of, smugglers of, or dealers in narcotics, controlled substances, or dangerous drugs in any form.e

☒ Notify the Collections Unit, United States Attorney's Office, of any interest in property obtained, directly or indirectly, including any interest obtained under any other name, or entity, including a trust, partnership or corporation until the fine or restitution is paid in full.e

☐ Take no medication containing a controlled substance without valid medical prescription, and provide proof of prescription to the probation officer, if directed.

☒ Provide complete disclosure of personal and business financial records to the probation officer as requested.

☒ Be prohibited from opening checking accounts or incurring new credit charges or opening additional lines of credit without approval of the probation officer.

☐ Seek and maintain full time employment and/or schooling or a combination of both.

☐ Resolve all outstanding warrants within days.

☐ Complete hours of community service in a program approved by the probation officer within

☐ Reside in a Residential Reentry Center (RRC) as directed by the probation officer for a period of

☒ Notify the Collections Unit, United States Attorney's Office, before transferring anyinterest in property owned, directly or indirectly, including any interest held or ownedunder any other name, or entity, including a trust, partnership or corporation.

AO 245S Judgment in Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: GARY YIN (1)
CASE NUMBER: 13CR3488-WQH

FINE

The defendant shall pay a fine in the amount of $5,000 unto the United States of America.

This sum shall be paid ___ immediately.
x as follows:

Pay a fine in the amount of $5,000 through the Clerk, U. S. District Court. Payment of fine shall be forthwith. During any period of incarceration the defendant shall pay fine through the Inmate Financial Responsibility Program at the rate of 50% of the defendant's income, or $25.00 per quarter, whichever is greater. The defendant shall pay the fine during his supervised release at the rate of $3,000 per month. These payment schedules do not foreclose the United States from exercising all legal actions, remedies, and process available to it to collect the fine judgment at any time. Until fine has been paid, the defendant shall notify the Clerk of the Court and the United States Attorney's Office of any change in the defendant's mailing or residence address, no later than thirty (30)edays after the change occurs.e

The Court has determined that the defendant _____ have the ability to pay interest. It is ordered that:

___ The interest requirement is waived.

___ The interest is modified as follows:

AO 245S Judgment in Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: GARY YIN (1)
CASE NUMBER: 13CR3488-WQH

RESTITUTION

The defendant shall pay restitution in the amount of $1,428.287 unto the United States of America.

This sum shall be paid ___ immediately.
___ as follows:

Defendant shall pay restitution for investigative costs as follows:
Defendant shall pay restitution in the total amount of $1,428,287 to Merrill Lynch, with $ 1,200,000 of this total amount, joint and several with Jing Wang, to the following: David Montague, Bank of America Corp., 50 Rockefeller Plaza, 7th Floor, New York, NY 10020, through the Clerk, U.S. District Court. Payment ofrestitution shall be forthwith and in a lump sum. During any period of incarceration the defendant shall pay restitution through the Inmate Financial Responsibility Program at the rate of 50% of the defendant's income, or $25.00 per quarter whichever is greater. Defendant shall pay the restitution during his supervised release at the rate of $ 39,675.00 per month. These payment schedules do not foreclose the United States from exercising all legal actions, remedies, and process available to it to collect the restitution judgment. The Clerk of the Court shall credit payments initially to satisfy defendant's individual liability and thereafter to the Defendant's joint and several liability.

The Court has determined that the defendant ___ have the ability to pay interest. It is ordered that:

___ The interest requirement is waived.

___ The interest is modified as follows:

EXHIBIT 4

GARY Y. LEUNG, Cal. Bar No. 302928
Email: leungg@sec.gov
WENDY E. PEARSON, Cal. Bar No. 211099
Email: pearsonw@sec.gov

Attorneys for Plaintiff
Securities and Exchange Commission
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. GARY YIN, et al., Defendants.	Case No. 13-cv-02270-L-WVG **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S FIRST SET OF REQUESTS FOR ADMISSIONS TO DEFENDANT GARY YIN**

PROPOUNDING PARTY: SECURITIES AND EXCHANGE COMMISSION

RESPONDING PARTY: GARY YIN

SET NO.: ONE (Nos. 1 to 4)

In accordance with Rule 36 of the Federal Rules of Civil Procedure, the Securities and Exchange Commission ("SEC") hereby requests that defendant Gary Yin respond to the following requests for admission within 30 days of the date of service hereof.

I. INSTRUCTIONS & DEFINITIONS

A. Definitions

1. The term "SEC" means the U.S. Securities and Exchange Commission.

2. The term "document(s)" is synonymous in meaning and equal in scope to the usage of the term "documents" in Rule 34(a) of the Federal Rules of Civil Procedure and the term "writings and recordings" in Rule 1001(l) of the Federal Rules of Evidence, and shall include any drafts, originals, and non-identical copies of any kind, written, typewritten, printed, recorded, computer-generated or graphic material, however produced, reproduced or compiled, including, but not limited to, any correspondence, memoranda, letters, notes, instructions, contracts, agreements, books, journals, ledgers, statements, reports, studies, bills, invoices, articles, diaries, minutes, calendars, analyses, projections, transcripts, declarations, witness statements, interview reports, summaries, notes of personal or telephonic conversations, e-mail, summaries or notes of any meetings or conferences, and all electronically stored information including electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term.

3. The term "communication(s)" means any written, oral, telephonic or other utterances of any nature whatsoever, shared, shown, and/or transferred between and/or among any two and/or more persons, including, but not limited to, any statements, inquiries, discussions, conversations, dialogues, correspondence, e-mail, consultations, negotiations, agreements, understandings, meetings, letters, notations, telegrams, advertisements, declarations, transcripts, interviews, interview reports, blogs, chat room or other Internet postings, and all other documents. A draft or non-identical copy is a separate communication within the meaning of this term.

4. The term "identify" means to describe with particularity, in full detail, all relevant facts about the subject matter, including, but not limited to, names, dates, relationships, functions, addresses, purposes, objectives, results and other information

which could lead to the discovery of admissible evidence.

5. The term "identify" when used with respect to a document or communication means to identify the document or communication by exhibit number or bates number(s) if previously produced in this action or the SEC's non-public investigation that preceded this action; or if the document or communication has not been previously produced in this action or the SEC's prior investigation, to set forth the following information: (a) the nature or type of document or communication (e.g., telephone communication, letter, e-mail or memorandum); (b) the date the document or communication was made: (c) the author(s) of the document or communication; (d) each person who received a copy of the document or communication or was informed of its contents; (e) the person who now has the document or communication or was last known to have it; and (f) the general subject matter and, if applicable, the title of the document or communication.

6. The term "concerning" shall mean discussing, reflecting, evidencing, constituting, mentioning, pertaining to, assessing, embodying, recording, stating, describing, supporting, contradicting, contravening, touching upon or summarizing.

7. The term "person(s)" means any natural individual(s) and/or natural person(s), in any capacity whatsoever, or any entity or organization including divisions, subsidiaries, departments, and other units thereof, and shall include, but not be limited to, a public or private corporation(s), partnership(s), professional corporation(s), limited liability company(ies), business trust(s), banking institution(s), firm(s), joint venture(s), voluntary or unincorporated association(s), organizations(s), proprietorship(s), trust(s), estate(s), governmental agency(ies), commission(s), bureau(s) and/or department(s), and/or any other legal entity.

8. The terms "you" and "your" mean defendant Gary Yin, and all persons, agents, attorneys, representatives or other persons or entities acting or purporting to act on his behalf.

9. The term "Qualcomm" means Qualcomm Inc.

10. The term "SEC Action" means the civil enforcement action captioned, SEC v. Yin, et al., Case No. 13-cv-02270-L-WVG (S.D. Cal.)

11. The term "SEC Complaint" means the complaint filed by the SEC against defendants Yin and Jing Wang in the SEC Action.

12. The term "Answer" means the answer filed by defendant Yin in the SEC Action.

13. The term "piggybacking" shall have the same meaning as the term "piggybacking" was used in defendant Yin's February 12, 2016 "Wells Submission/White Paper of Gary Yin," i.e., "the trading by a person simply on the basis of the information obtained on the face of the trade being copied."

14. The term "Atheros" means Atheros Communications Incorporated.

B. Instructions

1. In responding to these requests for admission, you are required to obtain all responsive information that is available to you and to any of your representatives, agents, employees or attorneys, and to obtain all such responsive information that is in your actual or constructive possession, custody or control, or in the actual or constructive possession, custody or control of any of your representatives, agents, employees or attorneys.

2. These requests for admission are continuing in nature and you are required to promptly supplement or amend your responses to the requests for admission if, after the time of your initial responses, you learn that any response is or has become, in some material respect, incomplete or incorrect, to the full extent provided for by Federal Rule of Civil Procedure 26(e).

3. If you object to a request for admission, and that objection pertains to only a part of the request for admission, or word, phrase or clause in it, then you are required to state your objection to that portion only and to respond to the remainder of the request for admission, using your best efforts to do so. No part of a request for admission shall be left unanswered merely because you interpose an objection to

another part of a request for admission.

4. For requests for admission regarding the authenticity or accuracy of a copy of a document or communication, each document or communication identified and described in the particular request for admissions consists of one or more individual pages. Should you deny any request, state with specificity whether your denial is to the entire document or communication, or solely to certain pages, sections or other aspects (such as markings or annotations) contained within the document or communication. Also, if your denial is only with respect to certain pages, sections, or other aspects (such as markings or annotations) contained within the document or communication, specify, by bates number and by description of the page, sections or other aspects as appropriate, those specific pages, sections or other aspects that you refuse to admit are authentic and/or and true and correct copies of "records of a regularly conducted activity" or "business records" within the meaning of Rule 803(6) of the Federal Rules of Evidence.

5. If you withhold any information, or documents or communications asked to be identified, which is responsive to a request for admission, based on a claim of privilege or any other reason, then provide the following information concerning the withheld information, document or communication: (a) the nature or type of information that is being withheld (*e.g.*, telephone communication, letter, e-mail or memorandum); (b) a general description of the subject matter of the information that is being withheld; (c) the date the responsive information was made; (d) the name, address, and telephone number and occupation of each person who (i) made or authored the information or (ii) received (or was intended to receive) the information, or was otherwise informed about the information; and (e) a statement of the privilege or other reason claimed to withhold the information or otherwise object to the request for admission.

6. If you identify any document(s) or communication(s) in your responses to these requests for admission that no longer exist, cannot be located or are not in

your possession, custody or control, then in your response, identify those document(s) or communication(s), as well as: (a) the author(s); (b) the date the responsive material was created; (c) each person who received a copy of the responsive material or was informed of its contents; (d) the person who now has the responsive material or was last known to have it; (e) the general subject matter and, if applicable, the title of the responsive material; (f) the type of such responsive material (*e.g.*, telephone communication, letter, e-mail or memorandum); (g) the size of the material (*e.g.*, number of pages); (h) a detailed description of the responsive material; and (i) a detailed and complete explanation of why such responsive material is no longer in your possession, custody, or control.

7. For each of the requests for admission below, in order to make the request inclusive rather than exclusive, the past tense shall be construed to include the present tense, and vice versa. Moreover, "and" and "or" as used herein are both conjunctive and disjunctive, and "any" includes the word "all" and vice versa.

8. No agreement by the SEC or its staff purporting to modify, limit, or otherwise vary these requests for admission is binding on the SEC or its staff unless confirmed or acknowledged in writing by the SEC or its staff.

II. REQUESTS FOR ADMISSION

Request for Admission No. 1:

Admit that every factual assertion contained in the February 12, 2016 "Wells Submission/White Paper of Gary Yin," attached hereto as Exhibit 1, was made by a person who you authorized to make a statement on the subject.

Request for Admission No. 2:

Admit that you piggybacked defendant Wang's March 1, 2010 trading in Qualcomm securities when you engaged in the securities trading described in paragraph 31 of the SEC Complaint.

Request for Admission No. 3:

Admit that you piggybacked defendant Wang's December 6, 2010 trading in

Atheros securities when you engaged in the securities trading described in paragraph 42 of the SEC Complaint.

Request for Admission No. 4:

Admit that Merrill Lynch internal policies and procedures governing your conduct as a registered representative at Merrill Lynch, in 2010 and in connection with your assignment to defendant Wang's accounts, prohibited piggybacking of client accounts.

Dated: June 21, 2017

/s/ Gary Y. Leung
GARY Y. LEUNG
Attorney for Plaintiff
Securities and Exchange Commission

EXHIBIT 1

SHUSTAK REYNOLDS
& PARTNERS, P.C.

February 12, 2016
John W. Berry, Esq.
Securities and Exchange Commission

February 12, 2016

John W. Berry, Esq.
Securities and Exchange Commission
444 South Flower Street, Suite 900
Los Angeles, CA 90071

Re: Wells Submission/White Paper of Gary Yin
Securities and Exchange Commission v. Jing Wang and Gary Yin
United States District Court, Southern District of California
Case No. 13-cv-02270-L-WVG

Dear Mr. Berry:

Defendant Gary Yin ("Yin") furnishes this Wells Submission/White Paper ("Submission") to the Staff in connection with our ongoing discussions to resolve this action without the need for full litigation. It is submitted to inform the Staff of certain factual, legal and policy matters Yin believes should be considered by the Staff, and is otherwise furnished consistent with the goals and process set forth in Securities Act Release 5310. Yin understands the Securities and Exchange Commission ("SEC" or "Commission") may use this Submission in any and all ways permissible to it in both this action and/or in any follow-on administrative proceeding; Yin has no objection to that use by the Commission. Yin requests that this Wells Submission be afforded Confidential Treatment by the Commission, and intends that it not ever be made available to non-governmental third parties.

Various facts set forth herein are drawn from three proffer meetings, and the Plea Agreements of the two defendants herein; please see section I below for a description of such sources. Other facts are drawn from in-depth interviews of Yin by the undersigned and Frank Vecchione, Esq. ("counsel"). Based on Mr. Vecchione's extensive involvement in representing Yin in the criminal case, counsel's review and evaluation of the proffer meetings, the Plea Agreements, and the evaluation of the matters covered in such client interviews, and Mr. Stubblefield's extensive experience in representing broker-dealers, registered representatives and others in various matters, counsel believe and represent to the Staff that the facts drawn from such client interviews appear to be highly reliable. Yin sets them forth here without any waiver of applicable privileges and protections. For reference, a table of contents and a table of authorities are attached to the end of this letter.

February 12, 2016
John W. Berry, Esq.
Securities and Exchange Commission

I. INTRODUCTION: WHY THIS CASE IS QUITE DIFFERENT

In 2010, defendant Gary Yin, then a wirehouse stockbroker, received two incoming buy orders from one of his better clients.[1] The client was co-defendant Jing Wang, who was then the 5th-highest-level officer of Qualcomm Incorporated, a Fortune 500 public company; Wang was a leading member of the San Diego Chinese-American community to which Yin belongs. The first order was in March, to buy 7,700 shares of Qualcomm at the market. The second order was in December, to buy 10,800 shares of public company Atheros at the market. In instructing Yin to buy Atheros, Wang said, in effect, "you may wish to buy some yourself." After executing these trades, Yin "piggybacked"[2] them, buying 1,280 shares of Qualcomm for his own account in March, and 1,000 shares of Atheros for his own account in December.

On or about January 4, 2011, Yin noticed the recently-published news that Qualcomm was going to acquire Atheros. After righting himself from the sickening realization that Wang may have traded Atheros on illegal inside information, Yin insisted that he and Wang meet the next day in person and, at that time, expressed his concern that "both men could get into trouble because of this trade." In response to Wang's query if Yin could "erase his trades," Yin explained that that was not possible. Wang said that he would contact Yin later to "give him instructions" regarding potential next steps. At this meeting, Wang did not admit anything regarding insider trading or any other potentially illegal conduct. Rather, they only spoke about the fact that Wang might have a problem.

Little else was said at this meeting, and Yin went back to work. He sold his Atheros shares shortly thereafter. He also sold the Qualcomm shares he bought, disposing of them in three separate transactions between March 2010 and February 2011.

Throughout 2011 to 2013, the SEC and the United States Department of Justice ("DOJ") were becoming keenly interested in Wang, but not because these particular trades hit their radar screens initially. Rather, Qualcomm was the subject of a major FCPA investigation.[3] Apparently, in the course of that investigation, Wang and all of his securities trades became increasingly in focus.

In response, Wang pressured Yin to take steps designed to mislead both the SEC and DOJ as well as Yin's then-employer, Merrill Lynch. Unfortunately, Yin, fearful of losing his job, and intimidated by the insistence of his prominent and forceful client Wang, complied.

---

[1] Complaint, *SEC v. Wang*, No. 13-cv-02270-L-WVG (S.D. Cal. Sept. 23, 2013) ("Complaint")

[2] We use the term "piggybacking" herein as we have used this term in discussions with the Staff to date, and as that term has been used in connection with the Government's investigation of this matter, *i.e.*, the trading by a person simply on the basis of the information obtained on the face of the trade being copied.

[3] Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1, *et seq.* (1998).

February 12, 2016
John W. Berry, Esq.
Securities and Exchange Commission

The criminal probe of Qualcomm resulted in Yin retaining criminal defense counsel in or about March 2013. Yin promptly and fully cooperated with the U.S. Attorney for the Southern District of California, including being interviewed in three lengthy proffer meetings; representatives from the local office of the Federal Bureau of Investigation ("FBI"), as well as the Los Angeles office of the SEC, were present or advised of these meetings. The meetings, which spanned over four months from April to July 2013, covered in detail Yin's background, experience in the securities industry, relationship with Wang, the particular trades in question, including Yin's own trades, certain offshore entities which were used in the trades, and the details of Wang's and Yin's efforts to mislead the government and Merrill Lynch.

During these meetings, Yin admitted and amplified upon certain steps he took at Wang's insistence. However, he steadfastly and consistently denied that he learned any insider information whatsoever from Wang, and specifically about Qualcomm information related to the key announcements that followed the trades in Qualcomm in March, and Atheros in December 2010. Throughout eighteen hours of meetings, Yin insisted that the only information he learned from Wang on these key trades was the trade-order instructions themselves, and, on Atheros, the suggestion by Wang that Yin may wish to buy some shares himself.

