

No. 10-6287

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

U.S. COMMODITY FUTURES
TRADING COMMISSION, et al.,

Plaintiffs - Appellees,

v.

SIMON YANG, an individual, a/k/a Xiao
Yang, a/k/a Simon Chen,

Defendant - Appellee,

and

PRESTIGE VENTURES CORP., a
Panamanian corporation, et al.,

Defendants,

STEPHEN J. MORIARTY,

Receiver.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
The Honorable Judge David L. Russell
D.C. No. 5:09-CV-01284-R

BRIEF FOR APPELLEES
U.S. COMMODITY FUTURES TRADING COMMISSION
OKLAHOMA DEPARTMENT OF SECURITIES *EX. REL.* IRVING L. FAUGHT

Oral Argument Not Requested

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RELATED APPEAL

A related appeal is pending before this Court: *U.S. Commodity Futures Trading Commission, et al., v. Kenneth Wayne Lee, an individual, et al.*, Case No. 10-6276.

Plaintiffs/Appellees, U.S. Commodity Futures Trading Commission (the “CFTC”) and Oklahoma Department of Securities *ex. rel.* Irving L. Faught, Administrator (“ODS”) (collectively, “Plaintiffs” or “Appellees”), herein respond to *Appellant’s Opening Brief*.¹

STATEMENT OF JURISDICTION

Pursuant to Rule 28(a)(4) of the Federal Rules of Appellate Procedure, Appellees state that the district court’s subject matter jurisdiction was based upon 7 U.S.C. § 13a-1 and 7 U.S.C. § 13a-2. This first provision empowers the CFTC to commence enforcement actions in federal district court for violations of the Commodity Exchange Act (“CEA”), including, in particular, 7 U.S.C. § 6m(1) (failure to register as a commodity pool operator), 7 U.S.C. § 6k(2) (failure to register as an Associated Person of a commodity pool), 7 U.S.C. § 6q(1) (fraud by commodity pool operator), and 7 U.S.C. § 6b (a)(2) (the CEA’s general anti-fraud provision). The latter provision, 7 U.S.C. § 13a-2, provides the State of Oklahoma with the power to enjoin violations or enforce compliance with state law, including claims brought pursuant to Sections 1-603 and 1-608 of the Oklahoma Uniform Securities Act of 2004 (“OUSA”), Okla. Stat. tit. 71 §§ 1-101 through 1-701

¹ This brief is signed and submitted jointly by the CFTC and ODS because the Appellees CFTC and ODS are in complete accordance with the facts and law as stated in this brief. However, each appellee is represented by separate counsel.

(Supp. 2004). The district court had supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a).

This Court's appellate jurisdiction under 28 U.S.C. § 1291 is established by the district court's order of November 29, 2010. v. 1, pt. 1, pp. 1526-1536.

Appellant Yang filed a notice of appeal on December 17, 2010. v. 1, pt. 1, p. 1592.²

STATEMENT OF THE ISSUES

WAS THE DISTRICT COURT CORRECT IN FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AND THAT PLAINTIFFS WERE ENTITLED TO JUDGMENT AS MATTER OF LAW?

WERE THE DISTRICT COURT'S FACTUAL FINDINGS IN ITS RELIEF ORDER ENTERED ON NOVEMBER 29, 2010 SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT CLEARLY ERRONEOUS?

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the Western District of Oklahoma in favor of Plaintiffs/Appellees' civil enforcement action against Simon Yang (a/k/a Xiao Yang a/k/a Simon Chen) and three other defendants: Prestige Ventures Corp. ("Prestige"), Federated Management Group,

² Appellant's opening brief will be cited as "Pet. Br. at ___."

Inc. (“Federated”), and Kenneth Wayne Lee (“Lee”). v. 1, pt. 1, p. 1. Yang is the only party to this appeal.³

A. Complaint

In their Complaint, the CFTC and ODS alleged that from approximately March 2003 through November 20, 2009, Yang and his co-defendants fraudulently solicited and accepted at least \$8.7 million from at least 140 members of the general public (“pool participants” or “investors”) to participate in commodity pools for trading commodity futures contracts and other financial instruments.⁴ v. 1, pt. 1, p. 26. The Complaint alleged that Defendants’ actions violated several CEA provisions, 7 U.S.C. §§ 1 *et seq.*, several CFTC’s regulations (“regulations”), 17 C.F.R. §§ 1.1 *et seq.*, and the Oklahoma Uniform Securities Act of 2004 (“OUSA”), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2004) by operating a “Ponzi” scheme. v. 1, pt. 1, p. 27. Specifically, Yang and co-defendants paid so-called profits to investors that actually came from existing investor monies or money invested from subsequent investors instead of from profits from successful

³ Although Yang’s Notice of Appeal, v. 1, pt. 1, p. 1592, only attaches the Relief Order, v. 1, p. 1, p. 1526, the docketing statement filed with this Court on December 17, 2010, attaches the Summary Judgment Order, v.1, pt.1, p. 1290, as well. For purposes of this appeal, Appellees will brief as if Yang appealed both Orders.

⁴ Broadly speaking, a commodity pool is analogous to a mutual fund except that the pool invests in commodity futures contracts instead of, or in addition to, securities. *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 965 (7th Cir. 1986).

trading. v. 1, pt. 1, p.27. Yang answered the Complaint on December 14, 2009.

v.1, pt. 1, p. 111.

B. Summary Judgment

The CFTC and ODS moved for summary judgment as to liability against all four Defendants on September 1, 2010. v. 1, pt. 1, 1171. Yang did not respond to the summary judgment motion nor did he dispute any facts. v. 1, pt. 1, p. 1297.

On October 27, 2010, the district court found Yang and the other Defendants liable for violations of the CEA, CFTC regulations, and the OUSA (“Summary Judgment Order”). v. 1, pt. 1, p. 1297-1317. In its opinion, the district court held that:

(1) there was “ample” evidence that Yang and Lee made material misrepresentations, with scienter, in violation of 7 U.S.C. § 6b(a)(2) and 6b(a)(2)(A)-(C)⁵;

(2) That Federated and Prestige were commodity pools;

⁵ On June 18, 2008, Congress enacted Section 4b(a)(1)(A)-(C), 7 U.S.C. §§ 6b(a)(2)(A)-(C), with the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act (“CRA”)), §§ 13101-13204, 122 Stat. 1651, which modified and redesignated what was Section 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2). However, the CRA’s modifications to that Section of the Act do not apply, and have no substantive effect, on the facts of this case. Accordingly, Section 4b(a)(2)(i)-(iii) of the Act, 7 U.S.C. §§ 6b(a)(2), applies to violations occurring before June 18, 2008 and Section 4b(a)(1)(A)-(C), 7 U.S.C. §§ 6b(a)(2)(A)-(C), as amended by the CRA, applies to violations occurring on or after that date. Although Yang’s behavior straddles both time periods, for purposes of this brief, Appellees will refer to 7 U.S.C. §§ 6b(a)(2)(A)-(C).

(3) Yang and Lee committed fraud as associated persons in violation of 7 U.S.C. § 6q(1);

(4) Yang was an associated person of the commodity pool and he violated 7 U.S.C. § 6k by failing to register as such;

(5) Yang and Lee made material misrepresentations with the requisite intent to violate 7 U.S.C. § 6q(1)(A) and (B);

(6) Yang and other Defendants violated the OUSA, Okla. Stat. tit. 71, § 1-301 by failing to register the securities sold by Defendants to investors;

(7) Yang and Lee failed to register as agents as required by the OUSA, Okla. Stat. tit. 71, § 1-402(A);

(8) Yang and the other Defendants made material misrepresentations in connection with the offer or sale of a security under the OUSA, Okla. Stat. tit. 71, § 1-501(2); and

(9) Yang and the other Defendants employed a scheme to defraud investors in violation of the OUSA, Okla. Stat. tit. 71, §§ 1-501(1) and 1-501(3). v. 1, pt. 1, pp. 1304, 1306, 1308-09, 1311-16.

C. Relief Trial

On November 8, 2010, the district court held a bench trial limited to issues of relief. Plaintiffs/Appellees presented testimony and other evidence. v. 1, pt. 1, 1407-08. Glen Grossman, an ODS investigator and a Certified Public Accountant,

testified about the deposits into and disbursements from the Prestige Enterprise⁶ bank accounts. v. 1, pt. 1, pp. 1407-08. Yang, the only Defendant present at trial, appeared *pro se*. v.1, pt. 1, pp. 1407-08. He proffered no documents or testimony. v. 1, pt. 1, pp. 1407-08.

On November 29, 2010, the district court entered an order of permanent injunction and other relief against all Defendants (“Relief Order”). v. 1, pt. 1, p. 1526. The same Relief Order permanently enjoined Yang from certain conduct relating to the trading of commodity futures and the sale of securities under the OUSA, ordered him to pay restitution totaling \$133,000 plus prejudgment and post-judgment interest, and precluded Yang from making a claim for restitution or any return of funds or payment from the other defendants or the Receivership. v. 1, pt. 1, pp. 1534-1535.

Yang appealed both the Summary Judgment and the Relief Orders. v. 1, pt. 1, pp. 1290, 1592.

STATEMENT OF THE FACTS

I. Yang Joined a Fraudulent Commodity Pool Enterprise.

A. Yang’s Initial Dealings with His Co-Defendants.

Appellant Yang resides in Edmond, Oklahoma. v. 1, pt. 4, doc. 109-25, p. 7,

¶ 14. Yang is ethnically Chinese and was sent to Canada by the Chinese

⁶ Federated and Prestige acted as a common enterprise, as discussed in more detail below.

government for graduate school in 1988. v. 1, pt. 4, doc. 109-4, p. 4 (8-9).⁷ Yang became a permanent resident of the United States in 1998. v. 1, pt. 4, doc. 109-4, p. 5 (13). After some initial setbacks trading in the stock market and mutual funds, Yang began to look for someone with investment knowledge who would be able to trade for him. v. 1, pt. 4, doc. 109-3, p. 15. Toward that end, Yang met Defendant Lee. According to Yang, he first learned of Defendant Lee while doing internet research on investment strategies. v. 1, pt. 4, doc. 109-3, p. 16.