The U.S. Attorney's office for the Southern District of California, with involvement from DOJ in Washington, was satisfied at the first proffer meeting that Yin was telling the truth about the steps he took at Wang's insistence, and was also telling the truth about what happened—and what didn't happen—on his own underlying trades. Yin was informed by the Government that Wang's March Qualcomm trade was based on inside information. Unlike his reaction to learning about the Qualcomm/Atheros combination, Yin, a busy stockbroker, had long forgotten about the March 2010 Qualcomm buys. Thus, despite his best efforts, Yin could not recall in the proffer meetings the circumstances under which he may have learned the publicly-disclosed March Qualcomm earnings news. Arguably, a key takeaway for the prosecutors at the proffer meeting was that the only *potential* insider trading case they might have was based on Atheros. But, even on that trade, they determined ultimately that insider trading charges against Yin were not supported.

Following these meetings and negotiations between Yin's counsel and DOJ, Yin agreed to plead guilty to a single Conspiracy count (premised on two separate statutory violations), and the Plea Agreement setting forth that plea was filed in the San Diego federal court on September 24, 2013. The day before, the SEC filed this civil injunctive action against Wang and Yin for insider trading, charging Yin with both the March 2010 Qualcomm trade and the December 2010 Atheros trade.

For approximately two years, the Commission's action was stayed while the criminal justice process took its course. That process concluded on August 25, 2015, when Yin was sentenced to time served with three years' supervised release, and a $5,000 fine. In addition, the court imposed an order for forfeiture in the amount of $27,455 (representing his entire profit in the transaction), and an order for restitution in the amount of $1,428,287 (joint and several). Notably, at the Sentencing Hearing, Judge

February 12, 2016
John W. Berry, Esq.
Securities and Exchange Commission

William Q. Hayes found, in several definitive statements, that Yin had *not engaged* in insider trading (see further discussion in section II.D below). Assistant United States Attorney Eric Beste agreed with the court's assessment.

On October 8, 2015, the United States District Court reactivated the Commission's instant civil injunctive action, and a status conference is scheduled for February 26, 2016.

The Commission finds itself in an unusual posture on the eve of potential full litigation of this case, with presumably only a small fraction of the information it would have had if it had pursued a private investigation the regular way. For example, during its part in the FCPA investigation, the SEC failed to obtain any documents or testimony from Yin.

The ultimate wild-card factor present now is the decision of the United States Supreme Court to review *United States v. Salman*, 792 F.3d 1087 (9th Cir. 2015) *cert. granted*, 2016 U.S. Lexis 662 (Jan. 19, 2016) (No. 15-628), which will provide significant—potentially dispositive—guidance regarding the nature and extent of tippee liability for securities fraud.

Thus, the case brought by the SEC here is quite unusual and fraught with greater-than-average litigation risk for the agency. It is at its core about piggybacking, a practice that almost never is at the heart of the Commission's insider trading cases. Because DOJ took the lead in the investigation, the SEC must rely on a Complaint that lacks the bulk of the typical rich factual detail the agency normally enjoys at filing; its action now stands in the shadow of the high court's first revisit of tipper-tippee liability since *Dirks v. SEC*, 463 U.S. 646 (1983).

Therefore, in this submission, we set forth (1) the relevant facts, (2) certain aspects of the procedural posture of this case; (3) Yin's arguments that the SEC will have difficulty pleading or proving the underlying claims, establishing likelihood, and demonstrating sufficient public interest for a lengthy bar in any follow-on administrative proceeding; and (4) Yin's analysis and observations regarding suitable avenues to further explore settlement. The overarching message we endeavor to deliver is that, when it comes to insider trading government enforcement, relationships matter, and resources matter. We hope and trust both parties to this litigation can find their way to commonsense common ground to settle this matter promptly.

II. FACTS

A. Gary Yin, Jing Wang, and Their Business Relationship

Gary Yin was born in 1958 in Shanghai, China. After an early childhood and youth dominated by the repressive Chinese regime, he was fortunate enough to come to the U.S. on a scholarship to study music. In this country, he obtained a Bachelor of Music from University of Miami, and a Master of Arts

(Music) (and the completion of sufficient course work for his doctorate) from University of California, San Diego. He has been married to his wife Amy for 21 years, and has two children, ages 19 and 16.

Yin began his career at Merrill Lynch, San Diego, in 1994 and worked there for approximately nineteen years. The federal conspiracy investigation resulted in his termination. He had a very successful career at Merrill Lynch, holding several significant positions, including Vice President, Senior Vice President, and International Wealth Management Advisor. Yin advised approximately 250 clients (in the United States and China) and managed $200 - $300 million in assets. He was a Certified Financial Manager and held Series 7, 31, 63, and 65 securities licenses. He was never the subject of a client complaint or administrative disciplinary action.[4]

Jing Wang was born in Anhui Province, China in 1962. He received numerous degrees, including undergraduate and law degrees in China and an LLM degree from the University of Virginia in 1989. He worked at Reed Smith LLP as an attorney, and then joined Qualcomm in 2001, eventually rising to the positions of Executive Vice President and President of Global Business Operations, the 5th-highest-ranking officer of that public company.

Yin first met Wang in 2003 at the church they both attended. Yin was a new member of the church, and Wang and his wife were actively involved in its activities. Wang asked Yin several times to manage his money, but Yin initially declined. Yin did not look for new clients through his church. There were a few occasions when Yin accepted new clients that he met while attending church services, but it was not his usual practice. Yin knew that Wang held a high level position at Qualcomm. Yin also knew that Wang was hard to please. Yin recalled that while his children played with Wang's children at the church, one of Wang's children was accidentally hurt by one of Yin's children. Wang became angry at Yin and displayed a domineering personality.

Eventually Yin became Wang's Financial Advisor. Wang was not Yin's best client, nor was he Yin's best friend. Wang pressured people and tended to brag about how well he did. Wang's attitude made Yin uncomfortable. Yin became involved in the church's worship team because of Wang's wife.[5] By the time they first met, "Wang had already achieved iconic status in the community, having risen from abject poverty in a rural village in China to senior executive at Qualcomm, and was known for his wealth, integrity and philanthropy."[6]

Wang maintained four accounts (not including Unicorn) at Merrill Lynch. These included an account for purposes for Wang's exercise of Qualcomm stock options, which he was granted from time to time.

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[4] Yin Sentencing Memorandum ("Sent. Mem."), p. 6.

[5] Yin Proffer Interview, Apr. 26, 2013, pp. 1-2.

[6] Yin Sent. Mem., p. 12:4-7.

Merrill Lynch handled certain operational aspects of the exercise of such options, but the details of these aspects were typically handled by Yin's administrative assistant and/or back-office personnel. From approximately 2005 through 2013, Wang had approximately $12 million in cash and securities held at or through Merrill Lynch. Yin was listed as the "Financial Advisor" on various of these accounts, but in fact Wang rarely came to Yin for advice. "Yin suggested various trades and/or investments to Wang . . . [but] Wang, an independently successful man, rarely followed Y[in]'s advice regarding investment."[7]

"In early 2006, Wang requested an account be set up that would allow him to transfer funds to China confidentially. Yin established an account in the name of a British Virgin Islands . . . company, Unicorn [Global Enterprise Ltd. ("Unicorn")], and listed the account in the name of Wang's brother, Bing Wang. In April 2006, Wang transferred $360,000 from his personal Merrill Lynch account to open the Unicorn account."[8] This represented a minuscule percentage of Wang's total net worth of $18-20 million.

At around the same time as the Unicorn account was set up for Wang, Yin established a similar type account for himself, "Pacific Rim Investments," ("Pacific Rim") which was nominally held in the name of his mother-in-law. "Yin set up the [Pacific Rim] account . . . to hold stocks in an effort to inappropriately avoid capital gains taxes in the United States. . . . Yin always knew that the [Pacific Rim] account was not for his mother-in-law's benefit, and she never controlled the account."[9]

For nearly four years, Wang's Unicorn account saw virtually no activity save a handful of wire transfers of funds to China. On one of the only occasions where Wang took Yin's advice, Wang purchased approximately $100,000-150,000 worth of a Nikkei 225 Index structured note, which was redeemed, at a loss, at maturity.

At all relevant times, Yin was aware of Wang's obligations under Section 16 of the Exchange Act as an officer of Qualcomm. Yin has acknowledged and admitted that he had knowledge of Wang's failure to report the trades in Qualcomm that are referenced in the Complaint.

B. The Trades at Issue and Related Matters

In the proffer meetings, Yin fully explained the circumstances surrounding the trades at issue in this case. He specifically denied he learned any insider information from Wang about Qualcomm or Atheros. He reaffirms these denials. The sole information that Yin learned from Wang on the March Qualcomm trade was the fact of the buy order itself, as well as the content of that order, *e.g.*, the number of shares. This is the identical universe of information Yin learned from Wang on the December

[7] Yin Sent. Mem., p. 12:15-17.

[8] Yin Sent. Mem., p. 12:8-14.

[9] Yin Proffer Interview, Apr. 26, 2013, p. 3.

Qualcomm sell order, except that Wang also instructed Yin to sell all the Qualcomm shares and use the proceeds to purchase Atheros.

The following transpired ahead of Wang's Atheros buy order: Wang was interested in Atheros; Wang placed a limit order for Atheros in November 2010, but the order went unfilled as the price was too far from the market; Wang ultimately placed a second order for Atheros, this time a market order which was filled, and which is one of the trades at issue; in the conversation in which Wang placed this Atheros trade, he told Yin that, in effect, "[Yin] may want to buy Atheros himself."[10]

Wang traveled to China regularly as a part of his duties at Qualcomm, and Yin was aware of this. Wang placed the Atheros buy order from China. Yin explained in the proffer meetings, and reaffirms here, that, although he knew Wang was in China when he placed the trade, he did not know that Qualcomm was holding a Board meeting there during that time frame.[11]

In addition to Yin purchasing Qualcomm in his Pacific Rim account, he "...purchased an additional 180 shares for a total of $6,461.98 in a trust account held by him and his wife.[12]

Prior to his 2010 piggybacked trades at issue here, Yin had bought Qualcomm on four occasions. Such purchases and sales were based on his own research and evaluation.

In addition, prior to his 2010 piggybacked trades at issue here, Yin had piggybacked approximately seven to nine trades over the years at Merrill Lynch. During the government investigation of this matter, the DOJ representatives questioned Yin in detail regarding each of these earlier piggybacked trades.[13]

Yin first learned about the Qualcomm/Atheros transaction at issue in early January 2011, from a regular news source.[14] Yin insisted that he and Wang meet the next day in person and, at that time, Yin expressed his concern that "both men could get into trouble because of this trade."[15] In response to Wang's query if Yin could "erase his trades,"[16] Yin explained that that was not possible. Wang said that he would contact Yin later to "give him instructions" regarding potential next steps. At this meeting,

[10] Yin Proffer Interview, Apr. 26, 2013, p. 8.

[11] Yin Proffer Interview, July 5, 2013, pp. 8-9.

[12] Complaint, ¶ 31.

[13] Yin Proffer Interview, July 11, 2013, p. 1; Yin Proffer Interview, July 2, 2013, pp. 13-14.

[14] Yin Sent. Mem., p. 13:5-7.

[15] Plea Agreement, p. 9:20-27.

[16] *Id.*

Wang did not admit anything regarding insider trading or any other potentially illegal conduct. Rather, the two only spoke about the fact that Wang might have a problem.[17]

Little else was said at this meeting, and Yin went back to work. He sold his Atheros shares shortly thereafter. He also sold the Qualcomm shares bought the previous March in three separate transactions between the months of March 2010 through February 2011.

C. Yin's Extensive Cooperation with the Government in This Case

In this case, Yin entered into a Cooperation Agreement with DOJ, and provided substantial assistance to the government which he argued in the criminal case satisfies the pertinent criteria to be considered in sentencing. Yin's extensive cooperation includes:

- A pre-indictment proffer to representatives of the U.S. Attorney's Office ("USAO"), DOJ and the FBI resulting in a cooperation agreement with Yin;
- A second proffer/cooperation meeting with the USAO, DOJ, FBI, SEC, and Internal Revenue Service;
- A third proffer/cooperation meeting with the USAO, DOJ and SEC;
- Information provided to FBI Agent Marcie Soligo on various occasions regarding email accounts and access information;
- Signed Consent to Search forms allowing the FBI to search three email accounts;

The cooperation of Yin and his willingness to testify for the government at the trial of co-defendant Wang was a large factor in in the outcome of both the criminal and civil enforcement cases against Wang. Yin provided the government with timely and valuable information which led to Wang's indictment. Yin's availability as a government witness was a catalyst for the guilty plea of Wang and obviated the need for a trial. Yin's cooperation further provided information which was utilized by the SEC in its complaint, which led to its settlement with Wang.

[17] Yin Proffer Interview, Apr. 26, 2013, p. 12-17.

D. The Resolution of the Criminal Case

At Wang's insistence, Yin took certain actions designed to mislead the government. As a consequence, thereof, Yin pled guilty to a "one-count information charging him with Conspiracy to commit (two specified federal offenses including Obstruction of an Official Proceeding)."[18]

Yin was sentenced by the Honorable William Q. Hayes, United States District Court, Southern District of California, on August 25, 2015. He was sentenced to time served with three years' supervised release and a $5,000 fine, along with forfeiture and restitution.

At the Sentencing Hearing, Judge Hayes credited Yin with his extensive cooperation, which he found was instrumental in assisting DOJ in building its case against Wang. Notably, Judge Hayes, in four separate references, found that Yin did not engage in insider trading. Judge Hayes found that Yin's motivation in assisting Wang in the obstruction was his fear of losing his job at Merrill Lynch.[19]

III. THE UNUSUAL PROCEDURAL POSTURE OF THIS CASE

As noted, this case, filed over two years ago and now re-activated, presents the parties with a situation rarely found in SEC injunctive actions: a near clean slate from which to commence law and motion, discovery, and pre-trial work. Generally, in the lions' share of its filed cases, the SEC enjoys, at the outset of litigation, the significant informational advantage gained from its non-public investigation, and thus usually has an excellent sense of what happened, and why. Here, however, the situation is quite the opposite. Presumably because of the overarching FCPA focus of the investigation, and the fact that DOJ took the lead in examining the facts in this case given Yin's willingness to fully cooperate, the Staff appears to have very little of what it would normally have had Yin been required to produce documents and sit for extensive testimony. True, it has detailed information gleaned from telephone records, and presumably voluminous documents from Merrill Lynch and other sources. Thus, it has alleged a fair amount of detail regarding pre-trade contacts, particularly on Atheros.[20] In most insider trading cases, however, the Commission has rich investigative testimony, and, sometimes, the benefit of recorded conversations (as a result of authorized wiretaps etc.), which flesh out the actual words which were used at critical points in time. Here, the SEC seems to have virtually none of this detail.

The proffer meetings themselves are extensive, and provide a detailed look into important aspects of the government's concerns in this case, but a close examination of the transcripts of such meetings reveals two important points. First, the meetings focused on more of the obstruction-related behavior than the

[18] Plea Agreement, p. 2:3-6.

[19] *See* Transcript of Sentencing Hearing, August 25, 2015, pp. 6-16.

[20] Complaint, pp. 8-10.

underlying trades. Second, while it is apparent from both the proffer meetings and the subsequent negotiations that DOJ was also keenly interested in determining whether Yin had engaged in illegal insider trading, there is a curious lack of examination related to several aspects which would normally be part and parcel of the investigative record in a typical insider trading case. Specifically, while some background information on both Yin and Wang is covered, the full extent of the business (and, to some extent, the personal) relationship between the two is not well-developed. In particular, there are not detailed questions and answers of the type designed to probe several key points which are key to insider trading cases: on the December Atheros trade, the nature of any benefit to Wang for tipping anything to Yin; and Yin's knowledge of such benefit; and, on the March Qualcomm trade, the nature and extent of any broker-customer relationship which might support the Commission's misappropriation theory.

Within 14 months, we will know how the Supreme Court defines and explains the nature and extent of insider trading, and, particularly, tippee liability. Until then, of course, *Dirks* and *O'Hagan* are controlling. And, whatever else may be true, the Supreme Court has held that the Commission must plead and prove *scienter* in civil injunctive actions brought to enforce alleged violations of Section 10(b) and Rule 10b-5. *Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 691 (1980). The clear, commonsense opportunity to quickly close the relatively small gap in settlement discussions is obvious.

IV. THE SEC'S CONSIDERABLE LITIGATION RISK ON ITS UNDERLYING CLAIMS

A. Illegal Insider Trading Is a Species of Fraud under Section 10(b) and Rule 10b-5.

40 years ago the Supreme Court made clear that the statutory text of the Exchange Act's lynchpin anti-fraud provision means what it says: liability under Section 10(b)[21] and Rule 10b-5[22] thereunder can only be imposed if the defendant has acted with *scienter*, defined by the Court as "a mental state embracing intent to deceive, manipulate or defraud."[23] It thus rejected the rule which had developed in the Ninth Circuit and elsewhere that merely negligent conduct was sufficient to demonstrate *scienter*.

In the Ninth and all circuits, recklessness can suffice to show *scienter*.[24] Recklessness is "a lesser form of intent rather than a greater form of negligence."[25] A finding of recklessness requires that the trier of

[21] 15 U.S.C. § 78j(b) (2015).

[22] 17 C.F.R. § 240.10b-5 (2015).

[23] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12 (1976); *see Aaron*, 446 U.S. at 691 (holding that the Commission must prove scienter in its civil injunctive actions brought alleging violations of Section 10(b) and Rule 10b-5).

[24] *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-69 (9th Cir. 1990) (en banc); *see also Gebhart v. SEC*, 595 F. 3d 1034, 1040 (9th Cir. 2010); *SEC v. Infinity Group Co.*, 212 F.3d 180, 192 (3rd Cir. 2000).

fact determine that the defendant engaged in behavior which is nothing less than "an extreme departure from the standards of ordinary care, [presenting] a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it."[26] The Ninth Circuit has adopted a subjective approach to determine whether the defendant acted recklessly.[27]

B. Liability for All Illegal Insider Trading Is Dependent Upon Breaches of Duties in Specific Relationships.

In *Chiarella v. United States*, 445 U.S. 222 (1980), the Supreme Court, in defining the "classical theory" of insider trading, relied on the Commission's reasoning in *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961), in affirming that corporate insiders of a corporation—*e.g.*, officers and directors—are prohibited from using material non-public information to trade that corporation's securities, because such use violates the duty of trust and confidence such insiders owe to the corporation and its shareholders. *Chiarella*, 445 U.S. at 228. "[The duty is derived] by virtue of their position [and the fact that they know material facts] which are not known to persons with whom they deal *and which, if known, would affect [such counter-parties'] investment judgment.*" *Chiarella*, 445 U.S. at 227 (emphasis supplied). In reversing the conviction below upheld by the Court of Appeals, Justice Powell stated that the Second Circuit's reasoning was flawed in two fundamental respects. First, "not every instance of financial unfairness constitutes fraudulent activity under §10(b)." *Id.* at 232; *see Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 474-77 (1977). Second, the Court of Appeals, like the Southern District of New York, had "failed to identify a relationship between [the financial printer Chiarella] and the sellers [of the securities bought by him] that could give rise to a duty [and] thus rested solely upon its belief that the federal securities laws have 'created a system providing equal access to information necessary for reasoned and intelligent investment decisions.' " *Chiarella,* 445 U.S at 232.

In *Dirks v. SEC*, 463 U.S. 646 (1983), the Supreme Court held that tippees' liability for insider trading is entirely derivative of the tipper/insider. *Id.* at 659. The Court endeavored to provide meaningful guidance in response to the "analytical difficulties" of the Commission and courts "in policing tippees who trade on inside information" in view of the fact that, unlike corporate insiders, "the typical tippee has no [specific relationship of trust and confidence with those with whom he trades]." *Id.* at 655.

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[25] *Hollinger,* 914 F.2d at 1569; *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F. 2d 1434, 1435 (9th Cir. 1984); *Sanders v. John Nuveen & Co., Inc.*, 554 F. 2d 790, 793 (7th Cir. 1977); JAMES D. COX, ROBERT W. HILLMAN & DONALD C. LANGEVOORT, SECURITIES REGULATIONS: CASES AND MATERIALS 709 (7th ed. 2013).

[26] *Broad v. Rockwell Intern. Corp.*, 642 F. 2d 929, 961 (5th Cir. 1981); *see also Gebhart*, 595 F.3d at 1042.

[27] *Gebhart*, 595 F.3d at 1042; JAMES D. COX, ROBERT W. HILLMAN & DONALD C. LANGEVOORT, SECURITIES REGULATION: CASES AND MATERIALS 710 (7th ed. 2013).

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After first reiterating and approving *Chiarella*'s rejection of the equal access approach announced in decisions such as the then-leading *SEC v. Texas Gulf Sulphur Company*, 401 F.2d 833 (2d Cir. 1968), Justice Powell reasoned that, to impose tippee liability, the key duty to abstain or disclose—which is known as the *Cady Roberts* duty—must attach to the tippee to insure that any trading by the tippee while in the possession of material information, without disclosure, amounts to conduct which constitutes deception, manipulation or fraud. *Id.* Justice Powell found that the tippee's assumption of the *Cady Roberts* duty depends upon first, the specific actions and motivations of, and the benefit to, the insider in selectively disclosing non-public information, and, second, the tippee's knowledge of such actions and motivations and benefit. *Id.* at 660.

In tippee cases, courts must first determine whether the insider personally benefited, directly or indirectly, from the disclosure to the tippee: "absent some personal gain by the insider [just as if the insider were personally benefiting by trading himself with secret knowledge], there can be no breach of [the *Cady Roberts*] duty . . . ." *Id.* at 662. Thus, the tippee's duty to disclose or abstain is wholly derivative from that of the insider's duty; a tippee is liable "only when the insider has breached his fiduciary duty . . . and the tippee knows or should know that there has been a breach." *Id.* at 659-60.

"[In determining whether the insider's tip] itself [deceives], [manipulates], or [defrauds] shareholders, the initial inquiry is whether there has been a breach by the insider. This requires courts to focus on objective criteria, *i.e.*, whether the insider receives a direct or indirect personal benefit *from the disclosure*, such as a pecuniary gain or a reputational benefit that will translate into future earnings." *Id.* at 663 (emphasis supplied).

The *Dirks* court then quotes Professor Brudney: "The theory...is that the insider, by giving out the information selectively, is in effect selling the information to its recipient for cash, reciprocal information, or other things of value to himself...." *Id.* at 664 (quoting Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 Harv. L. Rev. 322, 348 (1979)). The Court continued:

> There are objective facts and circumstances that often justify such an inference. For example, there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient. The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.
>
> Determining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts. But it is essential, we think, to have a

> guiding principle for those whose daily activities must be limited and instructed by the SEC's inside-trading rules, and we believe that there must be a breach of the insider's fiduciary duty before the tippee inherits the duty to disclose or abstain.

Id. The Court held that, as the Equity Funding insider Secrist disclosed the fraud at his company to the analyst Dirks to expose wrongdoing rather than profit personally, there was no breach by Secrist, and therefore none by his tippee Dirks. *Id.* at 666-67.

In 2014, the Second Circuit decided *United States v. Newman*, 773 F.3d 438 (2nd Cir. 2014) *cert. denied*, 136 S. Ct. 242 (Oct. 5, 2015) (No. 15-137). *Newman* stated that the question of whether a tippee must be aware of both the tipper's breach *and the tipper's personal benefit* for liability purposes had not been presented directly to the Second Circuit. The Court, however, found the answer in *Dirks*. *Dirks* expressed that it is the fiduciary breach that triggers liability for fraud under Rule 10b-5; the insider's mere disclosure of confidential information is not necessarily a breach in and of itself. "Without establishing that the tippee knows of the personal benefit received by the insider in exchange for the disclosure, the Government cannot meet its burden of showing that the tippee knew of a breach." *Id.* at 448. The government argued that the tippee's knowledge of the fact of the breach was sufficient, without the additional requirement of knowing of the *benefit* to the insider. The Court squarely rejected this reasoning:

> [The answer to] the question of whether the tippee's knowledge of a tipper's breach requires knowledge of the tipper's personal benefit...follows naturally from *Dirks*. *Dirks* counsels us that *the exchange of confidential information for personal benefit is not separate from an insider's fiduciary breach; it* ***is*** *the fiduciary breach that triggers liability for securities fraud under Rule 10b-5.*

Id. at 447-48 (certain emphasis supplied).

Newman also restricted the definition of "personal benefit," holding that there must be, at the very least, "a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents...a potential gain of a pecuniary or similarly valuable nature." *Id.* at 452.[28]

United States v. O'Hagan, 521 U.S. 642 (1997) established that a violation of Section 10(b) and Rule 10b-5 occurs when a person trades securities using misappropriated information in breach of a fiduciary duty owed to the *source of the information*. *Id.* at 652. Thus, *O'Hagan* expanded the scope of insider trading liability to reach those considered to be "outsiders," *i.e.*, individuals (other than those who could

[28] The law on tippee liability in the Ninth Circuit is, for the time being, uncertain and unreliable in light of the Supreme Court accepting *United States v. Salman*, 792 F.3d 1087 (9th Cir. 2015) *cert. granted*, 2016 U.S. Lexis 662 (Jan. 19, 2016) (No. 15-628).

be characterized as tippees) who do not have a traditional fiduciary duty to a corporation or its shareholders.

Thus, the current reality in government policing of the behavior of those non-insiders who learn inside information is (1) specific one-on-one relationships must be the key focus of analysis (*see Chiarella*, 445 U.S. at 233; *Dirks*, 463 U.S. at 654-55; *O'Hagan*, 521 U.S. at 661), and (2) there must be fraud, deception or manipulation (*see Hochfelder*, 425 U.S. at 193; *Aaron*, 446 U.S. at 705).

C. The Supreme Court Considers Both Investor Protection and Market Integrity in Fashioning the Necessary and Appropriate Liability Framework.

Chiarella and *Dirks* carefully considered the effect those rulings would have on the securities industry and the markets it serves. *Chiarella*, 445 U.S. at 233-34 n.16-19; *Dirks*, 463 U.S. at 658-667. *Chiarella* reviewed the applicable law, legislative history and the Commission's own proposed rulemaking and other guidance[29] regarding the roles performed by various persons in the industry—specialists, block positioners, market-makers and others—which fully-sanctioned functions presume and indeed depend on those persons having superior access to (often material) nonpublic information. The *Chiarella* Court observed that the "parity-of-information" rule advocated by the Commission in that case had never been adopted by the SEC or Congress. It was concerned that such a rule would unduly hamper and disrupt the legitimate market activities that Congress and the Commission had left in place as part of the careful design of a regulatory system which endeavors to strike the right balance in favor of healthy and robust—but fundamentally fair—markets.

In *Dirks*, Justice Powell continued and expanded this law-and-economics-informed analysis. It was obviously critical to do so as *Dirks* raised important issues of the appropriate law and regulation which should govern securities analysts. The Court first observed that the result advocated by the Commission in *Dirks* "differs little from the view that we rejected as inconsistent with congressional intent in *Chiarella*." *Dirks*, 462 U.S. at 656. The Court pointed out that the SEC itself recognized that analysts are crucial to the "preservation of a healthy market," and that the analyst's key function—"to 'ferret out and analyze information'"—often is discharged by "meeting with and questioning corporate officers and others who are insiders...[it] is the nature of this type of information, and indeed of the markets themselves, that such information cannot be made simultaneously available to all of the corporation's stockholders or the public generally." *Id.* at 658-59. The Court noted that "[t]he SEC's rule—applicable [to tippees] without regard to any breach of an insider—could have serious ramifications on reporting by analysts of investment news." *Id.* at 658 n. 18.

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[29] *Chiarella*, 445 U.S. at 233-34 n.16-19 (citing Securities and Exchange Commission, Report of Special Study of Securities Markets, H.R.Doc.No. 95, 88th Cong., 1st Sess., pt. 2, pp. 57–58, 76 (1963); 1 SEC Institutional Investor Study Report, H.R.Doc.No. 92–64, pt. 1, p. xxxii (1971)).

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Dirks relied heavily on the SEC's own guidance in *In re Investors Management Co., Inc., et al*, Exchange Act Release No. 34-9267, 44 S.E.C. 633 (July 29, 1971). There, the Commission, on its own motion, reviewed its hearing examiner's initial decision pursuant to Section 15(b) of the Exchange Act and an analogous section of the Investment Advisers Act of 1940, in which respondents were censured for illegal insider trading. The case involved the disclosure of certain material non-public corporate information—regarding earnings and earnings estimates of Douglas Aircraft Co., Inc.—by Douglas to Merrill Lynch's vice president in charge of the firm's proposed underwriting of Douglas debentures. The information was then relayed by the vice president to the firm's "...senior aerospace analyst, who gave it to [five firm employees who passed it on to decisionmakers at the Respondents, which were investment companies/partnerships or investment advisers]. All of the respondents knew that Merrill Lynch was the prospective underwriter of the anticipated public offering of Douglas debentures, and some of them had indicated to Merrill Lynch an interest in buying debentures in such offering. Most of them had shortly before purchased Douglas stock." *Id.* at 636.

The Commission stated that it took the case "since we felt that the legal issues raised respecting the obligations of persons other than corporate insiders who receive non-public corporate information (sometimes referred to as 'tippees') had significant implications for the securities industry and the investing public, [and therefore] we deemed it appropriate to consider those issues and express our views on them." *Id.*

In the Order, Chairman Casey reviewed the law of insider trading, particularly noting the Commission's earlier opinion in *Cady Roberts*. In addressing and recognizing the public interest inherent in the securities markets being as fully informed as possible with the legitimate interchange of corporate information between insiders and analysts, but also recognizing the need to tamp down rank unfairness and corruption, Commissioner Casey stated that "we believe it necessary to ensure that there be no improper use of undisclosed information for *noncorporate purposes*." *Id.* at 646 (emphasis supplied).

Justice Powell quoted Commissioner Smith's concurrence twice, ultimately endorsing its policy preference that "[i]t is important in this type of case to focus on policing insiders and what they do...rather than policing information *per se* and its possession." *Dirks,* 463 U.S. at 662-63 (citing *Investors Management Co.,* 44 S.E.C. at 648.)

The Commission in *Investors Management Co.* upheld the sanction of censure on all respondents.

Justice Blackmun dissented in both *Chiarella* and *Dirks*, and, in the latter decision, would have maintained the Commission's equal access theory going forward. *See Dirks*, 463 U.S. at 667-79 (Blackmun, J., dissenting). Certainly Blackmun was concerned about the Court's recent seemingly conservative approach as evidenced by, among other cases, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). However, he also observed that the majority's novel grafting of a "special motivational requirement" raised significant issues of market efficiency and effectiveness. In what we would

paraphrase as a "keep it simple, stupid" approach, Blackmun accurately foretold the considerable difficulties and costs involved in the Commission and the courts having to do what sometimes has seemed like semantic somersaults in rationalizing rulings on tippee liability in the varying fact patterns presented in enforcement matters of the years. *Id.*

The concerns about industry and market effects expressed in these seminal cases[30]—the core subject area of Law and Economics—clearly figured prominently in the Court's attempts to strike the right balance to effectively address the essence of the fraud overwhelmingly recognized as the type of market behavior which constitutes " 'manipulative and deceptive practices which have been demonstrated to fulfill no useful function.' " *Chiarella*, 445 U.S. at 241 (quoting S. Rep. No. 792, 73d Cong., 2d Sess., 6 (1934)). As we argue in section V.B.2 below, guidance from Law and Economics calls for prudent restraint and commonsense in the Commission's evaluation of what message its settlement of this case will send to the market and its legitimate participants.

D. As a Threshold Matter, No Market Moving Information Was Conveyed.

The SEC alleges that Yin misappropriated material inside information about the upcoming Qualcomm dividend/stock repurchase news. However, an examination of the Complaint reveals little more in connection with Yin's March 2010 trade than the bare fact of Wang's incoming trade order itself. The Commission has not alleged any specific conversations, much less actual words used. We know that Yin denies being told anything more than, in effect, "please buy 7,700 shares of Qualcomm at the market." We also know that, due to the way this matter proceeded, the SEC appears to have nothing much at this point to challenge this position.

The SEC seems to be alleging that the buy order itself should somehow be *deemed* to constitute inside information. It points primarily to three factors to support this position: first, what it terms the "sham" Unicorn account; second, Yin's alleged knowledge of Wang's failure to report such trade under Section 16 of the Exchange Act; and, third, Yin's alleged knowledge that this trade was out of character for Wang.[31] Yet these factors do not assist the Commission in establishing, as a factual matter, that any inside information was passed in the first place[32] (Yin does not challenge the relevancy of these factors *in properly evaluating his state of mind* vis-à-vis any theory the SEC asserts on this, or the Atheros, trade).

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[30] In *O'Hagan*, the Court endorsed the misappropriation theory on the policy basis that it "is designed to 'protect the integrity of the securities markets'...." 521 U.S. at 653.

[31] Complaint, ¶ 29.

[32] The fact of an insider's Form 4 filing is not necessarily material. *Cf. SEC v. Wyly*, 788 F. Supp. 2d 92, 124-25 (S.D.N.Y. 2011).

The SEC's Complaint alleging tipping by Wang on the Atheros trade suffers the same flaw: no allegations of actual words of any particular conversation are referenced, or even the gist of any such conversation. Rather, appearing to address the *scienter* element, the Complaint alleges in conclusory fashion that "Yin knew that Wang had a tip regarding Atheros and that Wang was encouraging him to buy Atheros stock."[33]

To the extent that the Commission is standing on the incoming trade orders themselves as constituting the inside information, it faces a seemingly insurmountable hurdle on the materiality element. For example, Wang's March purchase comprised a mere .002% of the total Qualcomm volume on March 1, 2010. To examine these data points is to realize the flaw in the Commission's apparent position. If we are considering solely the information embedded within the trade orders themselves, then it is difficult to understand how such orders could be material. *See Basic Inc. v. Levinson*, 485 U.S. 224, 226 (1988) ("[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." (internal quotations omitted)).

The Staff will argue we are dealing with much more stuff than the raw data in the orders themselves, and will point to the facts and circumstances leading up to the trades, and Yin's position as a stockbroker etc. But, this other stuff—everything other than the true nature and reality of the actual transmitted information itself—arguably should be relevant *only in assessing whether Yin breached an applicable duty, and/or evaluating whether he possessed the requisite mental state at the time of the trades sufficient to pass muster as securities fraud.*

E. The SEC Will Fall Short on the March Trade.

The Complaint alleges solely the misappropriation theory on Yin's March Qualcomm trade. It suggests that Yin breached a duty in purchasing Qualcomm in March, but is somewhat unclear as to whom the duty was owed, much less why it was breached. The thrust of the Complaint, taken as a whole, points to Wang as the source of the information allegedly misappropriated by Yin.

The gravamen of a misappropriation claim of insider trading is (1) the existence of a fiduciary or fiduciary-like relationship, and (2) deception by the fiduciary on the person to whom the fiduciary/similar duty is owed, in breach of this duty:

> Under this theory, a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information.

U.S. v. O'Hagan, 521 U.S. 642, 652 (1997).

[33] Complaint, ¶ 42.

The Commission's misappropriation claim is defective for four reasons. First, the relationship between Wang and Yin is insufficient to support such a claim. Second, the property right at issue—the information contained solely within an incoming trade order—is insufficient to trigger the duty contemplated by *O'Hagan.* Third, there is no deception on the source, *i.e.*, Wang. Fourth, to the extent that the SEC premises its claim on Yin's duties to his former employer, Merrill Lynch, the claim is defective.

1. The Commission has not pled, and cannot plead, a sufficient fiduciary/ fiduciary-like relationship between Yin and Wang.

In the Ninth Circuit, *United States v. Kim,* 184 F. Supp. 2d 1006, 1009-12 (N.D. Cal. 2002) describes the nature and meaning of the fiduciary/fiduciary-like relationship necessary to provide the foundation for a misappropriation case. *Kim* makes clear that the essence of a fiduciary relationship is reliance. *Id.* at 1010. There must be established "de facto control and dominance" by the fiduciary, and, significant reliance by the non-fiduciary. *Id.* (citing *U.S. v. Chestman*, 947 F.2d 551, 568 (2nd Cir. 1991)).

Measured under these standards, the SEC's current pleading based on Yin's March Qualcomm trade will fall short. The Complaint merely pleads in conclusory fashion that Yin misappropriated material nonpublic information from Wang, and that the misappropriation breached a duty of trust or confidence that Yin owed Wang.[34] This pleading is vulnerable to a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure; it further lacks the requisite particularity to properly plead fraud, and thus is also vulnerable under Rule 9(b). Any attempt to amend would be hamstrung by the practical difficulties of adequately pleading a sufficient relationship—a meaningfully-stated and described relationship which would meet the stringent standards demanded by *O'Hagan* and *Kim*—given the fact that the Commission appears not to possess the facts to do so, and could likely only cure this defect after discovery, a procedural option which is no longer available under modern federal procedure. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-559 (2007); *Somers v. Apple, Inc.*, 729 F.3d 953, 966 (9th Cir. 2013).

a. Amending to allege merely a typical customer-broker relationship is insufficient.