After communicating with Lee by email and telephone for a week and meeting him in person, v. 1, pt. 4, doc. 109-3, pp. 16-17, Yang invested \$100,000 with Lee. v. 1, pt. 4, doc. 109-3, p. 17. To safeguard his investment, Yang kept in daily contact with Lee. v. 1, pt. 4, doc. 109-3, p. 17. Yang eventually invested approximately \$469,507 with Lee and his companies Federated and Prestige. v. 1, pt. 1, doc. 107, p. 22, ¶ 52; v. 1, pt. 1, doc., p. 21 (75-76); R. 167-1, p. 20, Trial Exhibit 1, p. 1.⁸ Yang invested even though he testified that he thought that there

⁷ Where a citation to the record is to a page of a deposition transcript with multiple pages on a single page of the record, the pinpoint citation is in parentheses for ease in locating the pertinent testimony.

⁸ The district court transmitted the partial relief trial transcript and corresponding exhibits after it transmitted the bulk of the record. As a result, Plaintiffs/Appellees are citing to its Record number on the official docket sheet of the district court.

was an “overwhelming chance” that Lee’s investment pool, Federated, was a “Ponzi” scheme. v. 1, pt. 4, doc.109-4, p. 21 (75-76).

The relationship between Yang and Lee quickly evolved into what Yang described as a “commissioned independent contractor agreement.” v. 1, pt. 1, p. 1180, ¶ 5; v. 1, pt. 4, doc. 109-3, p. 3; v. 1, pt. 4, doc. 109-4, p. 35 (130). Yang ultimately recruited investors for Lee from the Chinese Baptist Church in Oklahoma City. v. 1, pt. 1, p. 1186, ¶ 31; v. 1, pt. 4, doc. 109-3, p. 20-22. At times, Yang received commissions from Lee and the Prestige Enterprise for customers that he recruited. v. 1, pt. 4, doc. 109-4, p. 37 (141); v. 1, pt. 4, doc. 109-3, p. 17.

B. Overview of the Fraudulent Commodity Pool Enterprise for Which Yang Recruited Investors.

1. Prestige and Federated: The Commodity Pool Operators.

Federated and Prestige acted as a common enterprise (“Prestige Enterprise”) and were used as part of a common scheme to solicit pool participants. Lee was the director of both companies. v. 1, pt. 1, pp. 1179, 1182, ¶¶ 3, 8; v. 1, pt. 4, doc. 109-25, pp. 6, 15; v. 1, pt. 3, doc. 109-2, p. 5. Both companies were in the business of soliciting and accepting funds from investors to pool together for purposes of trading various financial instruments, including commodity futures, stocks, stock options, and foreign currency. v.1, pt. 1, p. 1183, ¶ 17; v. 1, pt. 4, doc.

109-16, p. 2, ¶ 4; v. 1, pt. 1, doc. 109-19, p. 2, ¶ 4; v. 1, pt. 4, doc. 109-14, pp. 2-3, ¶ 7; v.1, pt. 4, doc. 109-15, p. 2, ¶ 4; v. 1, pt. 4, doc. 109-17, p. 2, ¶ 4; v. 1, pt. 4, doc. 109-18, p. 2, ¶ 5. Federated and Prestige shared offices, telephone numbers and solicitation materials. v. 1, pt. 1, p. 1182-83, ¶¶ 14-16; v. 1, pt. 4, doc. 109-25, p. 7, ¶ 16; v. 1, pt. 3, doc. 109-1, p. 11, ¶ 35; v. 1, pt. 4, doc. 109-15, pp. 17-19.

Both entities claimed to use proprietary software, the Legacy Trading System, to trade on behalf of the pools. v. 1, pt. 1, p. 1183, ¶ 15; v. 1, pt. 3, doc. 109-4, p. 42 (161); v. 1, pt. 4, doc 109-24, p. 44; v. 1, pt. 4, doc. 109-17, pp. 19-35. Federated and Prestige had common employees, agents or officers, including Yang and Lee. v. 1, pt. 4, doc. 109-16, p. 2, ¶ 7; v.1, pt. 4, doc. 109-19, p. 2, ¶ 7; v. 1, pt. 4, doc. 109-14, p. 2, ¶ 4; v.1, pt. 4, doc. 109-15, p. 2, ¶ 6; v. 1, pt. 4, doc. 109-17, pp. 2-3, 19-35; v. 1, pt. 4, doc. 109-18, p. 2, ¶¶ 4-5. Pool participants often did not know the difference between the two companies. v. 1, pt. 1, p. 1183, ¶ 16; v.1, pt. 4, doc. 109-16, p. 5, ¶ 22; v. 1, pt. 4, doc. 109-19, p. 4 ¶ 17. Neither company registered any securities or filed any notices of intent to rely on exemption from registration under the OUSA. v. 1, pt. 1, pp. 1181-1182, ¶¶ 7, 10.

2. Yang and Co-Defendants Deceived and Made Misrepresentations to Investors.

For seven years, Yang worked with Lee to fraudulently solicit funds from customers. Yang primarily targeted the greater Oklahoma City area's ethnic Chinese community to solicit investors. He did so through oral statements,

marketing materials, email correspondence, a website and other forms of solicitation. v. 1, pt. 4, doc. 109-16, p. 2, ¶ 7; v. 1, pt. 4, doc. 109-19, p. 2, ¶ 7; v. 1, pt. 4, doc. 109-14, p. 2, ¶ 4; v. 1, pt. 4, doc. 109-15, p. 2, ¶ 6; v. 1, pt. 4, doc. 109-17, pp. 2, 16, ¶¶ 6, 16; v. 1, pt. 4, doc. 109-18, p. 2, ¶¶ 4-5. Yang also targeted members of a certain religious congregation in Edmond, Oklahoma and even organized a trip for prospective investors to meet Lee in Texas. v. 1, pt. 4, doc. 109-16, pp. 2, 4, ¶¶ 7, 14; v. 1, pt. 4, doc. 109-19, pp. 2, 3, ¶¶ 7, 12; v. 1, pt. 4, doc. 109-14, p. 2, ¶ 4; v. 1, pt. 4, doc. 109-15, p. 2, ¶ 6; v. 1, pt. 4, doc. 109-17, p. 2, ¶ 6; v. 1, pt. 4, doc. 109-18, p. 2, ¶¶ 4-5.

The solicitation and disclosure materials for Prestige and Federated contained false and misleading information. For example, the “Federated Disclosure Document” (“FDD”), dated May 23, 2003, claimed that the Fund “consists of a dynamic mix of equity, currency and commodity positions each of which may be long, short or neutral.... Equity and foreign exchange exposure is obtained solely through the use of exchange –traded futures contracts.” v. 1, pt. 3, doc. 109-2, p. 155, FDD. The FDD also stated that Federated had grown in invested assets of \$1,675,000 in January 1, 1987 (a date more than 10 years prior to the formation of Federated) to approximately \$379,149,897 as of April 30, 2003. v. 1, pt. 3, doc. 109-2, p. 166, FDD. The FDD also stated that Federated had over

\$190 million in assets in 2000. v. 1, pt. 3, doc. 109-2, p. 174, FDD; v. 1, pt. 4, doc. 109-16, pp. 25-27.

The Prestige Enterprise marketing materials claimed that, at the end of December 2003, Prestige had \$1 billion under management. v. 1, pt. 4, doc. 109-17, p. 28. As recently as July 2008, Yang boasted to pool participants that Prestige had an investment portfolio of net \$18 million. Yet, at the end of 2003, the Prestige Enterprise bank account showed a balance of only \$113,588.58, and, at the end of June 2008, the Prestige Enterprise bank account had a balance of just \$2,123. v. 1, pt. 4, doc. 109-22, p. 3, ¶¶ 10-11.

The marketing materials for both companies also claimed that co-defendant Lee used the “Legacy Trading System,” a purportedly successful and propriety trading system that achieved claimed annual profits ranging from 16.89% in 1991 to 51.04% in 2003. v. 1, pt. 4, doc. 109-16, pp. 29-35; v. 1, pt. 3, doc. 109-2, pp. 163-165, FDD. According to the same materials, the Legacy Trading System outperformed both the S&P 500 and the futures Managed Account Reports (“MAR Futures”) during the same period. The materials stated, “[a]mazingly there has been no [sic] a single loss year for Legacy Trading System over the 18-year history.” v. 1, pt. 3, doc. 109-2, p. 163-165, FDD. Similar profitability claims were also made in other marketing materials. *See, e.g.*, v. 1, pt. 4, doc. 109-17, p. 28-30.

In fact, Lee was not a successful trader. v. 1, pt. 4, doc. 109-25, p. 8, ¶ 23. Federated and Prestige had a total of approximately thirty-two accounts that traded on-exchange commodity futures and off-exchange forex at Futures Commissions Merchants (“FCMs”) registered with the CFTC between January 2004 and July 2009. v. 1, pt. 4, doc. 109-25, p. 37-41. Prestige sustained net losses of \$4.3 million trading in these accounts. v. 1, pt. 4, doc. 109-25, p.8, ¶ 23. Lee also opened and controlled two securities trading accounts and sustained net losses of approximately \$70,000 in those accounts. v. 1, pt. 4, doc. 109-25, p. 8, FN 4. Moreover, Lee never employed a “Legacy Trading System.” v. 1, pt. 3, doc 109-1, p. 11, ¶ 35; v. 1, pt. 3, doc. 109-2, p. 26 (99-101). In developing their marketing materials, Yang suggested the name “Legacy Trading System” because, “[i]f you don’t have a history of trading record, you cannot convince anyone. So, you need to...show the longtime investment.” v. 1, pt. 3, doc. 109-4, p. 46 (176-177).

Yang and Lee also made other false statements. They told pool participants and prospective participants that funds were protected by a credit union, which did not exist. v. 1, pt. 4, doc. 109-16, p. 5, ¶ 20; v. 1, pt. 4, doc. 109-25, p. 7, ¶ 18. They also proclaimed that Federated’s marketers were members of the National Futures Association (“NFA”) and registered with the CFTC when, in fact, they were not. v. 1, pt. 4, doc. 109-16, p. 5, ¶ 20; v. 1, pt. 4, doc. 109-25, p. 7, ¶ 17. Nor were Yang or Lee registered with the OUSA. v. 1, pt. 1, pp. 1179-1180, ¶¶ 3, 5.