Presumably, the most that the SEC would seek to add on amendment is the allegation of a "typical" customer-stockbroker relationship. Yet, we know now, in 2016, more than ever before, that no such typical relationship exists, if it ever did. It is well known that the significant developments in the past 40 years—from the ending of fixed commissions in 1975 to the transformative changes driven by technology today—have resulted in a complex, fractured and still-not-fully-understood market

[34] Complaint, ¶ 67.

environment. The market and environment for financial advice and services is such that actual relationships—with a human on at least one side of the "client-facing" exchange—run the gamut from client-driven deep-discount brokerage models (the Interactive Brokers and T.D. Ameritrades of the world) to the other end of the spectrum, the fully discretionary assets-under-management model, where the customer delegates wholesale discretion to the financial advisor to make decisions ranging from individual buys and sells to the creation, maintenance and periodic rebalancing of investment portfolios and modification of strategies over time. Of particular importance here is the reality that only some of these relationships can truly be described as "fiduciary" in nature, at least as that term is understood in the law of insider trading. It is neither sufficient nor productive, for our purposes here, to describe relationships solely in conventional terms such as "customer-stockbroker" or "employer-employee."

There is no federal fiduciary standard for stockbrokers, at least not yet. State law differs on this issue, with California having one, *see, e.g., Duffy v. Cavalier*, 215 Cal. App. 3d 1517, 1521 (1989), and other states not having one, *see, e.g., SEC v. Pasternak*, 561 F. Supp. 2d 459, 499 (D.N.J. 2008) (applying New Jersey law); *De Kwiatkowski v. Bear, Stearns & Co.*, 306 F.3d 1293, 1307 (2d Cir. 2002) (applying New York law). The SEC, understandably, has taken longer than expected in formulating a uniform standard for stockbrokers and investment advisors. The over 2,000 comment letters received by the United States Department of Labor in response to its own proposed fiduciary-standard rulemaking is yet a further indication that the question of proper and thoughtful regulation of this issue is very difficult indeed.

Guidance from cases involving customer-stockbroker disputes makes clear that any existence of a fiduciary duty is only the starting point. The real questions are, "what is the scope of the particular fiduciary relationship at issue," and "given that scope, and other relevant circumstances, was it breached?" *See Petro-Diamond Inc. v. SCB & Assocs.*, LLC, 2015 U.S. Dist. LEXIS 113439, at *21-29 (C.D. Cal. 2015) (holding that the scope of the broker's fiduciary relationship was very limited, and therefore not breached); *In re Colucci v. Morgan Stanley*, 2004 NASD Arb. LEXIS 1982, at *19-21 (2004) (Montag, Arb.) (same).

b. The actual relationship is insufficient under *O'Hagan* and *Kim*.

Although the Complaint is silent on the details of the relationship, we know quite a bit from Yin. First, all of Wang's accounts at Merrill Lynch were non-discretionary. We also know that Wang, coming in as a sort of "big shot," called his own shots, and, when he suffered a loss on the only Yin recommendation that Yin clearly remembers, likely was none too pleased.[35]

[35] Yin Proffer Interview, Apr. 26, 2013, p. 6.

We know that Merrill Lynch offered Wang a decent discount on total fees/commissions paid by him on his various accounts. However, it also appears that neither Yin nor anyone at Merrill Lynch ever offered Wang "special deals" such as preferred access to IPOs, etc.

We know that, except for occasional cash transfers to China in the Unicorn account, the exercise of Qualcomm stock options from time to time, and the purchase of Nikkei in Unicorn, Wang did virtually no other investing at Merrill Lynch, and certainly did not rely on Yin for advice. Wang even insisted in paying cash for a major residential real estate purchase, notwithstanding Yin's observations that such a strategy was not particularly tax-savvy. Wang was presumably considered by Yin and Merrill Lynch as a good client in terms of the total assets held at Merrill Lynch, but the reality was that the lions' share of those assets was sitting in cash or cash equivalents. Merrill Lynch held only a small percentage of Wang's total investable assets.

Wang and Yin met to review the accounts more than once a year and possibly as often as once every quarter, but these meetings were a far cry from those often employed by many full service financial advisors today, which are detailed, strategy-and-tactics-driven in-depth sessions. Such advisor-driven relationships are designed for the financial professional to take an active, integral role in working with clients to strive to generate long-term value in their portfolios. Certainly market forces in the last ten years—particularly the rise of numerous fee-only investment advisors—have impelled broker-dealers to refine their models to attract and retain high-net-worth clients and offer them the level and extent of service, and access to product offerings, that is not often available in other models, certainly not in the deep-discount models.

Certainly Wang had the means to pay for such extensive advice should he have desired it. And presumably his ultra-demanding schedule as a top Qualcomm officer would be reason enough to avail himself of a trusted advisor who could be counted on to execute trades in accordance with broad investment policy parameters. Yet, as far as we can tell, nothing remotely similar to that occurred here. Wang was his own man, making his own decisions, always the most prominent and smartest one in the room, and, when displeased, never hesitant to make that known.

This relationship is insufficient to support the Commission's misappropriation theory. The Commission has not alleged, nor will be able to ultimately prove, that Yin exercised "de facto dominance and control" over Wang. *Kim*, 184 F. Supp. at 1010; *Chestman*, 947 F.2d at 568. If anything, it was the other way around.

c. Caselaw touching on piggybacking is of little assistance to the Commission

There is precious little case law that is factually analogous here. The overwhelming percentage of reported insider trading cases involve scenarios where the materiality—in particular, the type of information which is so obviously important that it "require[s] no analysis" (*Dirks*, 463 U.S. at 658

n.18)—is front, center and undeniable. Yin has located two cases that touch on or mention the practice of piggybacking: *United States v. Chestman*, 947 F.2d 551, 577-78 (2nd Cir. 1991) and *SEC v. Wyly*, 788 F. Supp. 2d 92, 124 (S.D.N.Y. 2011).

1) The *Wyly* decision

Yin understands the Staff may be relying on *Wyly*. There, the SEC charged Louis J. Schaufele III, a wirehouse stockbroker, with insider trading when he purchased common stock of one of the companies he knew was secretly controlled by his long-standing clients, Charles and Samuel Wyly. In *Wyly*, Schaufele's own firm, Lehman Brothers, was imminently in line to serve as a counter-party on a customized swap transaction which Schaufele suggested to his clients in connection with their expressed intention to place securities trades designed to capitalize on a soon-to-be-announced transaction involving the company. The case is a textbook example of how classic manipulators—"behind-the-curtain" promoters utilizing key confederates like stockbrokers, attorneys, accountants, etc.—pervert the letter and the spirit of the federal securities laws to perpetrate brazen frauds upon the public.

Judge Scheindlin ruled that, as a matter of pleading, the SEC's complaint sufficiently made out a case charging Schaufele with misappropriating the property of his firm—presumably the valuable commissions and/or principal spread to be earned by Lehman on this customized swap transaction. Her order cited several policies of Lehman brothers which the SEC alleged Schaufele violated in connection with his own allegedly deceptive trading.

Apart from its non-binding authority in our case, *Wyly* does little to assist the SEC, and in fact supports several of Yin's key arguments. To understand why, it is helpful to first recall the significance of *Chestman*'s and *O'Hagan*'s treatment of fiduciary/fiduciary-type relationships.

2) Understanding *Wyly* in light of *Chestman* and *O'Hagan*

Robert Chestman was a stockbroker whose customer, Keith Loeb, was related by marriage to the founder of publicly-held Waldbaum, Inc. Loeb later learned inside information from his wife relating to an impending sale of Waldbaum. *Chestman,* 947 F. 2d at 556-57.

According to Loeb's testimony at trial, the day after learning about the sale, Loeb told Chestman that Waldbaum was about to be sold at a substantial premium. Later that morning, Chestman executed several purchases of Waldbaum stock, for his own account, and for clients' discretionary accounts, one of which was Loeb's. When Loeb pressed Chestman for advice about what to do with the information, Chestman told Loeb that he couldn't advise him in "a situation like this," but that Waldbaum was a "buy" based on his own research. Then, Loeb told Chestman to purchase additional Waldbaum shares.

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Chestman denied speaking with Loeb on the day of the trades, and testified that he bought Waldbaum on his own research, that the trades were consistent with his previous purchases of Waldbaum and other retail food stocks, and were supported by trade publication reports and the unusually high trading volume of Waldbaum the day prior.

Waldbaum's share price rose substantially when news of the transaction was publicly announced the next day.

After conviction below on all counts, including multiple counts of insider trading and a single perjury count, the Second Circuit reversed on all counts. A three-opinion *en banc* rehearing decision affirmed the underlying appellate panel's reversal of Chestman's Rule 10b-5 convictions. However, both the majority opinion, and the dissent by Judge Winter, are palpable with the difficulty of the judges in assessing whether the relationship at issue there—marriage—sufficed to support the misappropriation theory.

The majority opinion concluded that it did not; the dissent disagreed. The majority cautioned that assessing the nature and scope of fiduciary relations outside the traditional corporate insider/shareholder context was fraught with difficulty, with little Second Circuit guidance. This same caution is evident in its discussion of the fiduciary-like "similar relationship of trust and confidence." *Id.* at 566-570; *see also Chiarella*, 445 U.S. at 228 (citing Restatement (Second) of Torts § 551(2)(a) (1976)).

The dissent candidly recognized that the rationale in the Second Circuit's earlier *Chiarella* decision seemed "overbroad to many." *Chestman*, 947 F.2d at 575 (Winter, J., dissenting). In striving to come to a principled view of what insider trading regulation should look like, Judge Winter noted the key tension in a property-rights approach to the law of insider trading:

> Efficient capital markets depend on the protection of property rights in information. However, they also require that persons who acquire and act on information about companies be able to profit from the information they generate so long as the method by which the information is acquired does not amount to a form of theft.

Id. at 578. The relationship at issue in *Chestman* was marriage. Notably, in its discussion of another relationship where relevant duties arise—employment—the only cases cited were *Carpenter*, *Materia,* and the 1983 *Newman* decision. *Chestman*, 947 F.2d at 564-67 (citing *U.S. v. Carpenter*, 791 F.2d 1024, 1034 (2d Cir. 1986)); *SEC v. Materia*, 745 F.2d 197, 203 (2d Cir. 1984); *U.S. v. Newman*, 664 F.2d 12 (2d Cir. 1981), aff'd after remand, 722 F.2d 729 (2d Cir. 1983), cert. denied, 464 U.S. 863 (1983). These were described by the Court as situations involving "egregious fiduciary breaches," as each of these cases involved the brazen theft of classic employer-owned assets such as newspaper columns in the works (*Carpenter*), corporate takeover secrets in galley proofs at the financial printer

(*Materia*), and confidential information ahead of investment banking deals (*Newman*). *Chestman*, 947 F.2d at 567.[36]

O'Hagan also involved the classic employment relationship, exacerbated by the fact that the employee—O'Hagan—was a licensed attorney with important professional fiduciary duties to his firm and the firm's clients. In holding that O'Hagan's conversion of the information at issue—without disclosure to his principal, his firm Dorsey & Whitney, or to the firm's client, Grand Met—violated Section 10(b) and Rule 10b-5, the Supreme Court relied heavily on *Carpenter*. But *O'Hagan* did not undertake a review or analysis of the nature and extent of various fiduciary and fiduciary-like relationships, as the majority and the dissent did in *Chestman*. Rather, the court seemed to simply equate the employment relationships in both situations, and evaluate the facts through the prism of classic employee theft—*i.e.*, theft of obviously valuable, critical, material information.

Returning to *Wyly*, what is the relevant takeaway from our analysis of *Chestman* and *O'Hagan*? First, as we noted in section IV.B above, specific relationships matter. Second, as we cover more fully in the next subsection, the nature of the property—*i.e.*, the nature of the information which the SEC charges is "material inside information"—matters. *Wyly* involved the type of information the materiality of which "required no analysis." *Dirks*, 463 U.S. at 658 n.18. And, the nature of the relationship between Schaufele and his clients, as well as his function at Lehman Brothers on the impending swap transaction, was that of an immersed, engaged, and sophisticated advisor who first counseled his own clients on how to structure their market play, and then played point with his own firm in positioning them to be on the other side of the swap. *Wyly* is thus of little assistance to the Commission:

- For approximately 15 years, Schaufele played a key, intimate role in facilitating the Wylys' elaborate system of dozens of offshore trusts which he knew they were using to mask major securities frauds; Yin, in contrast, merely assisted Wang in setting up Unicorn, and, in his mind (see discussion of the *scienter* element below), was doing little more than facilitating Wang's sending money to China.

- The stock transaction in *Wyly* was "massive, bullish and unique in the history of their trading" (788 F. Supp. 2d at 124); in contrast, Wang's open market purchases were tiny in comparison to any relevant benchmarks, and not bullish on their face (perhaps both trades were out of character, but, under the circumstances, not sufficiently so as to be "so obvious that the actor must have been aware of it." *Hollinger*, 914 F.2d at 1569).

[36] Although the holding and impact of *Chestman* has been mooted by the Commission's subsequent adoption of Rule 10b5-2, 17 C.F.R. § 240.10b5-2 (2000), the analysis therein remains relevant to the assessment of the true nature of the Wang-Yin business relationship.

- The Section 16/Form 4 violations by the Wylys were on the scale and magnitude of more significant Section 13 violations—the calculated, deliberate masking of beneficial ownership and insiders' massive moves that the Williams Act seeks to reign in; in contrast, any violations by Wang in his failure to file two Form 4s pale by comparison; perhaps professional analysts *might have picked up* Wang's market bets in his own company's stock, and that of Atheros, thus *potentially* triggering further investigation and analysis; but, clearly, the materiality to the market of Wang's purchases is not so obvious as to, again, in *Dirks*' parlance "require no analysis." *Dirks*, 463 U.S. at 658 n.18.

- Finally, the nature of the property itself—apparently the impending value to Lehman on the swap transaction—is much closer to the classic property which *O'Hagan* speaks of, rather than that represented in a relatively garden-variety incoming market order.

As we have set forth in section II ("Facts"), and, as argued above, at the heart of the Yin-Wang relationship were accounts much closer to the type of non-discretionary model in which a significant customer makes his or her own investment decisions, rather than the fully discretionary model driven and overseen by the type of trusted, influential and powerful fiduciary envisioned by *O'Hagan*. The former business relationship between Yin and Wang is insufficient to trigger liability for misappropriation.

3) The nature of the property itself—merely the information contained in the trade orders—is insufficient to trigger liability under the misappropriation theory.

As discussed above, the misappropriation cases that will guide the court all involved the type of classic employer property which is commonly stolen by rogue employees. In relying heavily on *Carpenter,* the Supreme Court in *O'Hagan* appeared to equate the information in the advance "Heard on the Street" columns, at issue in *Carpenter*, to a law firm's client's corporate transactional information, at issue in *O'Hagan*, concluding that both constituted "property to which the Company has a right of exclusive use." *O'Hagan*, 521 U.S. at 654.

We have not located any cases which address specifically whether an incoming client trade order, such as that placed by Wang for Qualcomm, in March 2010, constitutes the type of property of which *O'Hagan* speaks.

Certainly, based on the above analysis, it does not. Rather, trade orders are, as a general rule, not intended, or considered, to constitute proprietary information, but are rather simply instructions which, in a matter of a few seconds, are converted electronically into anonymous, infinitesimal particles within the daily market movement of securities in vast, interconnected public markets. Arguably, the only way in which Wang's March Qualcomm trade could be viewed as a valuable property right is to assume that

the meaning of the trade is wholly dependent upon Wang's status as a Qualcomm insider, the existence of the Unicorn account, and Yin's conduct in acquiescing in this trade going through without being properly reported by Wang on Form 4. While Yin recognizes and accepts the relevance of such factors to assess his mental state on both trades, he submits that it is, in effect, improper bootstrapping and fundamentally flawed analysis to consider them for the purpose of illustrating the nature of the information itself. Cf. Allan Horwich, *An Inquiry into the Perception of Materiality as an Element of Scienter Under SEC Rule 10b5*, 67 BUS. LAW. 1, 17 (2011) (citing Bainbridge, SECURITIES LAW: INSIDER TRADING 35-36 (2d ed. 2007) (improper "bootstrapping" to infer materiality from fact of trading)).

As previously argued in Section IV.D, the trade orders themselves—Wang's purchase of Qualcomm in March 2010 comprised a mere .002% of total Qualcomm volume that day—did not involve market-moving inside information. Wang either communicated material non-public information about an impending Qualcomm corporate announcement, or he did not. Again, the SEC has alleged nothing concrete, much less specific words used. It is improper to convert what is otherwise a garden-variety market order into the type of informational property contemplated by the misappropriation theory of insider trading.

4) There was no deception on the source.

As reiterated in *O'Hagan,* section 10(b) of the Exchange Act "is not an all-purpose breach of fiduciary duty ban; [rather,] it trains on conduct involving manipulation or deception." 521 U.S. at 655 (citing *Santa Fe Industries*, 430 U.S. at 473-76). *SEC v. Clark* holds that there must be an "implicit representation" by the fiduciary that he will not use the information for his own use." 915 F.2d 439, 445 (9th Cir. 1990) (citing *Newman*, 664 F.2d at 17-18).

Even if the relationship between Wang and Yin were deemed sufficient, and information passed deemed adequate to comprise the property right required by *O'Hagan*, the SEC still must meet one additional hurdle: the requirement of *deception. O'Hagan*, 521 U.S. at 653; *Santa Fe Industries*, 430 U.S. at 474-75; *Clark*, 915 F.2d at 450. As discussed, the SEC does not plead any facts constituting any deception by Yin on Wang. Indeed, the facts and circumstances of this case strongly point to one and only one conclusion: that *Wang could not have cared less whether Yin piggybacked this trade* (certainly Wang's suggestion to Yin on Atheros supports the theory that Wang likely expected that Yin might buy Qualcomm, and that he wouldn't have been upset if he knew that Yin did so).

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5) The SEC will have difficulty in its alternative theory premised upon Yin's duties to Merrill Lynch.

The SEC alleges, alternatively, that Yin breached a duty of trust or confidence he owed to Merrill Lynch.[37] To the extent that the SEC takes the position that Merrill Lynch is the exclusive owner of Wang's incoming orders, we have found no persuasive, much less binding, legal support for such a position, the *Wyly* decision notwithstanding. Nor does that position make any sense in the modern securities markets. In fact, Wang is arguably the sole owner of whatever value such orders may possess.

While there is a paucity of cases on point, Yin refers the Staff to the recent law review article by Ray J. Grzebielski, *Why Martha Stewart Did Not Violate Rule 10b-5: On Tipping, Piggybacking, Front-Running and the Fiduciary Duties of Securities Brokers*, 40 AKRON L. REV. 55, 67-69 (2007). Here the author argues that, in the case of true piggybacking, the nature of the firm-stockbroker relationship does not constitute the type of fiduciary/fiduciary-like relationship required to impose insider trading liability under *O'Hagan.* Moreover, the author argues that a firm such as Merrill Lynch cannot claim any ownership rights over mere incoming trade orders, or whatever information value those orders may have had. The reasoning in this article is persuasive, and is consistent with the realities of securities trading in our modern markets. As Yin acknowledges below, his actions vis-à-vis his former employer raise legitimate questions implicating the various obligations he had pursuant to FINRA rules and Merrill Lynch policies and procedures. But to convert simple piggybacking into *illegal insider trading*, as the SEC seeks to do here, is a stretch too far.[38]

In sum, the SEC stands a significant risk of failing to prevail on its insider trading claim on the March 2010 Qualcomm trade.

F. The SEC Will Fall Short on the December Trade.

For Yin to be liable under the SEC's theory of the December trade, *Dirks* requires that (1) Wang received a benefit, directly or indirectly, from Yin for breaching Wang's applicable duties, and improperly tipping Yin, and (2) Yin knew, or should have known, of the benefit. *See Dirks,* 463 U.S. at 660; *Newman*, 773 F. 3d at 450. Importantly, *Newman* has substantially restricted what constitutes the requisite benefit under *Dirks*, and, further, appears to have moved the tippee's knowledge element much closer to an actual knowledge rather than a negligence standard, which, of course, is consistent with the

[37] *See* Complaint, ¶ 69.

[38] In the case of *SEC v. Talbott*, 530 F. 3d 1085 (9th Cir. 2008), the court found that the duty of a director of a corporation to the corporation sufficed under *O'Hagan* for purposes of the misappropriation theory; the information in that case is what Yin has described herein as classic, very likely material information regarding an imminent corporate transaction. *Id.* at 1087, 1097-98.

requirement, under *Aaron*, that *scienter* must be pled and proven in SEC civil injunctive actions under Section 10(b) and Rule 10b-5. *Aaron*, 446 U.S. at 691.

1. The SEC cannot establish a sufficient benefit to Wang.

It is very doubtful the SEC can establish a sufficient benefit to Wang. One obvious factor to evaluate is the significance of the Unicorn account and its use. It is true that Yin set up the Unicorn account in the name of a person who Yin knew was not the beneficial owner of the account; that he facilitated wire transfers in such account, under circumstances which would violate Merrill Lynch policies and procedures; and that he was aware that Wang's purchase of Qualcomm stock in such account would not be reported to Wang's employer, or to the market via Form 4. Yet, when these actions are examined closely, it is apparent that any benefit to Wang by virtue of them, without more, is insufficient under *Dirks*.

a. The SEC has not pled, and cannot prove a sufficient *quid pro quo*.

The Complaint is vague as to the benefit obtained by Wang.[39] However, the benefits of Wang's use of the Unicorn account are insufficient. Whatever benefit inured to Wang as a result of the Unicorn account had already been provided when the account was set up, and when Wang used the account for occasional transfers of funds to China. By the time of the Qualcomm trade in March 2010, the account was already firmly established; this continued through the Atheros trades at issue. Under contract law, past consideration is no consideration. 4 WILLISTON ON CONTRACTS § 8:11 (4th ed.). Measured against this hornbook requirement, the fact that the Qualcomm sell and Atheros buy orders were executed in the Unicorn account is of no moment: Wang received no *additional benefit* from Yin in exchange for allegedly tipping Yin on Atheros. The presumed SEC theory—the notion that the continued accommodation to Wang of the Unicorn account simply existing constitutes the benefit—is insufficient under *Dirks*. The SEC has not alleged, or implied in the Complaint as a whole, any other concrete thing of value that could constitute a benefit.

b. The SEC has not sufficiently alleged a gift, nor can it do so.

The above analysis and discussion reveals why *Newman* is significant, and worthy of careful consideration. The key to *Newman* is its recognition that there is no meaningful difference between a *quid-pro-quo*, on the one hand, and the *type of gift* that is contemplated by *Dirks*. Here, the SEC alleges a gift from Wang to Yin,[40] and, indeed, the suggestion by Wang that Yin may want to buy Atheros seems like a nice gesture. But is this gift in the nature of what *Dirks* demands? It is much more

[39] Complaint, ¶ 42.

[40] Complaint, ¶ 64

plausible that what Wang did with Yin is what Wang likely did on a regular basis in his community: throwing folks some bones.

The passing of Wang's suggestion to buy Atheros is even more innocent than the executive casually mentioning some *confidential* information to his barber in *SEC v. Maxwell*, 341 F. Supp. 2d 941, 944 (S.D. Ohio 2004). In *Maxwell*, the SEC failed to prevail on its tippee case against the barber. The court reasoned that there was no *quid pro quo*, given the relationship between the tipper and his barber—"[t]here was no family relationship or close friendship between the two Defendants. Indeed, they did not even socialize outside of . . . haircut appointments. There was no history of substantial loans or personal favors between Defendants; in short, there was no particular reason for [the insider] to suddenly decide to bestow upon [his barber] a significant gift." *Id.* at 948. The court also was persuaded by the tipper's and tippee's "relative stations in life," noting that the corporate insider was unlikely to have received any "meaningful future advantage" as a result of any reputational benefit he gained in the eyes of his barber from the tip. *Id.* As the barber argued, "[s]urely it cannot be claimed that the purpose of the alleged disclosure was so [the corporate insider] would receive a better haircut, a better appointment slot, a better price?" *Id.* at 948 n.2.

Yin, like the barber in *Maxwell*, was simply not at the same level of socio-economic class and clout as Wang. Minor nice gestures do not rise to the level of indicating either the *quid-pro-quo* relationship, or the magnitude of the gift, demanded by *Dirks*. Rather, the type of "gift" necessary to support illegal tippee liability is the sort of major transfer of money or value which some (like Ayn Rand) would argue is not motivated by altruism, but, rather, merely a proxy for *quid-pro-quo*-like mutual major back-scratching over time. We suspect that Justice Blackmun might very well agree with our analysis. *See Dirks*, 463 U.S. at 676 n.13 (Blackmun, J., dissenting) ("The distinction between pure altruism and self-interest has puzzled philosophers for centuries; there is no reason to believe that courts and administrative law judges will have an easier time with it.")

2. The SEC cannot establish any knowledge by Yin of any benefit to Wang.

The SEC appears to be pointing to the following to support its theory that Yin had knowledge of Wang's "breach"[41]: that Yin knew that (i) Wang had never bought Qualcomm on the open market previously; (ii) Wang went "all in" in the March 2010 Qualcomm buy; (iii) Qualcomm's trading window was closed at the time of that trade; (iv) Wang, in effect, flipped his entire Unicorn Qualcomm position for Atheros in December[42]; and (v) the Atheros purchase was "out of character" as Wang had never bought Atheros

[41] Complaint, ¶¶ 63-65.

[42] Complaint, ¶¶ 33-35.

before, and, generally, "Wang had rarely purchased equity stocks on the open market and that Wang's investments were primarily in money market mutual funds."[43]

None of these factors, or any or all of them in combination, will be sufficient to permit a trier of fact to conclude that Yin should have realized that the incoming Atheros trade was in fact based on illegal inside information, much less that, as required by *Dirks*, Wang was receiving a benefit from Yin in allegedly tipping Yin about Atheros. It must be recalled here just how dominant a personality Wang had. He was confident, even cocky, and virtually always made his own investment decisions, without consulting, much less seeking advice from, Yin. As of late Fall 2010, Wang's Qualcomm position in Unicorn showed a gain, so perhaps he, in his investing and trading wisdom, wished to just take the profit and try another investment. It is very plausible that a fact finder will conclude that Yin acted reasonably in his assessment of this incoming order.

Yin himself is the first to admit that he assumed that Wang "knew something" and that something was likely positive, and that figured into why Yin piggybacked the trade. Is the SEC suggesting that, just on these facts, Yin should have known this was an illegal tip? Is it suggesting that he should have done more—on the spot, in the middle of a busy market day himself—for example, asked Wang directly why he was buying Atheros, whether his imminent purchase was tied to his learning nonpublic inside information? Or asked other probing questions where Yin would be wearing the hat of investigator more than stockbroker?

And what of the SEC's detailed chronology of the key phone calls and texts ahead of Wang's trade? The momentum of such rapid-fire communications seems in so many insider trading cases to hint conspiracy or something equally nefarious. But Wang was in China at the time, and likely hammered by jet lag and a crushing corporate schedule. It is entirely plausible that, having struck out earlier on his technical skills in the failed Atheros limit order, Wang simply had a sense of urgency in making sure to get in the second time. Who was Yin to second-guess this busy executive and needlessly waste even seconds of his precious time? A fast-moving, big-talking hot shot with friends in high places all over the world with a line on a hot stock does not an insider trader make.

The above analysis would be compelling enough were this the type of account relationship where Yin was charged with regular monitoring and ongoing advice and counsel. But, as we have emphasized, the actual relationship here was nearly at the opposite end of the spectrum. The December Qualcomm sell and Atheros buy came after nearly nine months of very little interaction with Wang, and, it appears, no transactions whatsoever in Unicorn. The SEC's theory on this seems to presume that Yin should be judged on the Atheros trade with perfect, top-of-mind memory of what had happened way back in the Spring of the year before, complete with the investigator's suspicion sufficient to connect all of the

[43] Complaint, ¶ 42.

relevant dots, on the spot, notwithstanding that he was communicating with a public company pillar of the community icon, long distance from China, in the middle of a busy day himself.

The fallacy in such an approach can be seen when viewing Unicorn pre-and-post early 2010. As previously discussed, until the March Qualcomm trade, the account had been used almost exclusively to simply achieve certain privacy-related objectives by Wang; the sole securities trade was the Yin-recommended Nikkei buy, which lost money. By the time of the Atheros trade, some *nine months* after Wang had bought Qualcomm in March, and nearly five years after Unicorn was opened, the last thing on Yin's mind was that Wang was trading on inside information. The SEC has not alleged any facts even suggesting a new benefit, and it is not plausible that the mere maintenance of the Unicorn status quo constituted any sort of requisite benefit, much less that such a far-fetched notion would cross Yin's mind. Yin's own very modest bet on Atheros, and the paltry profit realized, speak volumes about whether Yin really should be seen to have been received a *Dirks*-sufficient gift on Atheros.

G. The SEC Will Have Difficulty Adequately Pleading and Proving *Scienter* on Either Trade.

The discussion above should make it apparent that the SEC has vulnerability in establishing the required *scienter* to prevail against Yin on either or both of the trades in question. To reiterate, DOJ has accepted Yin's statements that he did not know that Wang was trading on illegal inside information, and the SEC does not appear to have facts or circumstances it can point to which are not already pled in its Complaint, and/or part of the criminal case record herein, *i.e.*, Yin's Plea Agreement and proffer meetings. It appears beyond peradventure the Commission will not be able to demonstrate *intentional fraud.*

Under *Hollinger* and its progeny, that leaves recklessness. Recklessness is *qualitatively different and distinct from* mere negligence. It involves conduct viewed as so outrageous, so outside the bounds of reasonableness, so as to suffice to be *deemed* the same as the intentional fraud otherwise required to support liability under section 10(b). *Gebhart,* 595 F. 3d at 1041. As set forth before, in the Ninth Circuit, courts are *required* to admit and weigh evidence from defendants bearing upon their *subjective state of mind* to determine the element of *scienter*. *See Gebhart*, 595 F. 3d at 1042; *SEC v. Platforms Wireless Intern Corp.*, 617 F. 3d 1072, 1093-94 (9th Cir. 2010) (citing *Hollinger*, 914 F. 2d at 1569); *SEC v. Loomis*, 969 F. Supp. 2d 1226, 1234 (E.D. Cal. 2013).

In evaluating whether a defendant acted with *scienter*, including whether she acted recklessly, courts consider the materiality of the information at issue, including the defendant's own perceptions of its significance. *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 48-50 (2011); *SEC v. MacDonald*, 699 F.2d 47, 50 (1st Cir. 1983) (en banc) (insider trading case; court stated that the element of *scienter* "is satisfied if at the time defendant purchased stock he had actual knowledge of undisclosed material information; knew it was undisclosed; *and knew it was material...*" (emphasis supplied)).

As argued above, the materiality of the trade orders themselves is non-existent. What, then, does the Commission have to demonstrate that Yin was *reckless* in buying Qualcomm and Atheros? Apart from the facts and circumstances analyzed above, it appears that the SEC will rely upon inferences to be drawn from Yin's unfortunate decision to attempt to protect Wang and himself once the Atheros news became public. The SEC will likely point to cases which state that *scienter* may be inferred from a defendant's efforts to conceal or obfuscate. In this particular case, however, it is neither reasonable nor appropriate to infer from his post-Atheros-announcement actions that he in fact committed any underlying alleged securities fraud. DOJ did not insist on taking that inference, and ultimately concluded that he was telling the truth on the insider trading charges.

Under the circumstances of this case, a trier of fact will view Yin's post-trading-period actions differently than those of persons who employ obstruction tactics as integral components of egregious underlying schemes to defraud. A trier of fact will also draw a distinction between what Yin did—and didn't do—here with what the stockbroker Robert Chestman did. As set forth in Judge Winter's dissent, Chestman—*in the middle of the underlying events in question*—said things to Loeb which struck Winter as reflective of a guilty and devious mind; he pointed in part to these statements in concluding that Chestman knew of what Winter would have found to be Loeb's breach of duty to his wife. Here, in contrast, the SEC has alleged nothing of the sort in connection with either trade. The closest it gets is the existence, maintenance, and implications of the obscured Unicorn and Pacific Rim accounts.

If the SEC forces Yin to litigate this case, the ultimate theme at trial will be, at most, Yin's *negligent* failure to connect the dots on the two trades; the Commission will thus fall short on the *scienter* element.

V. EQUITY AND THE PUBLIC INTEREST: THE REMEDY MUST BE REMEDIAL

As the Staff well knows, it must plead and prove the need for an injunction, and the entitlement to a particular sanction in its follow-on administrative proceeding. As Yin sets forth below, the SEC carries significant litigation risk that it will fail on these elements.

A. There Is No Realistic Likelihood That Yin Will Violate the Securities Laws in the Future.

Even if the Commission prevails on every element necessary to establish the underlying securities fraud violations, it cannot obtain its requested relief unless it proves that there is need for an injunction, *i.e.*, that there is a "reasonable likelihood of future violations" by Yin. *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 99-100 (2d Cir. 1978).

> In identifying the relevant factors that demonstrate "a reasonable likelihood of future violations," the courts have pointed to "the degree of scienter involved, the sincerity of defendant's assurances against future violations, the isolated or recurrent nature of the infraction, defendant's recognition of the wrongful nature of his conduct, and the

> likelihood, because of defendant's professional occupation, that future violations might occur." Courts have also deemed relevant the gravity of the offense committed, the time elapsed between the violation and the court's decision, whether the defendant, in good faith, relied on advice of counsel, and the adverse effect an injunction would have on the defendant.

25 MARC I. STEINBERG & RALPH C. FERRARA, SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT §5:5, at 5-9 to 5-11 (2d ed. 2001, and 2015-2016 Supplement) (footnotes omitted).

Steinberg and Ferrara make clear that the modern tendency of courts is to exercise considerable caution before imposing injunctive relief:

> Largely due to recent judicial recognition of the severe collateral consequences that injunctions may impose, courts have become far more reluctant to grant the SEC's request for injunctive relief. In the words of Judge Friendly, the Commission is now required "to go beyond the mere facts of past violations and demonstrate a realistic likelihood of recurrence." Judge Friendly further noted: "It is fair to say that the current judicial attitude toward the issuance of injunctions on the basis of past violations at the SEC's request has become more circumspect than in earlier days." Employing the foregoing rationale, courts have concluded in a number of recent cases that the Commission has not made a sufficient showing and have denied the SEC's request for injunctive relief.

Id. at 5-17 to 5-19 (footnotes omitted).

Indeed, the SEC's difficulty in demonstrating its need for injunctions has included recent insider trading cases in California. *See SEC v. Ingram*, 694 F. Supp. 1437, 1442 (C.D. Cal. 1988); *SEC v. Lund*, 570 F. Supp. 1397, 1403-04 (C.D. Cal. 1983).

Here, the SEC could well have great difficulty in demonstrating the need for an injunction. First, it bears repetition that the only underlying violations Yin has admitted comprise solely of a single conspiracy count, charging violations that are exclusively those of DOJ to bring. He has not admitted to insider trading, but, as set forth, has been frank and forthright to admitting to his piggybacking trades.

Thus, Yin should be credited with the frank and full cooperation which DOJ (and Judge Hayes at sentencing) clearly took into account. He should not be faulted for continuing to maintain he did not commit insider trading. Our discussion above demonstrates that the piggybacking trades themselves, even with the various other circumstances attendant, will likely be deemed insufficient by a fact finder to be constitute nonpublic material information.

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Through the entire criminal process in this matter, culminating with his recent sentencing hearing, Yin has expressed great remorse and recognition of his wrongdoing. In addition, at sentencing, and throughout the criminal case, he has made it clear that he greatly regrets and apologizes for the things he did at Merrill Lynch which constituted violations of the firm's policies and procedures, including in connection with the false information provided regarding the beneficial ownership of the Unicorn and Pacific Rim accounts, and Yin's conduct vis-à-vis Wang's failure to properly report his Qualcomm trade pursuant to Section 16's requirements. Yin is fully cognizant that his conduct will pose significant hurdles should he ever desire to become associated with a broker-dealer in the future (see further discussion in section V.C below).