In reliance on the solicitations described above, prospective pool participants decided to participate in the Prestige Enterprise pools. v. 1, pt. 4, doc. 109-16, p. 6, ¶ 27; v. 1, pt. 4, doc. 109-19, p. 5, ¶ 22; v. 1, pt. 4, doc. 109-14, p. 2, ¶ 5; v. 1, pt. 4, doc. 109-15, p. 7, ¶ 12; v. 1, pt. 4, doc. 109-17, p. 5, ¶ 17; v. 1, pt. 4, doc. 109-18, p. 4, ¶ 13.

3. Yang and His Co-Defendants Issued False Account Statements.

The Prestige Enterprise and Lee misappropriated millions of dollars in pool participant funds. v. 1, pt. 4, doc. 109-22, pp. 2-5, ¶¶ 7-15. To conceal their trading losses and misappropriation, the Prestige Enterprise and Lee issued false statements to pool participants reflecting consistent monthly profits generated by the Prestige Enterprise and Lee's trading. The account statements showed monthly profits of up to 4% and no losses. v. 1, pt. 4, doc. 109-16, pp. 37, 39, 41; v. 1, pt. 4, doc. 109-17, pp. 46-135, 236- 243, 273-282, 288-335.

Defendants, through Yang, also issued or caused to be issued monthly reports to pool participants reflecting purported returns the Prestige Enterprise had generated trading with the Legacy Trading System. v. 1, pt. 4, doc. 109-17, p. 6, ¶¶ 23-25, pp. 19-35, 137-221; v.1, pt. 4, doc. 109-18, pp. 10-11. In one email to participants forwarding a Legacy Trading System statement, Yang wrote, "Lee/[Prestige] have worked very hard for all us to produce these wonderful returns." v. 1, pt. 4, doc. 109-17, p. 208. The reports falsely indicate that, for 16

years, the Legacy Trading System outperformed the S&P 500 and the MAR Futures. v. 1, pt. 4, doc. 109-17, p. 208. Once pool participants started receiving the monthly statements and reports showing consistent profits, they decided to invest more money with Defendants and new pool participants were convinced to invest with Defendants. v. 1, pt. 4, doc. 109-14, p. 2, ¶ 5; v. 1, pt. 4, doc. 109-18, p. 4, ¶ 16; v. 1, pt. 4, doc. 109-17, pp. 2,7, ¶¶ 6, 29. After investing with Yang and Lee, several pool participants were able to withdraw funds, as promised by Yang and Lee, from their accounts. v. 1, pt. 4, doc. 109-19, pp. 3,6, ¶¶ 15, 28; v. 1, pt. 4, doc. 109-15, pp. 3-4, ¶ 11, 14; v. 1, pt. 4, doc. 109-18, p. 4, ¶ 17. However, starting in April 2006, Defendants began refusing pool participant requests to withdraw funds with excuses about margin requirements, market fluctuations and lack of new investments. v. 1, pt. 4, doc. 109-16, p. 7, ¶ 35, pp. 22-23, 49; v. 1, pt. 4, doc. 109-14, pp. 13-15; v. 1, pt. 4, doc. 109-19, p. 6, ¶ 28; v. 1, pt. 4, doc. 109-15, pp. 6-7, ¶¶ 23-25; v. 1, pt. 4, doc. 109-17, pp. 10, 12, ¶¶ 42, 45, 52; v. 1, pt. 4, doc. 109-17, p. 341; v. 1, pt. 4, doc. 109-18, p. 4, ¶ 17.

II. Yang's Misconduct.

A. Yang's Specific Fraudulent Conduct.

As explained above, Yang recruited investors from the Chinese Baptist Church in Oklahoma City. v. 1, pt. 1, p. 1186, ¶ 31; v. 1, pt. 3, doc. 109-3, p. 20-22. Yang was instrumental in creating the Prestige solicitation materials and the

investors' application form cited Yang as a point of contact for additional information. v. 1, pt. 3, doc. 109-4, p. 51 (196-197). Also as noted above, Yang created the concept of the "Legacy Trading System" v. 1, pt. 3, doc. 109-2, p. 26-27 (100, 102) and he provided content for Prestige's website. v. 1, pt. 3, doc. 109-4, pp. 51-52 (197-199).

As Yang began to understand how Lee's business worked, Yang started to pass this information on to investors and to answer their questions about Prestige and Federated. v. 1, pt. 3, doc. 109-4, p. 51 (197). In addition to soliciting for the Prestige Enterprise, Yang performed administrative functions for the Prestige Enterprise and Lee, including answering email and other correspondence addressing pool participants' concerns about investing, account status and margin requirements. v. 1, pt. 4, doc. 109-16, p. 5, ¶ 24; v. 1, pt. 4, doc. 109-16, pp. 22-23; v. 1, pt. 4, doc. 109-14, pp. 7-10; v. 1, pt. 4, doc. 109-17, pp. 8-17, 50-53, 137, 143-44, 157-160. Yang did not do independent research to determine whether the information he provided to investors was true or accurate. v. 1, pt. 1, pp. 1188-1189, ¶ 37.

Yang spent significant amounts of time dealing with investors. v. 1, pt. 3, doc.109-3, p. 30. For example, Lee received an email from an angry investor on January 29, 2007. Lee asked Yang to handle the matter for him. Yang talked to the investor and reported back to Lee. v. 1, pt. 3, doc. 109-3, pp. 42-43. Yang

regularly communicated with some Prestige investors. v. 1, pt. 3, doc. 109-4, p. 54 (212-213). One of the web pages for Prestige’s website said “[c]ontact us. For more information on Prestige Ventures and application, please contact Simon Yang.” v. 1, pt. 3, doc. 109-4, p. 51 (196-197). When Lee needed additional cash to engage in trading to recoup some of his trading losses, Yang forwarded the fundraising email to investors. v. 1, pt. 3, doc. 109-4, p. 46 (174-75). Yang created and compiled information on Prestige’s performance based on information sent to him by Lee even though Yang never saw the individual account statements to support those figures. v. 1, pt. 3, doc. 109-4, pp. 47-48 (180-82).

Despite his activities as a “commissioned independent contractor” for Federated and Prestige, Yang represented to potential pool participants that he was just a friend of Lee’s and a Prestige Enterprise investor himself. v. 1, pt. 4, doc. 109-17, p. 33, 35; v. 1, pt. 4, doc. 109-16, p. 3, ¶ 10. From March 2003 until November 30, 2009, Yang received approximately \$133,500 of investor money from the Prestige Enterprise. R. 167-1, p. 20, Trial Exhibit 1, p. 1.

B. Yang’s Conduct During Enforcement Proceedings.

In connection with an early CFTC investigation of Federated and Prestige, Yang provided false and misleading information in a declaration to the CFTC. v. 1, pt. 4, doc. 109-25, p. 11-12, ¶ 41-42; v. 1, pt. 4, doc. 109-26, pp. 117-186. Yang failed to respond in the first instance, forcing the CFTC to file an action to enforce

the subpoena issued to him. In response, Yang submitted the declaration, dated May 25, 2004, to the CFTC pursuant to 28 U.S.C. § 1746 and declared it to be true and correct under penalty of perjury. v. 1, pt. 4, doc. 109-26, p. 186. However, in his declaration, Yang falsely represented that: he solicited investors only through emails, all of his information about Federated came from the Federated website, he no longer solicited for Federated, and the persons he had solicited did not open trading accounts with Federated. v. 1, pt. 4, doc. 109-26, p. 186. None of these statements were true. Yang also failed to disclose the material information that Prestige, through Lee, was operating and soliciting funds from prospective investors and that Yang was soliciting on behalf of Prestige. v. 1, pt. 4, doc. 109-26, p. 186.

SUMMARY OF THE ARGUMENT

The district court properly granted summary judgment on the issue of Yang's liability. The court correctly found that there was no genuine issue of material fact and that Appellees were entitled to judgment as a matter of law.

Plaintiffs/Appellees' motion for summary judgment was supported by declarations, deposition transcripts, and exhibits that were amply sufficient to establish that there was no genuine issue of material fact. v. 1, pt. 1, pp. 1171-1224; v. 1, pt. 4, doc. 109-1 through v. 1, pt. 4, doc. 109-26. Neither Yang nor any other Defendant or Relief Defendant submitted affidavits or other material of the

sort required to establish a genuine issue of material fact under Fed. R. Civ. P. 56. The undisputed facts demonstrate that Yang violated the provisions of the CEA and OUSA at issue in this case. Yang has presented no legal argument to the contrary either before the district court or in his brief on appeal.

Yang also has demonstrated no reason to reverse the district court's findings in its Relief Order. This Order was fully supported by the record of the bench trial on relief issues. The order enjoining Yang from certain conduct relating to the trading of commodity futures and the sale of securities and precluding him from making a claim for restitution or any return of funds or payment from the other Defendants or the Receivership was plainly justified by his participation in the fraudulent enterprise in this case. The restitution award was proportioned to the victim funds that Yang himself received.

ARGUMENT

I. The District Court Properly Granted Summary Judgment on Liability.

A. Standard of Review Is De Novo.

This Court reviews an entry of summary judgment de novo, "applying the same standard as the district court." *Jones v. Unisys Corporation*, 54 F.3d 624, 627 (10th Cir. 1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)); *see also Ross v. University of New Mexico*, 599 F.3d 1114, 1116-1117 (10th Cir. 2010); *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996)). The district

court's standard is "whether there is no genuine issue as to any material fact and ...the moving party is entitled to a judgment as a matter of law." *Jones*, 54 F.3d at 627-28 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)); *Jenkins*, 81 F.3d at 990); *Burnette v. Dow Chemical Co.*, 849 F.2d 1269, 1273 (10th Cir. 1988). When applying this standard, the Court must "view the evidence and draw any inferences in the light most favorable to the party opposing summary judgment[.]" *Jones*, 54 F.3d at 628; see *Burnette*, 849 F.2d at 1273; *Jenkins*, 81 F.3d at 990.

To defeat a motion for summary judgment, a non-movant "must bring forward specific facts showing a genuine issue for trial[.]" *Jenkins*, 81 F.3d at 990. The non-movant must show more than the "mere existence of a scintilla of evidence" in support of his position. *Burnette*, 849 F.2d at 1273 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

Although the review is de novo, the appellate court conducts the review from the perspective of the district court at the time it made its ruling, ordinarily limiting the review to the materials adequately brought to the attention of the district court by the parties. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998).