While those transgressions while Yin was at Merrill Lynch are admittedly troubling, without more, they are not probative of whether he actually committed *securities fraud*, and thus are insufficient to raise any inference of *scienter* to support an injunction. Indeed, except for the poor judgment Yin showed in connection with establishing and maintaining the two accounts in question, and the once-in-a-lifetime panic decision to try to save his job, instead of doing the right thing, Yin was an outstanding registered representative with his firm over the years, never being the subject of any customer complaint or government or SRO investigation other than the present case. This conduct—his bad judgment here—should be viewed as an aberration—an isolated incident concerning which he has more than learned his lesson.

Yin's extensive cooperation with the government will surely be seen by the Court as highly indicative of his sincere assurances against future wrongdoing.

Although Yin has not yet determined how he will earn his livelihood long-term—he may not seek appropriate relief from the Commission and/or FINRA to re-enter the securities business—he has already taken certain steps to ensure that, should he wish to return, his business endeavors over the next several years will be in full compliance with applicable law and regulation. Specifically, Yin has consulted with a leading securities transactional and advisory attorney, Alvin Fishman, Esq. Mr. Fishman was with the Staff in the Enforcement Division for six years, and has focused on advising broker-dealers, investment advisors and their professional representatives his entire career. Although Yin has not yet retained Mr. Fishman as special compliance counsel, he is prepared to do so if such retention is a feature that would be significant to the Staff in evaluating settlement of this matter. Mr. Fishman has represented to counsel for Yin that he is available and willing to be retained.

In sum, the Commission runs an appreciable litigation risk that it will not demonstrate the need for a permanent injunction.

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B. In the Follow-On Proceeding, the SEC Will Not Meet Its Burden to Justify a Full Bar.

Even if the Commission were successful in prevailing on the merits in a follow-on proceeding sufficient to reach the issue of the appropriate sanction, any such sanction must be found by the Commission's Administrative Law Judge to be "in the public interest." *See Steadman v. SEC*, 603 F. 2d 1126, 1142 (5th Cir. 1979).

1. The Commission must consider factors in mitigation.

The SEC must consider any mitigating factors that are necessary for the determination. *Paz Sec., Inc. v. SEC,* 494 F. 3d 1059, 1065 (D.C. Cir. 2007). Various factors will be considered by the reviewing court when evaluating an SEC disciplinary sanction, and the SEC must establish compelling reasons for a lifetime bar. *See Steadman*, 603 F. 2d at 1140. These factors include: "(1) the egregiousness of the defendant's actions; (2) the isolated or recurrent nature of the infraction, (3) the degree of scienter involved, (4) the sincerity of the defendant's assurances against future violations, (5) the defendant's recognition of the wrongful nature of his conduct, and (6) the likelihood that the defendant's occupation will present opportunities for future violations." *Gibson v. SEC,* 561 F. 3d 548, 555 (6th Cir. 2009); *see, e.g. Kornman v. SEC*, 592 F. 3d 173, 179 (D.C. Cir. 2010) (upholding a bar of an investment advisor who intentionally made misleading statements regarding an investigation). The state of mind of the advisor is highly relevant in determining what sanction is appropriate and the court will not uphold a lifetime bar based on "isolated negligent violations." *Steadman*, 603 F. 2d at 1140-41.

For example, the Sixth Circuit has held that egregious conduct was present when an advisor "misappropriated approximately $450,000 from a group of investors, many of whom were clients to whom he owed a fiduciary duty, all the while sending the investors 'lulling communications.' " *Gibson,* 561 F. 3d at 555. The Eighth Circuit has also indicated that *scienter* is a necessary element to consider when imposing sanctions, but that recklessness will also serve as a basis. *See Lowry v. SEC*, 340 F. 3d 501, 506 (8th Cir. 2003). The First Circuit upheld a permanent bar in part because the advisor was not at all remorseful regarding the strategy he used that eventually caused great losses to unsophisticated investors. *Rizek v. SEC*, 215 F. 3d 157, 162-63 (1st Cir. 2000). The District of Columbia Circuit Court of Appeals declined to overturn or modify a decision ordering a lifetime bar. *See Siris v. SEC*, 773 F. 3d 89, 98 (D.C. Cir. 2014). There, the Commission had charged several counts of securities fraud, based on a half-dozen major types of fraudulent conduct, which included over ten counts of insider trading. *Id.*

Although SEC sanctions are rarely overturned (they are reviewed solely for abuse of discretion), there has been at least one instance of a remand. *See Saad v. SEC*, 718 F. 3d 904, 913-14 (D.C. Cir 2013). In *Saad*, the court held that the SEC abused its discretion for two reasons. First, the SEC failed to consider that Saad had been terminated prior to FINRA detecting his conduct, which is a mitigating factor set forth by FINRA guidelines. *Id.* at 913. Second, the SEC also failed to take into consideration that Mr.

Saad was under severe stress due to the hospitalization of his infant child and the stress of his job. *Id.* The case was remanded for further consideration by the SEC. *Id.* at 914.

The same key facts and circumstances that militate against the need for an injunction argue forcefully here in favor of mitigation: that Yin did nothing to mislead in connection with the trades themselves (save what we know about the implications of the existence and use of the Unicorn account); the absence of *scienter* in connection with such trades; his prompt and extensive cooperation with DOJ (recognized by Judge Hayes as significant and instrumental in assisting the government to investigate, and successfully charge insider trading, against Wang, and thereafter secure a guilty plea), thus demonstrating the sincerity of his assurances that he will not violate any laws in the future; his genuine remorse as expressed throughout the criminal case; and the fact that the steps he took at Wang's behest comprised an isolated mark on an otherwise unblemished and successful career at Merrill Lynch. All of these factors will be taken into consideration in mitigation; particularly when taken together, they argue forcefully for a sanction well shy of a lifetime bar. The cases cited immediately above in this section demonstrate what type of behavior truly demands a permanent bar. Yin's actions do not rise to that level. See *SEC v. Globus Group, Inc.*, 117 F. Supp. 2d 1345, 1349 (S.D. Fla. 2000) (denying approval of a consent decree for an "unwarranted injunction," explaining that "federal courts do not merely rubber-stamp the SEC's requests for statutory injunctions but, rather, must exercise independent judgment to determine whether the SEC has made a 'proper showing'" and further explaining that such a showing had not been made in that case).

2. The Commission should consider industry and market effects in its public interest determination.

It is important to recognize here that "[t]he Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive." *Kornman*, 2009 SEC Lexis 367 at *22 (citing *David Henry Disraeli*, Exchange Act Rel. No. 57027, 92 SEC Docket 852, 875 (Dec. 21, 2007)).

The Commission is charged not only with protecting investors, but insuring the effectiveness and efficiency of the securities markets:

> In 1975, after nearly five years of study of SEC and industry efforts to create a *national* market system, Congress enacted the 1975 Securities Acts Amendments, which...authorized the SEC "to facilitate the establishment of a national system for securities. Congress intended that the SEC make rapid progress in eliminating stock exchange and over-the-counter *(OTC)* rules that limited competition between the exchanges and OTC marketmakers. [These amendments] directed the SEC to amend "any such rule imposing a burden on competition which does not appear to the

> Commission to be necessary or appropriate in furtherance of the purposes of this Chapter" within 180 days of the passage of the Amendments.

5 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 664 (5th ed. 2016). Professor Loss notes the legislative findings, as set forth in section 11A(a)(1) of the '34 Act:

> (1) The Congress finds that--
>
> > (A) The securities markets are an important national asset which must be preserved and strengthened.
> >
> > (B) New data processing and communications techniques create the opportunity for more efficient and effective market operations.
> >
> > (C) It is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure--
> >
> > > (i) economically efficient execution of securities transactions;
> > >
> > > (ii) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets;
> > >
> > > (iii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities;
> > >
> > > (iv) the practicability of brokers executing investors' orders in the best market; and
> > >
> > > (v) an opportunity, consistent with the provisions of clauses (i) and (iv) of this subparagraph, for investors' orders to be executed without the participation of a dealer.
> >
> > (D) The linking of all markets for qualified securities through communication and data processing facilities will foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors, facilitate the offsetting of investors' orders, and contribute to best execution of such orders.

Id. at 463 (quoting 15 U.S.C. § 78k-1(a)(1) (2012)).

The public interest in efficient, effective capital markets underlies much if not all of the literature in the field of law and economics. In addition to being carefully considered in *Chiarella* and *Dirks* (see discussion in section IV.C above), key principles expressed in such literature have provided the mathematical and theoretical underpinnings for the theory of efficient markets, which is the foundation for presuming reliance in private securities fraud actions. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011); *Basic Inc. v. Levinson*, 485 U.S. at 241-49.

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Yet, as Professor Donald Langevoort (who served in the SEC's Office of General Counsel) has written in his excellent text on Securities Regulation,

> Some economics-oriented legal scholars remain convinced that insider trading regulation is both unnecessary and counterproductive in that it frustrates prompt price adjustment to new private information. The classic article in this genre is Carlton & Fischel, The Regulation of Insider Trading, 35 Stan. L. Rev. 857 (1983). Others justify restriction on a diverse set of grounds: the reduction of informational asymmetry as a means of lowering market transaction costs, the elimination of disincentives to prompt public disclosure of information by management, and—perhaps most commonly—the desire to protect confidential information as a form of corporate property. Naturally, one's answer to why insider trading should be regulated determines both who should regulate (federal, state, or private arrangements) and how regulation should be designed. To explore this further, you may wish to sample the extensive literature in this area. *E.g.*, Ayres & Choi, *Internalizing Outsider Trading*, 101 Mich. L. Rev. 313 (2002); Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 SMU L. Rev. 1589 (1999); Cox, *Insider Trading and Contracting: A Reply to the Chicago School*, 1986 Duke L.J. 628; Wang, *Trading on material Nonpublic Information on Impersonal Stock Markets: Who Is Harmed and Who can Sue Whom Under SEC Rule 10b-5*, 54 S. Cal. L. Rev. 1217 (1981); Scott, *Insider Trading: Rule 10b-5, Disclosure and Corporate Privacy*, 9 J. Leg. Stud. 801 (1980).

JAMES D. COX, ROBERT W. HILLMAN & DONALD C. LANGEVOORT, SECURITIES REGULATIONS: CASES AND MATERIALS 906 (7th ed. 2013).

One of the key concerns articulated by many scholars is that the need for Courts and the Commission to tread cautiously, and to beware of various "chilling" effects on market and industry behavior which we generally want to encourage.

In our case, these concerns are significant. The message that an unduly harsh settlement herein could very well send to the market is that registered reps must be private investigators, second-guessing their clients' orders, particularly those of public company officers and directors. Such investigative function takes time. Even if protocols were developed in which reps could go through, for example, a 30-second script designed to prevent insider trading, such delay is a lifetime in today's markets (and anything much less than 30 seconds would obviously be insufficient; many would argue that 30 minutes would not be enough to preempt even a small percentage of thieves).

Some examples of the potential effects of an unduly harsh settlement message in our case, include, but likely would not be limited to:

- The risk that public company officers and directors will be hesitant to place market orders, thus inhibiting a well-recognized indicator of price.[44]

- The risk that their companies will not benefit by relevant business-side market/competitor data which may be garnered by such executives' trading;

- The risk that such executives might have civil claims against broker dealers who insisted on such pre-trade investigation; they could likely range from negligence/contract claims (refusal to execute legitimate orders) to failure to discharge the duty of best execution (creative plaintiffs' lawyers would seek to have courts rule that such duty should be seen to commence at the time that a garden-variety trade order *should have been entered*);

And all of these potential effects are before we even get to what economists term "transactions costs." As applied here, as in so many scenarios, these costs range from compliance and risk management outlays, to the enormous costs—in terms of both money and lost executive time—incurred in the process of firms and reps and their public company officer clients defending themselves against government insider trading investigations.

If compelled to litigate this case, Yin would press that such concerns be fully considered by the Commission if any administrative proceeding were brought. The Staff should carefully consider them now in endeavoring to reach a palatable settlement of this matter. Regardless of what the Supreme Court will ultimately decide in *Salman*, the tempered, commonsense approach to a resolution here would likely be roundly endorsed by Justice Blackmun, were he around and were asked to confirm any global settlement of this matter.

C. FINRA's MC-400 Process Is the Ultimate Backstop and Arbiter.

To the extent that the Staff is still unconvinced that less than a lifetime bar would be acceptable, it is important to recognize that the Commission has a statutorily-designed backstop here that serves as a virtually foolproof process for insuring future investor protection: FINRA. Whatever sanction might ultimately be deemed appropriate in any follow-on proceeding—even if no sanction were meted out at all, and, further, even if the Commission failed to prove likelihood if the instant case were litigated—it would still be able to be confident that FINRA would set a high bar for Yin to demonstrate that he was fit to re-enter the broker-dealer business. This is in part because his felony conviction (whatever its status might prove to be under Section 15(b)(6)(A)(ii)), is in the broader category of "any . . . felony"

[44] Patrick J. Glen, *The Efficient Capital Market Hypothesis, Chaos Theory, and the Insider Filing Requirements of the Securities Exchange Act of 1934: The Predictive Power of Form 4 Filings*, 11 FORDHAM J. CORP. & FIN. L. 85 (2005).

within 10 years, thus rendering him disabled by a "statutory disqualification," and thus, absent relief from FINRA's Member Regulation Department, unable to be associated with a broker-dealer. *See* 15 U.S.C. § 78c (2012); 15 U.S.C. § 78o-3(g)(1)-(2) (2010); FINRA By-Laws Art. III, § 3(d); FINRA Rules 9520-27.

An Administrative Law Judge at hearing might very well conclude, under all the circumstances, that any sanction longer than a relatively short-term bar, perhaps even a suspension, would be excessive.

D. A Negligence-Based Injunction and a Suspension or Very Short Limited-Term Bar Are Suitable and Appropriate Here.

Counsel and the Staff have discussed various issues regarding the potential resolution of this matter without the need for full litigation. It is Yin's understanding that the terms of disgorgement and penalties are largely, if not completely, deemed satisfied as a result of the outcome of the criminal proceeding; thus, they will not be addressed herein. Therefore, this section focuses on the type of injunction which makes sense here, and the length of the necessary and appropriate sanction.

1. Although unusual, a 17(a)(2) or 17(a)(3) injunction makes sense here.

Either Section 17(a)(2) or 17(a)(3) under the '33 Act could serve as a suitable and sufficient basis for an injunction in this case. Both of these sections, while recognized universally as part of the '33 Act's lynchpin anti-fraud provision, require only negligence to establish liability. Subsection (a)(2) makes it unlawful for a person "to obtain money or property..." by means of misstatements, or omissions (where a duty to speak exists) of material fact in the offer or sale of securities. 15 U.S.C. § 77q(a)(2) (2011). Subsection (a)(3) makes it unlawful for any person, "in the offer or sale of any securities . . . to engage in any transaction, practice, or course of business which operates or *would operate* as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(3) (2011) (emphasis supplied); *see also Aaron*, 446 U.S. at 687.

Section 17(a) is only enforceable by the Commission. *Aaron*, 446 U.S. at 688. Unlike private litigants suing under Exchange Act section 10(b)/Rule 10b-5, the SEC in its governmental enforcement capacity cannot recover damages, and thus need not plead *reliance*. Subsections (a)(2) and (a)(3) focus on the *effect* of conduct, rather than the conduct itself. *Id.* at 695-97.

In our present situation, either of the above two subsections under Section 17(a) could serve here as the statutory basis for injunctive relief. The doctrinal justification proceeds along the following lines. As Section 17(a) addresses only wrongdoing by securities *sellers*, we would look to Yin's *sales* of Qualcomm following his March buy; and his sale of Atheros following his December buy. In selling such securities, Yin could be seen to have either misrepresented certain facts, or, alternatively, to have

omitted certain facts which were required to be disclosed under the circumstances. Both doctrinal approaches can be premised and founded upon the Shingle Theory.

In the seminal *Hanly* case, the Second Circuit upheld an SEC order imposing permanent bars on various stockbrokers in connection with their conduct in fraudulent sales of a low-priced security. *Hanly v. Securities and Exchange Commission*, 415 F.2d 589, 599 (2d Cir. 1969). In *Hanly*, the Court endorsed the reasoning of the SEC in finding an implied duty of broker-dealers and their registered representatives to deal fairly and honestly with the public as an integral component of standing ready to do business—*i.e.*, hanging their shingles. Under this approach, which is known as the "Shingle Theory," the SEC below "...found [fraud] both in affirmative falsehoods, and in recommendations made without disclosure of known, or reasonably ascertainable adverse information..." *Id.* at 595.

Here, it could be argued that Yin, in filling out the order tickets to sell Qualcomm and Atheros, violated either of these subsections by concealing the very facts that the SEC is pointing to in its Complaint, *i.e.*, (1) that he had learned of Wang's purchases of such securities in the first place, under circumstances which might indicate illegal insider trading by Wang, (2) that Wang's purchase of Qualcomm in the Unicorn account rendered the market mislead because of Wang's Section 16 non-compliance; and (3) that Yin ran afoul of certain Merrill Lynch policies and procedures in connection with his conduct vis-à-vis the Unicorn and Pacific Rim accounts. Such conduct could be seen as either Yin's affirmative misrepresentation that he was dealing honestly and fairly with the public (and the other side of his trades), or, alternatively, his omission, when under the speaking duty triggered by the Shingle Theory, of these various facts.

The fact that both the Qualcomm and the Atheros news likely delivered substantial truth on the market prior to Yin's sales here should pose no doctrinal problem, particularly in view of the approach taken by the Commission in charging insider trading on these two transactions in the first place. The breadth of either subsection under Section 17(a) contemplates the proscription of the conduct the SEC alleges here.

The Commission's theory on both trades rests, in large part, upon necessary inferences to be drawn from the various facts and circumstances surrounding these incoming trade orders. If the SEC must ultimately rely on such inferences (and they must, at least for the first round of law and motion practice), is it not entirely appropriate for the SEC to view those same facts and circumstances as the basket of transgressions that would suffice for purposes of the Shingle Theory? The SEC's own approach on its Complaint satisfies section 17(a)'s requirement that the wrongdoing proscribed involve *material* facts.

Thus, even if the market was already very well-informed by the lions' share of issuer-disclosed information by the time of Yin's sales, the statutory text of either subsection suffices here to supply the doctrinal justification. Subsection (a)(3) in particular appears to encompass *any activity at all* that potentially *would* operate as deceptive to purchasers on the other side of Yin's sales.