B. Plaintiffs/Appellees Established the Absence of a Genuine Issue of Material Fact.

In moving for summary judgment, Plaintiffs/Appellees showed the absence of a genuine issue of material fact, as well as entitlement to judgment as a matter of

law. *Jones v. Unisys Corp.*, 54 F.3d 624, 627-628 (10th Cir. 1995).

Plaintiffs/Appellees established each and every fact set forth above by deposition, declaration or exhibit, as well as discovery responses and answers, as is indicated by the reference to such evidence for each fact above. *See* Fed. R. Civ. P.

56(c)(1)(a). The facts establish the elements of each claim.

To defeat Plaintiffs/Appellees' motion for summary judgment, Yang had to identify specific facts as to which there was a genuine issue for trial. *Hammad v. Bombardier Learjet, Inc.*, 192 F.Supp.2d 1222 (D.C. Kan. 2002). In identifying these specific facts, Yang was required to make reference to affidavits, deposition transcripts, or specific exhibits incorporated therein. *Adler*, 144 F.3d at 671.

Yang never filed a response to Plaintiffs/Appellees' motion for summary judgment. He never submitted references to the record to identify a specific fact presenting a genuine issue for trial. It is clear that one "cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial." *Hammad*, 192 F.Supp.2d at 1228.

Even in his brief on appeal, Yang does not specify any evidence to dispute an issue of material fact. He uses the brief to advocate on behalf of his co-defendants and to provide his personal speculations about the investments made or supposedly made. He blames operational and financial difficulties in the 2006 economy for the problem investors had in getting access to their money. *E.g.*, Pet.

Br. at 2. He makes many statements about international connections that he believes validate the investment. *E.g.*, Pet. Br. at 5. However, Yang has not and does not substantiate his conjectures with evidence that raises a genuine issue of material fact in defense to the district court's entry of the Summary Judgment Order. To defend against a motion for summary judgment, one must "do more than simply show that there is some metaphysical doubt as to the material facts." *Hammad*, 192 F.Supp.2d at 1228.

Yang attaches certain exhibits to his appellate brief. Pet. Br. at A-1 through A-32. These exhibits were never introduced in connection with the summary judgment motion and were not considered by the district court.⁹ The exhibits have not been the subject of authentication or stipulation and Appellees have not had the opportunity to test their authenticity or veracity. They cannot be considered from the perspective of the district court at the time of the summary judgment ruling.

C. The Undisputed Material Facts Demonstrate that Yang Violated the CEA.

1. Yang Committed Fraud in Connection with Futures in Violation of the CEA.

Yang violated the CEA's general anti-fraud provision, 7 U.S.C.

§ 6b(a)(2)(A)-(C), by misrepresenting and omitting material facts in connection

⁹ Yang's status as a *pro se* litigant does not excuse him from complying with the general rules of procedure. *See Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir.1994).

with issuing false account statements. The CEA's general anti-fraud provision makes it unlawful "for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery made...for or on behalf of any other person...to cheat or defraud or attempt to cheat or defraud other such person... or willfully make or cause to be made... any false report or statement...." 7 U.S.C. § 6b(a)(2)(A)-(B).

To prove a violation of a 7 U.S.C. § 6b in a civil enforcement action, the CFTC must demonstrate: (1) a misrepresentation or omission was made; (2) with scienter; and (3) that the misrepresentation or omission was material. *CFTC v. R.J. Fitzgerald & Co.*, 310 F. 3d 1321, 1328-29 (11th Cir. 2002), *cert. denied*, 543 U.S. 1034 (2004).

In soliciting prospective and existing participants, Yang misrepresented that: (1) Lee was consistently profitable and never suffered losses in his trading on behalf of the Prestige Enterprise (v. 1, pt. 4, doc. 109-17, pp. 28-35; v. 1, pt. 4, doc. 109-16, pp. 29-55), (2) the profits Lee generated in his trading were extraordinarily high (v. 1, pt. 4, doc. 109-17, p. 31), (3) Prestige Enterprise and its agents were members of the NFA and registered with the CFTC, (v. 1, pt. 4, doc. 109-16, p. 5, ¶ 20; v. 1, pt. 4, doc. 109-25, p. 7, ¶ 17), (4) in December 2003, Federated had up to \$379 million in assets, (v. 1, pt. 3, doc. 109-2, p. 166, FDD), (5) pool participant accounts were insured by Federated's credit union, (v. 1, pt. 4, doc. 109-16, p. 5,

¶ 20; v. 1, pt. 4, doc. 109-25, p. 7, ¶ 18), (6) pool participants could withdraw money from their accounts at any time, (v. 1, pt. 3, doc. 109-3, pp. 4, 11, ¶¶ 20, ¶ 26), (7) by using a particular trading program with a highly successful track record, the Legacy Trading System, the Prestige Enterprise would achieve profitable returns on all investments, v. 1, pt. 4, doc. 109-16, p. 6, ¶ 26, and (8) Yang was merely a Prestige Enterprise investor. v. 1, pt. 4, doc. 109-17, p. 33, 35; v. 1, pt. 4, doc. 109-16, p. 3, ¶ 10.

Yang failed to disclose that he was not only an investor but also an active participant in the Prestige Enterprise and that his activities included marketing, providing information to pool participants and making false statements to participants concerning the Legacy Trading System. v. 1, pt. 3, doc. 109-7, pp. 33, 35; v. 1, pt. 4, doc. 109-16, p. 3, ¶ 10. Yang also failed to disclose that Defendants had been the subject of a CFTC investigation in 2004, that he had provided false and misleading information to the CFTC concerning his activities and omitted material information in responding to a Commission subpoena. v. 1, pt. 4, doc. 109-25, pp. 11-12, ¶¶ 41-42; v. 1, pt. 4, doc. 109-26, pp. 117-186. Yang's misrepresentations and omissions caused participants to invest, re-invest additional money and remain invested in the pools and induced new participants to give Defendants funds to trade. v. 1, pt. 4, doc. 109-16, p. 6, ¶ 27; v. 1, pt. 4, doc. 109-

19, p. 5, ¶ 22; v. 1, pt. 4, doc. 109-14, p. 2, ¶ 5; v. 1, pt. 4, doc. 109-15, p. 7, ¶ 12; v. 1, pt. 4, doc. 109-17, p. 5, ¶ 17; v. 1, pt. 4, doc. 109-18, p. 4, ¶ 13.

To prove scienter, Plaintiffs/Appellees need only show that Yang's actions were "intentional as opposed to accidental." *Lawrence v. CFTC*, 759 F.2d 767, 773 (9th Cir. 1985). Scienter only requires a showing that defendant committed the alleged wrongful acts intentionally or "that the representations were made with a reckless disregard for their truth or falsity." *National Inv. Consultants*, 2005 WL 2072105 (N.D. Cal. 2005) at *8, citing *CFTC v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 774 (9th Cir. 1995); *Do v. Lind-Waldock & Co.* (1994-1996 Transfer Binder) Comm. Fut. L. Rep. (CCH) ¶ 25,516 at 43,321 (CFTC Sept. 27, 1995) (a reckless act is one where there is so little care that it is "difficult to believe the (actor) was not aware of what he was doing"). Scienter can be inferred from circumstantial evidence. *In re JCC, Inc.*, CFTC No. 89-4, 1994 WL 183817, *11 (CFTC May 12, 1994), *aff'd sub nom. JCC, Inc. v. CFTC*, 63 F.3d 1557 (11th Cir. 1995).

Yang acted with the requisite scienter. Yang made representations to prospective and current participants with no regard for the truth or falsity of those representations, and which presented a danger of misleading pool participants that was so obvious that Yang must have been aware of it. Yang has testified that when he first learned of the Prestige Enterprise, he thought it was most likely a "Ponzi" scheme. v. 1, pt. 1, p. 1192, ¶ 52; v. 1, pt. 3, doc. 109-4, p. 21 (75-76). Yet, Yang

did no independent investigation of the trading results. v. 1, pt. 1, p. 1188-1189, ¶ 37. Instead, Yang started soliciting on behalf of the Prestige Enterprise based solely on Lee's representations. Yang told prospective pool participants that Prestige was a successful trading company without any basis. v. 1, pt. 3, doc. 109-4, p. 23 (83). Yang even assisted in the preparation and distribution of marketing materials and other documents for the Prestige Enterprise. v. 1, pt. 3, doc. 109-4, p. 46 (176-177).

Some of those documents that Yang provided to pool participants represented that the Prestige Enterprise achieved great returns through the use of the Legacy Trading System, but Yang knew that he himself made up the term "Legacy Trading System" to convince prospective pool participants that the Prestige Enterprise had a trading record. v. 1, pt. 3, doc. 109-4, p. 46 (176-77). Yang has admitted that he did not do any independent research to determine whether certain other statements made in the materials he provided to pool participants were correct. v. 1, pt. 1, pp. 1188-1189, ¶ 37. Despite his lack of independent research, Yang spent many hours helping pool participants with their investments in the Prestige Enterprise. v. 1, pt. 3, doc. 109-3, p. 30. Yang also represented that he was merely an investor with Prestige instead of revealing that he was an active participant in the Prestige Enterprise. v. 1, pt. 4, doc. 109-17, pp. 33, 35; v. 1, pt. 4, doc. 109-16, p. 3, ¶ 10. Therefore, Yang's conduct was reckless

and met the scienter standard under 7 U.S.C. § 6b(a)(2)(A)-(B) and presented a danger of misleading pool participants that was so obvious that Yang must have been aware of it.¹⁰

A statement is material if “it is substantially likely that a reasonable investor would consider the matter important in making an investment decision.” *R.J. Fitzgerald*, 310 F.3d at 1328. Any fact that enables customers to assess independently the risk inherent in their investment and the likelihood of profit is a material fact. *In re Commodities Int’l Corp.*, (1996-1998 Transfer Binder) Comm. Fut. L. Rep. (CCH) ¶ 26,943 at 44,563-64 (CFTC Jan. 14, 1997); *see also, e.g., CFTC v. Commonwealth Fin. Group*, 874 F. Supp. at 1353-54 (misrepresentations regarding firm’s trading record are fraudulent because past success and experience are material factors to reasonable investors); *CFTC v. U.S. Metals Depository Co.*, 468 F. Supp. 1149, 1160 (S.D.N.Y. 1979) (misrepresentations regarding profitability of investment).

Yang’s misrepresentations and omissions concerned the success and status of the Prestige Enterprise, the profitability of its trading and its use of customer

¹⁰ Yang’s misrepresentations to the CFTC in his 2004 declaration provide additional circumstantial evidence that he acted with scienter in his dealings with commodity pool customers and persons he solicited to invest in the Prestige Enterprise.

funds, all of which are material to the reasonable investor. As such, Yang violated 7 U.S.C. § 6b (a)(2)(A) and (C), through misrepresentations and omissions.

In addition, Yang violated 7 U.S.C. § 6b (a)(2)(B) as amended by the CRA and regulation 1.1(b)(2) by providing false statements to customers, purportedly showing continuous profitable returns on their investment. *See, e.g., CFTC v. Weinberg*, 287 F. Supp. 2d.1100, 1107 (C.D. Cal. 2003) (false and misleading statements as to the amount and location of investors' money violated 7 U.S.C. § 6b(a) of the Act.) Based on these statements, pool participants kept reinvesting their principal and purported profits and made new capital contributions to continue trading commodity futures, foreign currency, and other financial products.

2. Yang Committed Fraud as an Associated Person in Violation of 7 U.S.C. § 6o.

Section 4o(1) of the CEA, 7 U.S.C. § 6o, broadly prohibits fraudulent transactions by commodity pool operators and associated persons thereof. Sections 6o(1)(A) and (B) apply to all commodity pool operators and associated persons, whether registered, required to be registered, or exempted from registration.

The CEA defines a commodity pool operator as:

any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or

property, ...for the purpose of trading in any commodity
for future delivery....

7 U.S.C. § 1a(5) (2006). In this case, Federated and Prestige solicited and accepted at least \$8.7 million in funds from at least 140 investors, residing in Oklahoma and elsewhere, for the purpose of pooling those funds to trade commodity futures as well as other financial instruments, including foreign currency, stocks and stock options. v. 1, pt. 4, doc. 109-22, pp. 2-3, 5, ¶¶ 9,17; v. 1, pt. 4, doc. 109-16, p. 2, ¶ 4; v. 1, pt. 4, doc. 109-15, p.2, ¶ 4; v. 1, pt. 4, doc. 109-17, p. 2, ¶ 4; v. 1, pt. 3, doc. 109-2, p. 155, FDD; v. 1, pt. 4, doc. 109-18, p. 2, ¶ 5. Lee and Yang told prospective investors that funds from individual participant accounts would be pooled together to trade commodity futures and other financial instruments and that pool participants would be able to withdraw their funds at any time. v. 1, pt. 3, doc. 109-3, p. 4, 11, ¶¶ 20, 26. In other words, participants were investing in a commodity pool.

The CEA defines an associated person as:

any person associated with a commodity pool operator as
a partner, employee, consultant, or agent in any capacity
that involves the solicitation of funds, securities or
property for a participation in a commodity pool.

7 U.S.C. § 6k(2) (2006). Yang, by virtue of his solicitations for the commodity pool, was an associated person of Federated and Prestige. Yang actively solicited pool participants primarily at his church via oral representations and organized a

trip for potential investors to meet with Lee. v. 1, pt. 1, p.1186, ¶ 31; v. 1, pt. 4, doc. 109-16, p. 4, ¶ 14; v. 1, pt. 4, doc. 109-19, p. 3, ¶ 12. He received commissions for customers that he recruited. v. 1, pt. 3, doc. 109-4, p. 37 (141); v. 1, pt. 3, doc. 109-3, p. 17. Yang was listed as a contact on the FDD. v. 1, pt. 3, doc. 109-4, p. 51 (196-197). Yang acted as liaison between investors and Lee. v. 1, pt. 3, doc. 109-3, pp. 42-43. Therefore, Yang was an associated person of Federated and Prestige.

Section 6o(1)(A) makes it unlawful for a commodity pool operator or associated person to employ any device, scheme, artifice or to advertise in manner that defrauds any participant or prospective participant. Section 6o(1)(B) makes it unlawful for a commodity pool operator or associated person to engage in any transaction, practice, course of business or to advertise in a manner that operates as a fraud or deceit upon any participant or prospective participant. Significantly, unlike Sections 6b and 6o(1)(A), Section 6o(1)(B) has no scienter requirement. *In re Kolter*, [1994-1996 Transfer Binder] Comm. Fut.L.Rep. (CCH) ¶ 26,262 at 42,198 (CFTC Nov. 8, 1994) (citing *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678-79 (11th Cir. 1988)).

Because Yang acted as an associated person, the same misrepresentations and omissions that violate Section 6b, as set forth above, also violate Section 6o(1). *CFTC ex rel. Kelley v. Skorupskas*, 605 F.Supp.at 932 (finding that the

defendants' violation of Section 6(b) also violated Section 6o); *In re Slusser*, [1998-1999 Transfer Binder] Comm.Fut.L.Rep. (CHH) ¶ 27,701 at 48,313 (CFTC July 19, 1999) ("Where the record establishes that the respondents engaged in fraudulent conduct in violation of section [6b] the Division has, as the ALJ observed, surpassed its burden of proof with respect to section [6o]"), *aff'd. in relevant part and rev'd. sub nom, Slusser v. CFTC*, 210 F.3d 783 (7th Cir. 2000), *In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,218 (CFTC Aug. 11, 1992) (the same conduct that violates section 6b can be used to establish a violation of Section 6o(1)(A) and (B)), *aff'd. in part and modified sub nom., Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993) (affirming liability, modifying sanctions). As noted above, these misrepresentations and omissions would violate Section 6o(1)(B) even if Yang acted without scienter.

3. Yang Failed to Register as an Associated Person in Violation of 7 U.S.C. § 6k(2).

Section 4k(2) of the CEA, 7 U.S.C. § 6k(2), requires any associated person of a commodity pool operator to be registered as such with the CFTC. As shown above, Federated and Prestige were commodity pool operators within the meaning of the CEA and Yang was an associated person of these entities. Yang never registered as an associated person with the CFTC. v. 1, pt. 4, doc. 109-25, p. 7, ¶ 17. He therefore violated 7 U.S.C. § 6k(2).

D. The Undisputed Material Facts Demonstrate that Yang Violated the OUSA.

1. Yang Offered and Sold Unregistered Securities in Violation of Section 1-301 of the OUSA.

Section 1-301 of the OUSA makes it unlawful for a person to offer or sell a security in and/or from Oklahoma unless: “1. The security is a federal covered security; 2. The security, transaction, or offer is exempted from registration under [Sections 1-201 through 1-203 of the OUSA]; or 3. The security is registered under [the OUSA].” Okla. Stat. tit. 71, § 1-301. Through his sales activity on behalf of Federated and Prestige described above, Yang offered and sold securities in the nature of investment contracts¹¹ that were not registered under the OUSA. v. 1, pt. 1, pp. 1181-1182, ¶¶ 7, 10. The sales to investors occurred through the distribution by Yang of oral statements, marketing materials, email correspondence, and a website. Pursuant to Section 1-503 of the OUSA, the burden of proving an exemption, exception, preemption, or exclusion from registration is on the claimant. Okla. Stat. tit. 71, § 1-503. However, Yang did not respond to Plaintiffs/Appellees’ motion for summary judgment and did not raise a

¹¹ An “investment contract” is “an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor and a ‘common enterprise’ means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors[.]” Okla. Stat. tit. 71, § 1-102(32)(d).

defense to the violation of Section 1-301. In addition to the fact that neither Yang nor any other Defendant has ever claimed reliance on an exemption, exception, preemption, or exclusion from registration of the securities under the OUSA or presented any evidence in support thereof, the payment of commissions to Yang by the Prestige Enterprise makes the application of an exemption, exception, preemption, or exclusion from registration of the securities improbable.

2. Yang Failed to Register as an Agent in Violation of Section 1-402 of the OUSA.

Section 1-402(A) of the OUSA makes it unlawful for an individual to transact business in Oklahoma as an agent¹² of an issuer¹³ unless the individual is registered under the OUSA as an agent or is exempt from registration as an agent under subsection B of Section 1-402. Okla. Stat. tit. 71, § 1-402. By virtue of his efforts and activities in effecting or attempting to effect purchases or sales of the securities issued by the Prestige Enterprise described above, Yang acted as an agent of the Prestige Enterprise and transacted business in Oklahoma as an agent of the Prestige Enterprise.

¹² An “agent” is “an individual, other than a broker-dealer, who represents . . . an issuer in effecting or attempting to effect purchases or sales of the issuer’s securities.” Okla. Stat. tit. 71, § 1-102(2).

¹³ An “issuer” is “a person that issues or proposes to issue a security[.]” Okla. Stat. tit. 71, § 1-102(19).

Yang was not registered as an agent, or in any other capacity, under the OUSA. v. 1, pt. 1, p. 1180, ¶ 5. Pursuant to Section 1-503 of the OUSA, the burden of proving an exemption, exception, preemption, or exclusion from registration is on the claimant. Okla. Stat. tit.71, § 1-503. However, Yang did not respond to Plaintiffs/Appellees' motion for summary judgment and did not raise a defense to the violation of Section 1-402. Yang has never claimed reliance on an exemption, exception, preemption or exclusion from registration under the OUSA as an agent of the Prestige Enterprise or presented any evidence in support thereof. In addition, the payment of commissions to Yang by the Prestige Enterprise makes the application of an exemption, exception, preemption or exclusion from registration as an agent under the OUSA improbable.

3. Yang Engaged in Fraud in the Offer and Sale of Securities, in Violation of Section 1-501 of the OUSA.

Section 1-501 of the OUSA makes it unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

1. To employ a device, scheme, or artifice to defraud;
2. To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading; or
3. To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

Okla. Stat. tit. 71, § 1-501.

(a) Yang Employed a Scheme to Defraud Investors.