February 12, 2016
John W. Berry, Esq.
Securities and Exchange Commission

A recent settled administrative proceeding lends support for utilizing a negligence-based injunction here. *In the Matter of Bolan and Ruggieri* is an insider trading case which was settled, post-*Newman*, on the basis of section 17(a)(3). The case involved the settlement of a tipper/analyst based on trading by an apparent first-level tippee/trader. The Order includes findings that the inside information at issue there was passed "in words or substance." *Gregory T. Bolan, Jr. and Joseph C. Ruggieri*, Admin. Proc. File No. 3-16178; Securities Act Rel. No. 9795; Securities Exchange Act Rel. No. 75066, 2015 SEC Lexis 2201, at *4-*5 (May 28, 2015) (order). While this case does not address the doctrinal issue discussed above, it is on point to provide support for the settlement of the Commission's action here that sounds more in negligence, and where the transmission by Wang of much of anything more than a customer order is simply not revealed by the Complaint, nor likely to be revealed any time soon.

A section 17(a)(2) or 17(a)(3) injunction, therefore, makes sense and should form the basis for further discussions.

2. There is ample precedent for such a sanction significantly lower that a lifetime bar.

In this Submission, we have set forth compelling reasons why a lifetime bar here would be unwarranted and unjustified. In our discussions last summer, the Staff indicated that, unlike in years past, the Commission recently has not been generally accepting of, for example, three to five year bars. We have been unable to ascertain much guidance to further understand the Commission's current policy and practice on suspensions and bars, including the point above. It is our understanding that any current policy and practice does not emanate from any Commission or Staff publication. We further understand that the issue of the meaning and limits of the term "bar" is in focus currently within the Commission.

We have provided to the Staff *Ryan C. King*, Admin. Proc. File No. 3-15736, Securities Act Rel. No. 9543, Exchange Act Rel. No. 71471, Investment Company Act Rel. No. 30903, 2014 SEC LEXIS 451 (Feb. 4, 2014), where the Commission accepted an offer of settlement which included a 3-year collateral bar "with the right to apply for reentry after . . . 3 years." *Id.* at *7. Notably, *King*, a case involving a conspiracy to park securities for the apparent primary motivation of *King's* co-respondent to realize higher compensation levels from his firm, also included various acts by both respondents to improperly conceal their scheme from their respective firms. *Id.* at *2-4.

In addition, the recent settlement with Steven Cohen provides for a two-year bar. *In re Steven A. Cohen*, Investment Advisers Act of 1940 Release No. 4307 (January 8, 2016); *Steven A. Cohen Barred From Supervisory Hedge Fund Role*, U.S. SEC (Jan. 8, 2016) available at https://www.sec.gov/news/pressrelease/2016-3.html. While, *as a technical matter*, the Commission's settlement with Mr. Cohen was based on a failure to supervise, it is not a stretch to state that a vast swath of persons and institutions, including the SEC, firmly believed that Mr. Cohen was guilty of the most brazen type of insider trading; certainly the SEC and the U.S. Attorney for the Southern District of New York devoted enormous resources during the last several years to developing an insider trading

case against Mr. Cohen. Regardless of the particular charges ultimately settled upon, if the Commission could see its way to agreeing to a 2-year bar for Mr. Cohen, then it should find its way to flexibility here as well.

But perhaps the strongest precedent for a limited term bar is found in the three most significant Commission matters which bear on our case: *Cady Roberts, Investors Management Co.* and *Dirks*. In those cases, the Commission's sanctions clearly reflected its recognition that the conduct in those situations, when viewed through the lens of the agency charged with maintaining *both* investor protection *and* market efficiency, raised very significant issues demanding that the public message disseminated by such sanctions be reasonable, balanced, fair and appropriate. Thus, in *Cady Roberts*, the sanction, on a consent basis, was a $3,000 fine and a 20-day suspension from the New York Stock Exchange (40 S.E.C. at 917-18); in *Investors Management Co.*, the sanction after hearing was a censure (44 S.E.C. at 633); and, in *Dirks*, a censure (463 U.S. at 652).

Here, in such an unusual and important case, it seems very reasonable and suitable for the Commission to seriously entertain a very short limited-term bar, perhaps even a suspension.

E. Resolution Here Should Encompass FINRA Standing Down on Any Independent Investigation.

Finally, the ongoing discussions herein must encompass an evaluation of an appropriate global settlement not only with the Commission but also with FINRA's regulatory arm. We anticipate the Staff will answer this point with the standard "The SEC and FINRA operate independently, and we cannot bind FINRA." Yin's response to this is three-fold. First, in his candid and extensive proffer meetings with DOJ, Yin has acknowledged and admitted various infractions and transgressions which bear on a number of subjects which FINRA would have focused on had it been active in its own investigation; in light of this, it is unnecessary and wasteful for FINRA to initiate any separate investigation into such matters. Certainly the cost to Yin to defend himself in such a probe would be exorbitant, and unjustified under the circumstances.

Second, as we point out in section V.C above, FINRA's backstop on the member regulation side provides a roughly equivalent opportunity for FINRA to explore any remaining concerns it may have if and when Yin seeks to re-enter the securities industry. Third, in light of the SEC's robust oversight authority of FINRA pursuant to the Maloney Act, Yin perceives no real obstacle for the SEC to, in effect, cause its regulatory/enforcement delagatee FINRA to refrain from conducting its own probe, particularly now, nearly three years after Yin has been out of the business, and finally have the ability to get his life back in order.

February 12, 2016
John W. Berry, Esq.
Securities and Exchange Commission

VI. CONCLUSION

The parties have worked very diligently to resolve this very unusual case. The above discussion and analysis demonstrates the compelling reasons why the Commission should be creative, flexible, reasonable and compassionate in fashioning a settlement herein which will give Gary Yin a chance, if he wants to take it, to prove to FINRA that he deserves a second chance.

Very truly yours,

Dennis A. Stubblefield

DENNIS A. STUBBLEFIELD, ESQ.

Frank T. Vecchione

FRANK T. VECCHIONE, ESQ.

February 12, 2016
John W. Berry, Esq.
Securities and Exchange Commission

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PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

U.S. SECURITIES AND EXCHANGE COMMISSION,
444 S. Flower Street, Suite 900, Los Angeles, California 90071
Telephone No. (323) 965-3998; Facsimile No. (213) 443-1904.

On June 21, 2017, I caused to be served the document entitled **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S FIRST SET OF REQUESTS FOR ADMISSIONS TO DEFENDANT GARY YIN** on all the parties to this action addressed as stated on the attached service list:

☐ **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

☐ **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

☐ **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

☐ **HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

☐ **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

☒ **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

☐ **E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

☐ **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: June 21, 2017

/s/ Gary Y. Leung

Gary Y. Leung

SEC v. Gary Yin.
United States District Court – Southern District of California
Case No. 13-cv-02270-L-WVG

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EXHIBIT 5

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Attorneys for Defendant Gary Yin

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. JING WANG AND GARY YIN, Defendants.	Case No. 13-CV-2270-L WVG **DEFENDANT GARY YIN'S RESPONSES TO SECURITIES AND EXCHANGE COMMISSION'S FIRST SET OF REQUESTS FOR ADMISSIONS**

PROPOUNDING PARTY: SECURITIES AND EXCHANGE COMMISSION

RESPONDING PARTY: GARY YIN

SET NO.: ONE

PRELIMINARY STATEMENT

Each response below is subject to all objections as to competence, relevance, materiality, and admissibility and any other applicable objections made on any ground that would require exclusion of any response provided herein if the same were introduced in court, all of which objections are expressly reserved and may be interposed at any point up to, and throughout, trial in this matter.

Responding party ("Defendant") has not fully completed his investigation of the facts relating to this case, has not fully completed his own discovery in this action, and has not completed his preparation for trial. As such, all responses contained herein are based upon such information, records, and documents which are presently available and specifically known to this responding party. Defendant hereby discloses only those contentions which presently occur to him. It is anticipated that further discovery, independent investigation, legal research, and analysis will supply additional facts, add meaning to known facts, as well as establish new factual conclusions and legal contentions, all of which may lead to substantial additions, changes, and variations from the responses and contentions set forth herein.

The following responses are given without prejudice to Defendant's right to produce evidence of any subsequently discovered fact or facts which Defendant may later recall. Accordingly, Defendant reserves the right to change any and all of the answers and responses herein as additional facts are ascertained, additional analysis is conducted, additional legal research is completed, and additional contentions are made.

The responses contained herein are made in a good faith effort to supply as much specification of legal contentions as is presently known but will in no way prejudice Defendant in relation to his right to conduct additional discovery, conduct

further research and analysis, and supplement or modify the responses herein. These responses are made solely for the purpose of this action. Except for the explicit facts admitted herein, if any, no admissions of any nature whatsoever are implied, or should be inferred, and each answer is subject to all appropriate objections which may be made at the time of trial.

Discovery will continue as long as permitted by the governing statute or stipulation by the parties, and the investigation of Defendant and his attorneys will continue throughout the time leading up to, and during, trial in this action. Defendant, therefore, specifically reserves the right, at the time of trial, to introduce any evidence from any source which may hereafter be discovered. Defendant further reserves the right to elicit testimony from any witnesses whose identities may hereinafter be discovered. Defendant further reserves the right to introduce at trial or in support of or in opposition to any motion in this case any and all information heretofore or hereafter produced by the parties in this action by any non-party.

All of the foregoing is deemed to apply to each and every response provided herein and shall be incorporated by reference in each response as though fully set forth therein.

GENERAL OBJECTIONS

The following objections apply to all discovery requests, definitions and instructions, whether specific objections are also interposed, and no provision of information herein may act as a waiver of those objections.

Defendant objects to the following discovery requests to the extent they call for information, communications, or documentation protected by the attorney-client privilege, the attorney work-product doctrine, the common interest and/or joint litigation privilege, or any other rule of privilege or confidentiality provided by law. Any inadvertent identification of privileged information or writings by Defendant does not constitute a waiver of any applicable privilege.

Defendant objects to the following discovery requests to the extent that the information sought is not specified with sufficient particularity or is irrelevant to this action. Such overbreadth renders the following discovery requests burdensome and oppressive.

Defendant objects to the following discovery requests to the extent they seek disclosure of information or documents protected from disclosure by privacy rights promulgated by the constitutions of the State of California and United States, statutory or other rights of privacy, and/or information protected from disclosure as a trade secret or as confidential proprietary information.

Defendant objects to each request to the extent it seeks information or documents that are (1) in the public domain and, therefore, equally accessible to requesting party as to responding party, (2) readily available to requesting party from other sources, or (3) already in the possession, custody or control of requesting party.

This response is made without waiving and subject to (1) the right to object on the grounds of competency, relevancy, materiality, privilege, or admissibility of evidence or on any other applicable grounds in this action or in any subsequent or related proceeding; and (2) the right to object, on any ground, to other discovery requests involving or relating to the subject matter of these requests.

RESPONSES TO REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1:

Admit that every factual assertion contained in the February 12, 2016 "Wells Submission/White Paper of Gary Yin," attached hereto as Exhibit 1, was made by a person who you authorized to make a statement on the subject.

RESPONSE TO REQUEST NO. 1:

Defendant objects to the extent that this request may seek information protected by the attorney-client privilege, work product doctrine, or any other applicable privilege. Defendant further objects that this request is vague and ambiguous as to the word "authorized." The request is also improperly compound

and overbroad, as Exhibit 1, being nearly 50 pages, contains a myriad of factual assertions.

Subject to and without waiving the foregoing objections, Defendant responds as follows: Admit.

REQUEST FOR ADMISSION NO. 2:

Admit that you piggybacked defendant Wang's March 1, 2010 trading in Qualcomm securities when you engaged in the securities trading described in paragraph 31 of the SEC Complaint.

RESPONSE TO REQUEST NO. 2:

Defendant objects to the extent that the request calls for a legal conclusion and/or expert opinion regarding the term "piggyback." Defendant further objects to the extent that this Request may seek information protected by the attorney-client privilege, work product doctrine, or any other applicable privilege. Defendant further objects to the definition of the term "piggybacking."

Subject to and without waiving the foregoing objections, and solely with respect to the definition of "piggybacking" set forth in section I.A.13 of the requests, Defendant responds as follows: Admit.

REQUEST FOR ADMISSION NO. 3:

Admit that you piggybacked defendant Wang's December 6, 2010 trading in Atheros securities when you engaged in the securities trading described in paragraph 42 of the SEC Complaint.

RESPONSE TO REQUEST NO. 3:

Defendant objects to the extent that the request calls for a legal conclusion and/or expert opinion regarding the term "piggyback." Defendant further objects to the extent that this request may seek information protected by the attorney-client privilege, work product doctrine, or any other applicable privilege. Defendant further objects to the definition of the term "piggybacking."

Subject to and without waiving the foregoing objections, and solely with

respect to the definition of "piggybacking" set forth in section I.A.13 of the requests, Defendant responds as follows: Admit.

REQUEST FOR ADMISSION NO. 4:

Admit that Merrill Lynch internal policies and procedures governing your conduct as a registered representative at Merrill Lynch, in 2010 and in connection with your assignment to defendant Wang's accounts, prohibited piggybacking of client accounts.

RESPONSE TO REQUEST NO. 4:

Defendant objects to the extent that the request calls for a legal conclusion and/or expert opinion regarding the term "piggyback." Defendant further objects to the extent that this request may seek information protected by the attorney-client privilege, work product doctrine, or any other applicable privilege. Defendant further objects to the definition of the term "piggybacking."

Subject to and without waiving the foregoing objections, and solely with respect to the definition of "piggybacking" set forth in section I.A.13 of the requests, Defendant responds as follows: Defendant admits that Merrill Lynch's manual entitled "GWM Branch Office Compliance Policy Manual - Employee Conduct" states as follows:

- Where a client trade has materially moved the market in a specific security, it is inappropriate for employees to take advantage of the information by trading in his or her own account, or an account of his or her immediate family, until an appropriate amount of time has passed (FAs generally may not trade on the same day).
- Similarly, employees must not "piggyback" by patterning his or her own trading after a client's trading.
- Information regarding client orders must be kept confidential and must not be used in any way to effect trades in employee

accounts or in the accounts of other clients.

Except as expressly admitted above, Defendant lacks sufficient information or knowledge regarding the remaining aspects of this request, and on that basis, denies them.

DATED: August 4, 2017

Submitted by,

SHUSTAK REYNOLDS & PARTNERS, P.C.
DENNIS A. STUBBLEFIELD, ESQ.
JESSICA L. MACKANESS, ESQ.

s/ Dennis A. Stubblefield
Dennis A. Stubblefield

Attorneys for Defendant Gary Yin

DATED: August 4, 2017

Submitted by,

LAW OFFICE OF FRANK T. VECCHIONE
FRANK T. VECCHIONE, ESQ.

s/ Frank T. Vecchione
Frank T. Vecchione

Attorneys for Defendant Gary Yin

VERIFICATION

I am a Defendant in the above-captioned action. I have read the substantive responses contained in **DEFENDANT GARY YIN'S RESPONSES TO SECURITIES AND EXCHANGE COMMISSION'S REQUESTS FOR ADMISSION, SET ONE** and know the contents thereof. I am informed and believe that the substantive responses are true and correct to the best of my knowledge and recollection.

I certify and declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed on August 3, 2017, at San Diego, California.

Signature: Gary Yin (Aug 3, 2017)

Gary Yin

EXHIBIT 6

NEWS RELEASE

OFFICE OF THE UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF CALIFORNIA
San Diego, California

United States Attorney
Laura E. Duffy

For Further Information, Contact: Assistant U.S. Attorney Eric J. Beste (619-546-6695)

For Immediate Release

FORMER MERRILL LYNCH STOCK BROKER PLEADS GUILTY IN CONNECTION TO QUALCOMM INSIDER TRADING SCHEME

NEWS RELEASE SUMMARY – September 24, 2013

Former Merrill Lynch Stock Broker Gary Yin pled guilty today and admitted obstructing justice and laundering money for former Qualcomm Executive Vice President and President of Global Business Operations, Jing Wang (charged elsewhere).

According to his plea agreement, Yin agreed to assist Jing Wang in concealing Wang's illegal insider trading using a secret, nominee brokerage account at Merrill Lynch. Yin also agreed to Wang's request that he obstruct an ongoing SEC investigation into Wang's activities, and to launder the proceeds of Wang's insider trading. Among other things, Yin agreed to conceal evidence that Wang had engaged in insider trading by setting up a shell company in the British Virgin Islands, opening a brokerage account in the name of the shell company (but

actually controlled by Wang), and laundering the illegal insider trading profits by moving them into the British Virgin Islands account.

At Wang's direction, Yin also obstructed justice by removing account documents (subject to an SEC subpoena) from the United States and taking them to China. In China, Yin delivered the documents to Jing Wang's brother, Bing Wang. Once delivered, Yin rehearsed a false cover story with Bing, concocted by his brother. In order to make the cover story credible, Yin also reviewed the trading history in the offshore account with Bing Wang to enable him to lie successfully to the authorities in the United States.

Finally, in order to hide the proceeds of Wang's illegal trades, and to distance Wang from the trades, Yin transferred money from one shell company's brokerage account to another. All told, Yin transferred approximately $525,000 from accounts related to shell companies in the British Virgin Islands.

Yin entered his guilty plea before U.S. Magistrate Judge Nita Stormes, and is next expected in court on December 16 at 9 a.m. for his sentencing before U.S. District Court Judge William Q. Hayes.

DEFENDANT **CRIMINAL CASE NO. 13cr3488-WQH**

Gary Yin

SUMMARY OF CHARGES

Title 18 U.S.C. Section 371 – Conspiracy to commit offenses against the United States. Maximum Penalty: 5 years custody, a maximum $250,000 fine, three years supervised release and $100 special assessment.

DEFENDANT **Criminal Case No. 13CR3487-H**

Jing Wang
Bing Wang

SUMMARY OF CHARGES

Title 15 U.S.C. Sections 78j(b), 78ff and 17 C.F.R. § 240.10b-5—Securities Fraud (Insider Trading). Maximum Penalty: 20 years custody, a maximum fine of $5 million, five years supervised release, and $100 special assessment.

Title 18 U.S.C. Section 371 – Conspiracy (Obstruction of Justice and Money Laundering). Maximum Penalty: 5 years custody, a maximum $250,000 fine, three years supervised release and $100 special assessment.