The Official Comments to the Uniform Securities Act of 2002 indicate that Plaintiffs/Appellees are not required to plead or prove culpability for a cause of action under Section 1-501(1); however, federal case law and state court decisions interpreting the state securities laws similar to the OUSA, suggest that Yang must have acted with scienter to have violated Section 1-501(1). *See* Unif. Securities Act 2002, § 501, Official Comments; *Aaron v. SEC*, 446 U.S. 680, 696 (1980); *Fibro Trust, Inc. v. Brahman Financial, Inc.*, 974 P.2d 288, 294 (Utah 1999) (citing *Mann v. Oppenheimer & Co.*, 517 A.2d 1056 (Del.1986)); *Illinois v. Witlow*, 89 Ill.2d 322, 60 Ill.Dec. 587, 433 N.E.2d 629, 634 (1982); *Enservco, Inc. v. Indiana Sec. Div.*, 623 N.E.2d 416 (Ind.1993); *Trivectra v. Ushijima*, 144 P.3d 1, 12-16 (Haw. 2006) (citing numerous decisions of other states).¹⁴ If proof of

¹⁴ In an effort to achieve coordination with federal law and uniformity in state securities regulation, the OUSA was modeled on the Uniform Securities Act of 2002, promulgated by the National Conference of Commissioners on Uniform State Laws (with some distinctions mostly related to oil, gas and other mineral production). Okl.St. Ann. tit. 71, Ch. 1, Refs & Annos. The particular section of the OUSA involved here, Section 1-501, is identical to Section 501 of the Uniform Securities Act. Section 501 of the Uniform Securities Act was modeled on Rule 10b-5, 17 C.F.R. § 240, adopted under the federal Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, and on Section 17(a) of the federal Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, although it is not identical to either Rule 10b-5 or Section 17(a). Unif. Securities Act 2002, § 501, Official Comments. The Supreme Court of Oklahoma has used federal cases as instructive to interpret the State's securities laws that are uniform to the federal securities laws. *See State ex. rel. Day v. Southwest Mineral Energy, Inc.*, 617 P.2d 1334 (Okla. 1980).

scienter is required under the OUSA, a finding of recklessness is sufficient. *See Trivectra*, 144 P.3d at 13-15, n. 15; *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001) (court held that reckless conduct is an “extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it” (internal citations omitted)); *Meadows v. SEC*, 119 F.3d 1219, 1226 (5th Cir. 1997); *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982).

Here, Yang was involved in a scheme in which he enticed pool participants to invest in the Prestige Enterprise by making untrue statements of material fact and omissions of material fact that led the pool participants to believe that the Prestige Enterprise was a successful trading company that consistently achieved positive returns.

As discussed above in Section I.C.1., Yang acted with the requisite scienter in the scheme to defraud.

(b) Yang Made Untrue Statements of Material Fact and Omitted to State Material Facts in the Offers and Sales of Securities to Investors.

For purposes of Section 1-501(2), Plaintiffs/Appellees do not have to plead or prove culpability or scienter. *See* Unif. Securities Act 2002, § 501, Official Comments; *Aaron*, 446 U.S. at 697, 702; *Trivectra*, 144 P.3d at 12-16 (citing

numerous decisions of other states); *Fibro Trust, Inc.*, 974 P.2d at 294 (citing *Mann v. Oppenheimer & Co.*, 517 A.2d 1056 (Del.1986); *Illinois v. Witlow*, 433 N.E.2d 629, 634 (Ill. 1982); *Enservco, Inc. v. Indiana Sec. Div.*, 623 N.E.2d 416 (Ind.1993)).

As previously discussed, a fact is material if there is a “substantial likelihood” that a reasonable investor would consider it important. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988). “There must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” *TSC Industries, Inc.*, 426 U.S. at 449; *Levinson*, 485 U.S. at 231-32.

In his solicitation of investors, Yang falsely represented, *inter alia*, that: 1) for approximately sixteen years, Lee had been consistently profitable and never suffered losses in his trading on behalf of the Prestige Enterprise, v. 1, pt. 4, doc. 109-17, p. 208, 2) Prestige Enterprise and its agents were members of the NFA and registered with the Commission, v. 1, pt. 4, doc. 109-16, p. 5, ¶ 20; v.1, pt. 4, doc. 109-25, p.7, ¶ 17, 3) in December 2003, Federated had up to \$379 million in assets under management, v. 1, pt. 3, doc. 109-2, p. 166, 4) pool participants could withdraw money from their accounts at any time, v. 1, pt. 4, doc. 109-19, pp. 3, ¶ 15; v. 1, pt. 4, doc. 109-15, pp. 3, ¶ 11, and 5) Yang was merely a Prestige

Enterprise investor, v. 1, pt. 4, doc. 109-17, p. 33, 35; v. 1, pt. 4, doc. 109-16, p. 3, ¶ 10. There is a substantial likelihood that a reasonable investor would consider these untrue statements of fact to be important in making his investment decision.

In his solicitation of investors, Yang omitted the following facts: a) Lee's trading was unsuccessful, v. 1, pt. 4, doc. 109-25, p. 8. ¶ 23, and Lee misappropriated millions of dollars in pool participant funds, v. 1, pt. 4, doc. 109-22, pp. 2-5, ¶¶ 7-15, b) the positive returns purportedly being credited to pool participants' accounts exceeded the returns being earned by trading, v.1, pt. 4, doc. 109-16, pp. 37, 39, 41; v. 1, pt. 4, doc 109-17, pp. 46-135, 236-243, 273-282, 288-335, and c) there is no Legacy Trading System, v. 1, pt.3, doc. 109-1, p, 11, ¶ 35; v. 1, pt. 3, doc-109-2, p. 26 (99-101).

The facts omitted by Yang in his solicitations of prospective and existing pool participants were clearly necessary in order to make the statements made by Yang not misleading. The omitted facts were also material. The total mix of information would have been significantly altered by the disclosures that the profitable returns being reflected on the monthly account statements of the pool participants were false and exceeded the actual returns being earned by the Prestige Enterprise and that there is no Legacy Trading System. All of this information would have shed light on the actual trading record and legitimacy of Lee and the Prestige Enterprise.

(c) Yang Engaged in Activities that Operated as a Fraud on Investors.

For purposes of Section 1-501(3), Plaintiffs/Appellees do not have to plead or prove culpability or scienter. *See* Unif. Securities Act 2002, § 501, Official Comments; *Aaron*, 446 U.S. at 697, 702; *Trivectra*, 144 P.3d at 12-16 (citing numerous decisions of other states); *Fibro Trust, Inc.*, 974 P.2d at 294 (citing *Mann v. Oppenheimer & Co.*, 517 A.2d 1056 (Del.1986); *Illinois v. Witlow*, 433 N.E.2d 629, 634 (Ill. 1982); *Enservco, Inc. v. Indiana Sec. Div.*, 623 N.E.2d 416 (Ind.1993)). The language of Section 1-501(3) “focuses upon the effect of particular conduct on members of the investing public, rather than upon the culpability of the person responsible.” *Aaron*, 446 U.S. at 697.

Yang defrauded pool participants by wrongfully portraying that the Prestige Enterprise was a successful trading company. Investors relied on the false and misleading reports he created and distributed to them. By his representations that the Prestige Enterprise had achieved consistently high returns from January 1987 through April 2003 without a single losing month, investors put money into a losing venture. The Prestige Enterprise sustained net losses of over \$4.3 million trading commodity futures, foreign currency, and securities. v. 1, pt. 4, doc. 109-25, p. 8, ¶ 23.

II. The District Court’s Factual Findings in its Relief Order Were Supported by Substantial Evidence and Not Clearly Erroneous.

The district court made a number of factual findings in assessing penalties against Yang in its Relief Order. These findings were wholly supported by the evidence presented at trial that included testimony of two witnesses and six exhibits. The district court did not make an error.

Section 6(c) of the CEA, 7 U.S.C. § 13a-1, and Section 1-603 of the OUSA, Okla. Stat. tit. 71, § 1-603, provide the district court with authority to impose a permanent injunction with regard to Yang’s activities. *CFTC v. Brockbank*, 505 F.Supp.2d 1169, 1175 (D. Utah 2007) (“[T]he Court has the authority to award ‘ancillary equitable relief,’ including restitution.” The purpose of restitution is to “restore the status quo and order [] the return of that which rightfully belongs to” the investors.) (citations omitted). *See also Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (upholding restitution awarded incident to an injunction and stating that “[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied”).

A. Standard of Review Is Clearly Erroneous.

On appeal, the district court’s factual findings must be accepted unless they are clearly erroneous. *See Exxon Corp. v. Gann*, 21 F.3d 1002, 1005 (10th Cir. 1994). In *Manning v. U.S.*, 146 F.3d 808, 813 (10th Cir. 1998), the court stated,

“[a] finding of fact is clearly erroneous if it is without factual support in the record or if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been made.” *See Cowles v. Dow Keith Oil & Gas, Inc.*, 752 F.2d 508, 511 (10th Cir. 1985) (citation omitted).

B. Plaintiffs/Appellees Presented Substantial Evidence in Support of Yang Penalties.

In the November 8, 2010 trial of sanctions phase of this case against Yang, Plaintiffs/Appellees presented testimony and exhibits to establish the restitution they sought to be assessed by the court against Yang. The court issued three findings of fact in the Relief Order relating to Yang. First, the Court found that the Prestige Enterprise received at least \$10,656,921 from investors between March 5, 2003 and November 30, 2009. v. 1, pt. 1, p. 1527, Relief Order. Second, the Court found that the Prestige Enterprise returned \$3,357,732 to investors during the same period of time. v. 1, pt. 1, p. 1527. Third, the court found that the Prestige Enterprise received \$469,507¹⁵ from Yang and disbursed \$133,500 to him between March 5, 2003 and November 30, 2009. *Id.* All three findings were based on the

¹⁵ Yang states in his brief that he invested over \$500,000 with Prestige Ventures from 2003 to 2009. Pet. Br. at 1. While he attended the trial on the relief to be granted in this case, he presented no supporting evidence for his claim. Plaintiffs/Appellees substantiated their claim that Yang invested \$469,507 between March 5, 2003 and November 30, 2009 through a presentation of an analysis of the financial records of Prestige Enterprise and through the testimony of Glen Grossman. R. 167, Trial EXS. 1-6.

testimony of Mr. Grossman and his financial report exhibits and were not clearly erroneous. R. 167, Trial EXS. 1-6.

C. Yang Presented No Substantial Evidence to Refute Plaintiffs/Appellees' Claims.

In his appellate brief and as a basis for his requested relief, Yang generally challenges the Relief Order of the district court, claiming the decision is supported by “false statements and twisted facts.” What he does not do is provide any references to evidence presented at trial to support his defense on any specific finding of fact. He uses the brief as an opportunity to argue the value of the Prestige Enterprise investments, even today, and to give narrative support to the other Defendants. He presents no evidence or argument relevant to the district court’s award of relief. Yang has not met his burden of proof to show the district court was wrong to impose sanctions on him.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Oral argument is not necessary in this matter.

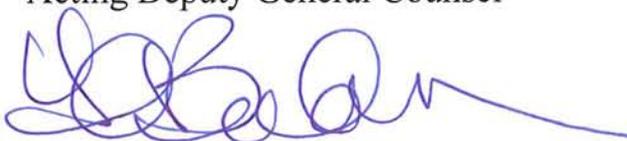
CONCLUSION

For the reasons set forth above, the district court's grant of summary judgment and the imposition of penalties against Yang should be affirmed in their entirety.

Respectfully submitted,

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Dated: April 29, 2011

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME AND
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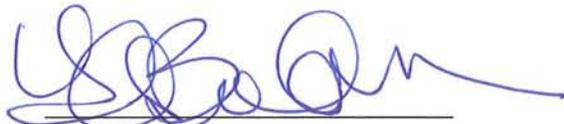
I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Tenth Circuit Rule 32, the attached answering brief complies with the type volume limitation of Rule 32(a)(7)(B) in that it contains 10,466 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief was prepared in proportionally spaced typeface using Microsoft Word 2007 with 14 point Times New Roman style type.

This brief and the electronic PDF version of the brief are identical.

I have scanned this brief for viruses and no viruses were detected. I used Symantec Anti-virus, version 11.0.6100.645.

Dated: April 29, 2011



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CERTIFICATE OF SERVICE

I hereby certify that an original and two copies of the foregoing Appellees' Brief was served by ECF and overnight express service on April 29, 2011 on the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

U.S. COMMODITY FUTURES TRADING)
COMMISSION and OKLAHOMA)
DEPARTMENT OF SECURITIES *ex*)
rel IRVING FAUGHT,)

Plaintiffs,)

v.)

Case No. CIV-09-1284-R

PRESTIGE VENTURES CORP.,)
a Panamanian corporation, FEDERATED)
MANAGEMENT GROUP, INC., a Texas)
corporation, KENNETH WAYNE LEE,)
an individual, and SIMON YANG)
(a/k/a XIAO YANG, a/k/a SIMON CHEN,)
an individual,)

Defendants.)

and)

SHEILA M. LEE, an individual, DAVID)
A. LEE, an individual, and DARREN)
E. LEE, an individual,)

Relief Defendants.)

ORDER

This matter comes before the Court on the Motion for Summary Judgment, filed by Plaintiffs, the United States Commodities Future Trading Commission (“the Commission”) and the Oklahoma Department of Securities *ex rel.* Irving Faught (“the Department”), and requesting that the Court conclude that no genuine issues of material fact exist with regard to the issue of Defendants’ liability on a number of federal and state law claims. Neither Defendant Kenneth Lee, Simon Yang, nor the relief Defendants responded in opposition to

the motion.¹ Having reviewed the evidence submitted by Plaintiffs, and having considered the applicable law, the Court finds as follows.

Plaintiffs allege that Defendant Kenneth Lee operated a Ponzi scheme; that he, with the help of Defendant Yang, utilized false statements about his trading prowess, recruited investors and suffered massive trading losses with their money, but failed to reveal those losses to investors. According to Plaintiffs, Defendant Lee, at times with the assistance of Defendant Yang, issued fraudulent statements indicating that all accounts had gains, although starting in mid-2006, Defendant Lee was unable to return money to investors when they inquired about withdrawal of their funds. Plaintiffs allege that Defendant Lee paid original investors with the contributions of later investors in an effort to support his claims of trading success. Plaintiffs further allege that Defendant Lee utilized substantial sums provided by investors for his own personal use, including the purchases of homes, cars, boats, and the payment of personal living expenses for his family, including his wife and sons, who have been named Relief Defendants. Plaintiffs seek relief under the Commodities Exchange Act (“CEA”) and Oklahoma law, specifically the Oklahoma Uniform Securities Act (“the Act”). Additional facts will be set forth herein as relevant to each of Plaintiffs’ claims.

Plaintiffs² first contend that Defendants committed fraud in violation of the CEA, specifically violating 7 U.S.C. § 6b(a)(2)(A)-(C), after June 18, 2008, and 7 U.S.C. §

¹ Neither corporate defendant has answered the allegations in the complaint and accordingly they did not respond to the instant motion either.

² The Commission and the Department refer to themselves collectively throughout their joint motion. The Court will do so as well.

6b(a)(2) prior to that date.³ In order to establish liability under either section, Plaintiffs must establish that a defendant made (1) a misrepresentation or omission, (2) with scienter, and (3) the misrepresentation or omission was material. *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1328-29 (11th Cir. 2002). Scienter requires evidence that a defendant committed the alleged wrongful acts intentionally or “that the representations were made with a reckless disregard for their truth or falsity.” *U. S. Commodity Futures Trading Com’n v. National Inv. Consultants*, 2005 WL 2072105, *8 (N.D.Cal. August 26, 2005). Plaintiffs have presented evidence of misrepresentations by both Defendant Kenneth Lee and Defendant Simon Yang, evidence of scienter, and evidence that the misstatements were material.

By way of background, this case was set in motion by the relationship between Kenneth Lee, a resident of South Carolina, who previously lived in Texas, and Simon Yang, a resident of Oklahoma, although a citizen of China. According to Mr. Yang, he first learned of Kenneth Lee via the internet, when he was researching investment strategies. He became intrigued by Mr. Lay’s alleged trading results and ultimately decided to invest money with him. This eventually evolved into what Simon Yang referred to as a commissioned independent contractor agreement, and in some form or fashion, Simon Yang ultimately recruited a number of investors for Kenneth Lee from the Chinese Baptist Church in Oklahoma City. During the relevant time period, specifically March 2003 through December 2009, Kenneth Lee operated two corporations. Prestige Ventures Corporation (“Prestige”)

³ Effective June 18, 2008, Congress amended the Commodities Exchange Act, which re-designated certain sections. As such, the new designations apply to actions taken on or after June 18, 2008.

is a Panamanian corporation registered by Defendant Kenneth Lee in Panama on July 7, 2003.⁴ Prestige has operated out of Kenneth Lee's Texas residence, and later from his South Carolina home. Defendant Federated Management Group "Federated" is a Texas corporation, formed in 2001, which forfeited its right to conduct business in October 2003.⁵ Federated was also run by Defendant Kenneth Lee from his Texas home, and later from his South Carolina residence. Defendant Lee operated Defendants Prestige and Federated as a common enterprise: they shared offices, telephone numbers and solicitation materials. In fact, their names were often used interchangeably, and Simon Yang informed investors that Prestige was Federated's parent company. Certain of the documents circulated included historical returns for Prestige, while others listed Federated Management's history. Although Kenneth Lee generally used a Prestige-related e-mail address, he also used an address of lkee@famcu.com, consistent with his misrepresentation to investors that Federated Management operated a credit union known as Federated Management Credit Union. Mr. Yang has used e-mail addresses linked to both entities. Furthermore, applications submitted by investors bore the name "Federated Management Group, Inc.,²³" although in most instances money was sent to what was represented to be a Prestige account. In a document entitled "Managed Individual Contracts," whereby Kenneth Lee sought to solicit additional deposits by investors to assist them in closing their Prestige accounts, he

⁴ The company was founded in June 2003, and the original directors resigned on July 14, 2003, appointing Kenneth Lee as the sole director and president.

⁵ This was approximately the same time that Defendant Lee was using the Federated name to solicit investors. Despite forfeiting its rights, Federated continued to operate in some capacity, soliciting money from investors.

referred investors to the website at www.federatedmanagement.com. As such, the Court concludes that Defendant Kenneth Lee, with the aid of Simon Yang, operated the two entities as essentially a single one, creating an enterprise, which the Plaintiffs, and the Court, refer to as the Prestige Enterprise.

Neither Prestige, Federated, Kenneth Lee or Simon Yang, has ever been registered with the Commodities Future Trading Commission, the National Futures Association, or under the Oklahoma Uniform Securities Act, despite representations to the contrary to investors. Both corporate entities claimed to use the Legacy Trading System, which existed in name only, having been suggested by Simon Yang to apply to Defendant Lee's trading strategy to give an aura of longevity.

Starting in approximately March 2003 until November 2009, Defendants Yang and Lee solicited and Kenneth Lee accepted, approximately 8.7 million dollars from investors, including numerous persons residing in Oklahoma. In approximately June 2003, Yang arranged a meeting between Kenneth Lee and several of Yang's acquaintances from Oklahoma. According to Defendant Simon Yang, the meeting, held at Lee's office in Fort Worth, Texas, was intended for prospective participants to learn more about Lee and Federated and verify what Yang had told them. At the meeting, Kenneth Lee and Simon Yang confirmed Yang's representations about Lee's alleged successful trading and stated that the Prestige Enterprise and Lee had never suffered any trading losses. Kenneth Lee "pitched" the idea of investing with him based on his profitable trading record, the fact that investments would be insured, and that money could be withdrawn at any time. Contrary to

Defendant Lee's representations, he suffered substantial losses through his trading activity, showing little monthly gain in any month.⁶

After that meeting, Lee continued to provide false and misleading Prestige Enterprise information to Yang, including materials indicating growth from a fund of less than two million dollars in 1987 to a fund exceeding 379 million dollars in 2003. There is no evidence of Prestige or Federated ever having 379 million dollars in their funds.⁷ Defendant Yang continued to circulate false information to potential investors, and both individual Defendants made additional misrepresentations on the corporate websites. Simon Yang had a hand in crafting the Prestige Website, which included misrepresentations regarding the strength of the Legacy Trading System. Defendant Yang made additional misrepresentations, including the fact that he told other investors his interest was limited to his role as investor, failing to disclose that he actually served as a commissioned agent for the Prestige Enterprise. He had

⁶ Plaintiffs present evidence that approximately thirty commodity futures or foreign currency accounts were maintained in the name of Federated or Prestige at various Futures Commission Merchants or at off-shore currency brokers. Lee controlled the majority of the trading accounts, which were opened as corporate accounts, not in the name of any trading pool. The Futures Commission Merchants were not informed that the accounts were pool accounts or that investor funds were involved. The accounts suffered losses totaling 4.3 million dollars. Additional securities accounts also suffered losses. Some amounts were returned to investors, and approximately two million dollars was diverted for the personal use of Lee and his family. There is evidence that Kenneth Lee used investor funds to purchase homes, cars and boats for himself, his wife, and their children. Money from the corporate bank accounts was transferred to Defendant's personal account, and at other times corporate checks were used to pay for purely personal expenses. Despite the fact that his sons were never employees of Federated or Prestige, he paid them approximately \$1500 each, weekly, for a period, apparently as compensation for menial tasks such as watching the markets and mowing the lawn.