Title 18 U.S.C. Section 1512(c)(1) and (c)(2) -- Obstruction of Official Proceedings. Maximum Penalty: 20 years custody, a maximum fine of $250,000 years supervised release, and $100 special assessment.

Title 18 U.S.C. 1956 – Money Laundering. Maximum Penalty: 20 years custody, a maximum fine of $250,000 years supervised release, and $100 special assessment.

Title 18 U.S.C. 1028A – Aggravated Identity Theft. Maximum Penalty: Mandatory two years custody consecutive to any other sentence.

DEFENDANT **Criminal Case No. 13CR3487-H**

Bing Wang

SUMMARY OF CHARGES

Title 18 U.S.C. Section 371 – Conspiracy (Obstruction of Justice and Money Laundering). Maximum Penalty: 5 years custody, a maximum $250,000 fine, three years supervised release and $100 special assessment.

INVESTIGATING AGENCIES

Federal Bureau of Investigation

Internal Revenue Service-Criminal Investigation

EXHIBIT 7

NEWS RELEASE

OFFICE OF THE UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF CALIFORNIA
San Diego, California

United States Attorney
Laura E. Duffy

For Further Information, Contact:

Assistant U.S. Attorney Eric J. Beste (619-546-6695)

For Immediate Release

FORMER PRESIDENT OF QUALCOMM'S GLOBAL BUSINESS OPERATIONS INDICTED FOR INSIDER TRADING

Executive Jing Wang used offshore entities and secret brokerage accounts to conceal and disguise his illicit profits

NEWS RELEASE SUMMARY – September 23, 2013

SAN DIEGO – Jing Wang, a former Executive Vice President and President of Global Business Operations for Qualcomm, Inc. (NASDAQ: QCOM) was charged with insider trading in shares of both Qualcomm and Atheros Communications, Inc. ("Atheros") using a secret brokerage account and an offshore shell company in the British Virgin Islands.

Wang, 51, of Del Mar, is also charged with conspiring with his brother, co-defendant Bing Wang, and his former Merrill Lynch stock broker, Gary Yin, to obstruct an ongoing SEC investigation, and laundering the proceeds of his insider trading using a second offshore shell company and secret brokerage account.

United States Attorney Laura E. Duffy and Acting Assistant Attorney General for the Justice Department's Criminal Division Mythili Raman announced that Wang was taken into custody at

the Federal Bureau of Investigation earlier today on these charges, and is expected to make his initial appearance in federal court in the Southern District of California at 2 p.m. before U.S. Magistrate Judge Nita Stormes. A warrant has been issued for the arrest of Bing Wang, 53, who is believed to be a citizen and resident of China.

Yin, the former stock broker, was charged in a criminal information filed today in the Southern District of California, and is expected to make his initial appearance on Tuesday, September 24, at 10:00 a.m. in federal court in San Diego, also before Judge Stormes.

"When there are two sets of rules – one for the powerful insiders and one for everybody else – the public quickly loses confidence in the stock market," Duffy said. "We intend to restore confidence in our markets by making sure that everyone is playing by the same rules."

FBI Special Agent in Charge, Daphne Hearn, commented, "Insider trading investigations are important, because our nation's economy is increasingly dependent on the success and integrity of the stocks and commodities markets. The FBI's message is simple, if your information is inside information, you can't trade on it."

"Mr. Wang has been charged with using offshore entities and secret brokerage accounts to conceal and disguise illicit profits from insider trading. Our special agents are experts in following the financial transactions that unravel complex schemes where individuals who use nominee offshore accounts believe they are out of the reach of the IRS," said Richard Weber, Chief, IRS Criminal Investigation. "These individuals face severe consequences including imprisonment and substantial fines."

"Insider trading is an insidious crime. It undermines ordinary investors' faith in our financial markets, and the Justice Department has zero tolerance for it," said Acting Assistant Attorney General Raman. "Today's charges show that you cannot trade on inside information, pocket the profit, and expect to get away with it. The Criminal Division has had a terrific partnership with the U.S. Attorney's Office for the Southern District of California in this important investigation, and through partnerships like these throughout the country, we will continue to root out fraud in our markets at every level."

According to the indictment, Wang used his Merrill Lynch broker (Yin) to create the offshore entity, Unicorn Global Enterprises ("Unicorn"), in the British Virgin Islands and to open a brokerage account for Unicorn at Merrill Lynch. Wang provided documents to Yin to create the false impression that his brother, Bing Wang, controlled the account, when in fact Qualcomm's Wang was the true owner of the account. This allowed Wang to conceal his true ownership and control of the assets in the account and to avoid reporting to U.S. tax authorities. Significantly, it also allowed Wang to disguise his transfer of large sums of money to China.

The indictment alleges that after the creation of the Unicorn account, Wang was named an Executive Vice President of Qualcomm and fell within the company's insider trading restrictions for officers. As an officer, Wang was exposed to Qualcomm's confidential business information, and was repeatedly notified that he was not permitted to use material, non-public information to engage in stock transactions.

Among the inside information learned by Wang because of his senior position was the fact that in the first quarter of 2010, Qualcomm was poised to announce an increased quarterly dividend and a stock repurchase program. On March 1, 2010, Wang allegedly acted on this material non-public information and directed Yin to purchase as much Qualcomm stock as possible in the Unicorn account before the information became public. After the close of trading on that same day, Qualcomm issued a press release announcing the dividend increase and stock repurchase program, and the company's stock appreciated approximately 10 percent in value.

According to the indictment, Wang next engaged in insider trading when he learned that Qualcomm was interested in purchasing Atheros. On December 1, 2010, acting on this information, Wang met with Yin and instructed him to sell all Qualcomm shares in the Unicorn account. Wang then told Yin to make preparations to purchase Atheros with the funds in the account, but to wait for further confirmation. Wang's broker proceeded to liquidate all of the illegally held Qualcomm stock in the Unicorn account, resulting in ill-gotten gains of approximately $94,709 from the earlier insider trading.

The indictment alleges that on December 6, 2010, while attending a meeting of Qualcomm's Board of Directors in Hong Kong, Wang learned that the board authorized Qualcomm to make a non-public offer to purchase Atheros for $45 per share. Later that same day, Wang called Yin in San Diego and instructed him to use all available funds in the secret Unicorn account to purchase Atheros stock, the indictment said. The broker followed Wang's instructions and purchased 10,800 shares at approximately $34 per share for a total of $366,766.

Qualcomm's offer to purchase Atheros remained confidential until an article appeared in the Dealbook section of the *New York Times'* website on January 4, 2011, and Qualcomm made an official announcement of the deal on January 5, 2011. Between the close of trading on January 3, 2011, and the close of trading on January 5, 2011, the price of Atheros stock jumped from approximately $37 to $44.50 – an increase of close to 20 percent.

The indictment alleges that Wang engaged in a third incident of insider trading on January 25, 2011, when he learned that Qualcomm was about to release record financial results. Immediately prior to announcement of those earnings, Wang directed Yin to sell all the Atheros stock in the Unicorn account and purchase Qualcomm stock. The broker sold all of Wang's illegally purchased Atheros stock for $44.60 per share, and used all of the proceeds to purchase Qualcomm stock at $50.87 per share. The following day, after Qualcomm announced the record earnings results, Qualcomm's stock price increased by approximately $4 per share. All told, Wang illegally gained approximately a quarter of a million dollars from these three illegal transactions.

The indictment and criminal information further alleges that in order to conceal his insider trading, Wang conspired with his brother, Bing Wang, and Yin, to conceal Wang's control of the Unicorn account and his illegal purchases of Qualcomm and Atheros stock. Yin and Bing Wang allegedly agreed to assist Wang, and the three defendants engaged in a number of activities to obstruct any investigation of the trades, as well as to conceal Wang's control of the Unicorn account. These obstructive acts included concocting a false cover story that would blame Bing Wang for the illegal trades in Qualcomm and Atheros, concealing Wang's actual control of the Unicorn account from Merrill Lynch, and transferring the proceeds of Wang's insider trading to

another offshore entity nominally owned by Wang's mother.

For example, in carrying out the obstruction, the indictment alleges that in January 2012, Wang forged the signature of his mother and used her identification documents to create another British Virgin Islands entity called Clearview Resources, Ltd ("Clearview"). At Wang's instruction, Yin created a Merrill Lynch account for Clearview, and attempted to further distance Wang from the transactions by transferring all of the money in the Unicorn account to the Clearview account in a series of structured transactions.

Another example of obstructive conduct alleged in the indictment took place in March 2012, when Wang met with Yin and explained that the SEC was investigating Qualcomm. At that time, Wang told Yin he was worried that his control of the Unicorn account and insider trading would be discovered. By that time, the SEC had already issued a subpoena to Wang calling for him to produce information about any brokerage accounts he controlled. Wang allegedly pressed Yin to stick to the false cover story he had created earlier – that his brother Bing Wang was the person who made the illegal trades, not him. Soon afterwards, Wang gave Yin a number of Merrill Lynch documents related to his Unicorn account and directed his broker to take the documents to China, give them to Bing Wang, and help his brother use them to corroborate the false cover story. Yin agreed, and during two trips to China in 2012, Yin met with Bing Wang, provided him with Unicorn documents removed from the United States, and rehearsed the false cover story. The indictment further alleges that after these meetings, Bing Wang and Yin sent emails to each other containing false and misleading statements in order to make it appear that Bing Wang actually controlled the Unicorn and Clearview accounts.

United States Attorney Duffy praised the efforts of the Federal Bureau of Investigation and the Internal Revenue Service, Criminal Investigation for piecing together this complex, international insider trading scheme. United States Attorney Duffy also thanked the SEC's Los Angeles Regional Office for its assistance, and noted that the SEC had today filed a civil complaint against Wang and Yin in federal court in San Diego.

**The public is reminded that indictments and informations are not evidence that the defendants committed the crime charged. The defendants are presumed innocent until the United States meets its burden in court of proving guilt beyond a reasonable doubt.*

DEFENDANT	**Criminal Case No. 13CR3487-H**	
Jing Wang	Age: 51	Del Mar, CA
Bing Wang	Age: 53	China

SUMMARY OF CHARGES

Title 15 U.S.C. Sections 78j(b), 78ff and 17 C.F.R. § 240.10b-5—Securities Fraud (Insider Trading). Maximum Penalty: 20 years custody, a maximum fine of $5 million, five years supervised release, and $100 special assessment.

Title 18 U.S.C. Section 371 – Conspiracy (Obstruction of Justice and Money Laundering). Maximum Penalty: 5 years custody, a maximum $250,000 fine, three years supervised release and $100 special assessment.

Title 18 U.S.C. Section 1512(c)(1) and (c)(2) -- Obstruction of Official Proceedings. Maximum Penalty: 20 years custody, a maximum fine of $250,000 years supervised release, and $100 special assessment.

Title 18 U.S.C. 1956 – Money Laundering. Maximum Penalty: 20 years custody, a maximum fine of $250,000 years supervised release, and $100 special assessment.

Title 18 U.S.C. 1028A – Aggravated Identity Theft. Maximum Penalty: Mandatory two years custody consecutive to any other sentence.

DEFENDANT **Criminal Case No. 13CR3487-H**

Bing Wang Age: 53 China

SUMMARY OF CHARGES

Title 18 U.S.C. Section 371 – Conspiracy (Obstruction of Justice and Money Laundering). Maximum Penalty: 5 years custody, a maximum $250,000 fine, three years supervised release and $100 special assessment.

DEFENDANT **Criminal Case No. 13CR3488**

Gary Yin Age: 54 San Diego

SUMMARY OF CHARGES

Title 18 U.S.C. Section 371 – Conspiracy to commit offenses against the United States. Maximum Penalty: 5 years custody, a maximum $250,000 fine, three years supervised release and $100 special assessment.

INVESTIGATING AGENCIES

Federal Bureau of Investigation
Internal Revenue Service-Criminal Investigation

EXHIBIT 8

Investment Adviser Firm Summary

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (CRD# 7691 / SEC# 8-7221, 801-14235)

View latest Form ADV filed | Part 2 Brochures

The adviser's **REGISTRATION** status is listed below.

This adviser is also a brokerage firm

REGISTRATION STATUS

SEC / JURISDICTION	REGISTRATION STATUS	EFFECTIVE DATE
SEC	Approved	12/08/1978

NOTICE FILINGS

Investment adviser firms registered with the SEC may be required to provide to state securities authorities a copy of their Form ADV and any accompanying amendments filed with the SEC. These filings are called *"notice filings"*. Below are the states with which the firm you selected makes its notice filings. Also listed is the date the firm first became notice filed or registered in each state.

JURISDICTION	EFFECTIVE DATE
Alabama	12/18/2000
Alaska	06/09/1993
Arkansas	01/17/1989
California	07/08/1997
Colorado	01/01/1999
Connecticut	08/19/1997
Delaware	08/28/2003
District of Columbia	11/27/1993
Florida	08/30/1982
Georgia	01/04/2001

Hawaii	06/01/1989
Idaho	07/15/1991
Illinois	04/12/1991
Indiana	11/08/2000
Iowa	01/01/1999
Kansas	12/30/1997
Kentucky	04/12/2001
Louisiana	10/11/2001
Maine	01/04/2001
Maryland	11/14/1990
Michigan	01/04/2001
Minnesota	01/05/1999
Mississippi	04/24/2001
Missouri	04/12/2001
Montana	12/26/1997
Nebraska	01/26/1998
Nevada	11/21/1990
New Hampshire	01/04/2001
New Jersey	08/25/1995
New Mexico	11/24/1987
New York	01/04/2001
North Carolina	10/23/2000
North Dakota	01/04/2001
Ohio	05/27/1999
Oklahoma	01/01/1998
Pennsylvania	06/15/2010
Rhode Island	01/01/1993
South Carolina	11/05/1992
South Dakota	10/12/1980
Tennessee	10/29/2001
Texas	01/01/1956

Utah	04/09/1993
Vermont	01/04/2001
Virgin Islands	04/25/2005
Virginia	08/20/1997
Washington	01/01/1990
West Virginia	01/26/1998
Wisconsin	02/ 02/1995
Wyoming	07/ 17/2017

EXEMPT REPORTING ADVISERS

Exempt Reporting Advisers ("ERA") are investment advisers that are not required to register as investment advisers because they rely on certain exemptions from registration under sections 203(l) and 203(m) of the Investment Advisers Act of 1940 and related rules. Certain state securities regulatory authorities have similar exemptions based on state statutes or regulations. An ERA is required to file a report using Form ADV, but does not complete all items contained in Form ADV that a registered adviser must complete. Other state securities regulatory authorities require an ERA to register as an investment adviser and file a complete Form ADV. Below are the regulators with which an ERA report is filed.

Not Currently an Exempt Reporting Adviser

EXHIBIT 9

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18165

In the Matter of **GARY YIN,** **Respondent.**	**ANSWER**

Respondent Gary Yin, by his attorneys, sets forth the following answers and affirmative defenses to the allegations contained in the Order Instituting Proceedings and Notice of Hearing ("OIP"), upon knowledge with respect to himself and his own acts and upon information and belief with respect to all other matters.

SECTION I

Respondent denies having sufficient information to address the position of the Securities and Exchange Commission ("SEC" or "Commission") that it is deemed "appropriate" and in the "public interest," to institute administrative proceedings as set forth in Section I, except to state that the OIP was not appropriate or in the public interest, particularly with respect to the timing of its issuance, in light of the ongoing settlement negotiations between the Enforcement Staff of the Commission and Respondent, designed to reach a "global settlement" of the Commission's civil injunctive action (alleging insider trading) against Respondent, which has been pending

since September 23, 2013.[1] Such settlement negotiations have been ongoing for nearly three (3) years, and have been supervised with the active involvement of the United States District Court.

From inception, such negotiations have always contemplated a "global settlement" which would encompass a resolution of the expected "follow-on" administrative proceeding. It was not in the public interest for the Commission to institute the OIP precipitously, a mere two months prior to a long-calendared Mandatory Settlement Conference in such civil injunctive action, in which all parties were moving toward such a global settlement. Such precipitous issuance has caused Respondent and this tribunal to needlessly expend litigation/administrative resources.

SECTION II

A. RESPONDENT

1. Respondent admits the allegations in Paragraph 1.

B. RESPONDENT'S CRIMINAL CONVICTION

2. Respondent admits the allegations in Paragraph 2.

3. Respondent admits the allegations in Paragraph 3.

SECTION III

A. Respondent states that section A constitutes a legal conclusion to which no answer is required. To the extent that a responsive pleading is required. Respondent denies each and every allegation in section A.

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[1] Securities and Exchange Commission v. Jing Wang and Gary Yin, Case No. 13-cv-02270-L-WVG (S.D. CA)

B. Respondent states that section B constitutes a legal conclusion to which no answer is required. To the extent that a responsive pleading is required. Respondent denies each and every allegation in section B.

C. Respondent states that section C constitutes a legal conclusion to which no answer is required. To the extent that a responsive pleading is required. Respondent denies each and every allegation in section C.

SECTION IV

Respondent states that the entirety of Section IV constitutes legal conclusions, expressed in the form of government commands, to which no answer is required.

AFFIRMATIVE DEFENSES

Further answering the OIP, Respondent asserts the following affirmative defenses without assuming the burden of proof where the burden would otherwise rest on the Commission:

First Affirmative Defense

The allegations of the Division of Enforcement fail to state a claim upon which relief may be granted by the Commission.

Second Affirmative Defense

The OIP, and each alleged cause of action contained therein, is barred in whole or in part by the statute of limitations.

Third Affirmative Defense

Any civil penalties sought by the Commission should be denied or substantially reduced because any such award would be unjust, arbitrary and oppressive, or confiscatory.

Fourth Affirmative Defense

No sanction against Respondent is in the public interest in view of various factors including but not limited to the absence of any likelihood that Respondent will violate the federal securities laws in the future in light of his retention of special compliance counsel, and in view of the fact that FINRA will set a nearly insurmountable bar to the extent that Respondent ever seeks to become associated with a broker-dealer.

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Counsel for Respondent Yin

In the Matter of Gary Yin
Administrative Proceeding File No. 3-18165

Service List

Pursuant to Commission Rule of Practice 150 (17 C.F.R. §201.150), I certify that the attached:

ANSWER

was served on October 25, 2017 upon the following parties via first class U.S. Mail as follows:

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