An investigator for the Oklahoma Department of Securities examined the bank records for three accounts controlled by Defendant Kenneth Lee and held in the names of the two corporations. He attests that on March 5, 2003, the accounts all had zero balances. Deposits totaling \$14,279,409.00 were made between March 5, 2003 and November 30, 2009. Sources for the funds included investors, cash, and transfers from Futures Commission Merchants or Forex brokerage firms. The Lee family deposited approximately \$59,950 and Simon Yang's contributions accounted for \$469,507 of the deposits. He opined that \$1,936,138 was paid directly to Kenneth Lee or members of his family or for expenses on their behalf. Simon Yang received \$133,500 from the accounts.

⁷ At the end of 2003, the Prestige Enterprise bank accounts had a total balance of \$126,950.44.

e-mail addresses affiliated with both Prestige and Federated at various points in the relevant time period.

Defendant Lee generated and circulated via e-mail false statements to pool participants regarding monthly profits. The account statements showed consistent monthly profits of up to 4% and reflect that the funds never suffered a single loss. For example, from September 2005 to February 2009, Lee prepared and sent monthly account statements to Susie Southwell, a participant, showing that her investment of \$20,000 had grown to \$41,020.12, without a single month of loss. The monthly account statements Lee sent to a group of participants falsely indicated their account had earned money every month from July 2003 through January 2009. The fabricated statement indicated that their combined investment of \$100,000 had increased in value to over \$340,000. Account statements were sent from the Prestige Enterprise by Lee, although Yang was also responsible for some of the monthly reports issued to pool participants. Once pool participants started receiving the monthly statements showing consistent profits and withdrew alleged profits⁸, many decided to invest more money with Defendants and new pool participants were convinced to invest with Lee. After investing with Defendants, several pool participants were able to withdraw a portion of their funds, as promised by Defendants. Starting in 2006, however, Defendant Lee informed participants that he could not permit withdrawals, because there had been a

⁸The Investigator for the Oklahoma Department of Securities opined that \$3,357,732 was paid out to investors.

margin call, and he was no longer willing to use his own funds to cover the call.⁹

Defendant Yang made additional misrepresentations to investors. Reports distributed by Defendant Yang falsely indicate that for 16 years, the Legacy Trading System had outperformed the S&P 500 and the MAR futures. The reports indicated that Prestige achieved positive returns for every month from January 2007 until April 2009, despite the fact that starting in 2006, Lee had started informing investors they could not make withdrawals, a fact known to Defendant Yang.

In short, the Court finds ample evidence of material misrepresentations, by Defendants, with scienter. To summarize, from the outset, Defendant Lee misrepresented the returns he had experienced, misrepresented the current returns on investment, omitted information about the diversion of funds and his criminal past, each of these was undoubtedly material to those persons who chose to invest their money with Prestige and Federated. There can be no doubt that Defendant Lee acted with the requisite intent, falsifying statements for both potential and current investors, and continuing the charade even after he had either lost or spent the original investments. With regard to Defendant Yang, although there is less evidence against him than against Defendant Lee, there is still evidence that he acted with the requisite intent and made material misstatements. Specifically, Defendant Yang crafted the term “Legacy Trading System,” specifically designed to give a feeling of longevity that he felt it needed to attract investors, and Defendant Yang created numerous

⁹ There is no evidence of any actual margin trading or any margin call, or that Kenneth Lee covered the margin for pool participants.

false return tables on behalf of Lee, Prestige and Federated. Defendant Yang continued to encourage investment with Lee despite having no actual knowledge about the results of Lees trading. Additionally, Defendant Yang misrepresented his status, informing investors that he was merely an investor rather than revealing his actual commission-based relationship with the corporate entities. As such, the Court finds that Plaintiffs are entitled to summary judgment in their favor on the issue of the Defendants' liability under 7 U.S.C. § 6b(a)(2) and 6b(a)(2)(A)-(C).

Plaintiffs next seek summary judgment on their claims that Defendants Lee and Yang committed fraud as "associated persons" in violation of 7 U.S.C. § 6o(1), which regulates commodity pool operators and prohibits fraudulent transactions by operators and associated persons. Plaintiffs contend Defendants Prestige and Federated were commodity pool operators under the Act.

It shall be unlawful for a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly--

- (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or
- (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

7 U.S.C. § 6o(1)(A)-(B).

The term "commodity pool operator" means any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds . . . either directly or through capital contributions . . . for the

purpose of trading in any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility . . .

7 U.S.C. § 1a.

As it must to hold Defendants Prestige and Federated liable, the Court finds that both were commodity pool operators. Both accepted funds from a variety of persons for the purpose of trading commodities and potential investors were informed by Defendant Lee that their investments would be pooled. The businesses provided a vehicle for collective investment. *See Commodity Futures Trading Com'n v. Equity Financial Group LLC*, 572 F.3d 150, 158 (3d Cir. 2009).

Furthermore, both Defendants Lee and Yang were associated persons whose actions are governed by § 6o as well. 7 U.S.C. § 6k requires the registration of persons associated with a commodity pool operator, including a “partner, officer, employee, consultant, or agent . . . in any capacity that involves . . . the solicitation of funds . . . for participation in a commodity pool.” Defendant Yang concedes that he presented the opportunity to persons he met at the Chinese Baptist Church, that he served as a commissioned contractor for Prestige and Federated, and that he arranged meetings between Kenneth Lee and potential investors. Defendant Lee was the sole person running both Prestige and Federated, and his role in soliciting funds both via live meetings, through e-mail and through Simon Yang is undeniable.

Finally, as set forth above, Plaintiffs have established that Defendants made material misrepresentations to potential investors and to investors, and that they did so with the

requisite intent. As such, Plaintiffs are entitled to summary judgment on their fraud claims under 7 U.S.C. § 6o(1)(A) and (B).¹⁰

Plaintiffs next seek relief on their claim that Defendants failed to register with the Commission in violation of 7 U.S.C. §§ 6m(1) and 6k(2). 7 U.S.C. § 6m(1) provides in part that “it shall be unlawful for any commodity trading advisor or commodity pool operator, unless registered under this chapter, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such commodity trading advisor or commodity pool operator. . . .” 7 U.S.C. § 4k(2). 7 U.S.C. § 6k(2) provides, in pertinent part, that it “shall be unlawful for any person to be associated with a commodity pool operator as a partner, officer, employee, consultant, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves (I) the solicitation of funds, securities, or property for a participation in a commodity pool . . . unless such person is registered with the Commission under this chapter as an associated person of such commodity pool operator. . . .”

¹⁰ There are different views about whether the antifraud provision in 7 U.S.C. § 6o(1)(A) includes a scienter requirement. Compare *First Nat'l Monetary Corp. v. Weinberger*, 819 F.2d 1334, 1341-42 (6th Cir.1987) (“[Section 6 o] does not contain the same scienter requirement as § [6b].... [T]he complainant need prove only that the commodity trading advisor intentionally made the statements complained of, and not that the advisor acted with the intent to defraud.”), and *CFTC v. Savage*, 611 F.2d 270, 285 (9th Cir.1979) (concluding a violation of § 6 o(1) only requires the intent to “employ the ‘device, scheme, or artifice’ ”), with *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 677-80 (11th Cir.1988) (“[W]e conclude that Section 6 o(1)(A) contains the same scienter requirement as Section 10(b) and Rule 10b-5 of the federal securities laws, while Section 6 o(1)(B) does not require proof of scienter.”)

Equity Fin. Group, 572 F3d at 159, n. 16. Because the Court concludes Defendants' conduct in this case demonstrates scienter, the Court need not decide whether scienter is required.

As set forth above, Plaintiffs have established that Defendants Federated and Prestige used instrumentalities of interstate commerce, most notably the internet, to solicit and receive funds from customers without being registered, and as above, Defendants Lee and Yang were associated persons without the requisite registration. As such, Plaintiffs are entitled to summary judgment on the claims under 7 U.S.C. § 6m(1) and § 6k(2) of the Act.

Plaintiffs next assert that Federated and Prestige constituted a common enterprise for purposes of establishing joint and several liability. Where one or more corporate entities operate in a common enterprise, each may be held liable for the deceptive acts and practices of the other. *Commodity Futures Trading Com'n v. Wall Street Underground, Inc.*, 281 F.Supp.2d 1260, 1271 (D.Kan. 2003)(citation omitted). “In determining whether a common enterprise exists, courts look to a variety of factors, including whether there is common control of the entities, whether the entities are distinct and operate at arms-length from one another, and whether the entities commingle funds.” *Id.* (citations omitted). As set forth above, Defendants Yang and Lee often referred to the companies interchangeably, Yang represented to investors that Prestige was Federated’s parent company, they shared a common control person, Kenneth Lee, as well as telephone numbers, addresses, and funds were apparently co-mingled in bank accounts. The Court finds that Federated and Prestige were a common enterprise, and thus are jointly and severally liable for the above violations of the CEA.

Plaintiffs next contend that Defendant Lee is liable for the acts of Prestige and Federated pursuant to 7 U.S.C. § 13c(b) as a controlling person. Any person “who, directly

or indirectly, controls any person who has violated any provision of this chapter” is liable for the controlled person’s violation if he “did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation.” 7 U.S.C. § 13c(b). In this case, Defendant Kenneth Lee was fully responsible for all activity of the two corporations, including the trading activity and the fraudulent statements issued from the corporate Defendants to the investors. As noted by Plaintiffs, Defendant Lee repeatedly held himself out as in control of both entities, he controlled their bank accounts, and operated the entities from his homes, moving their operations when he moved. Plaintiffs also contend that Defendant Lee is responsible for Defendant Yang’s actions, because he either controlled them or failed to rectify the fraudulent information that Mr. Yang was disseminating. Again, there can be no dispute that Mr. Lee controlled the flow of information to Mr. Yang, that he directed Mr. Yang’s actions with regard to the information, and as a result, Defendant Lee is responsible for Mr. Yang’s violations of the CEA as well.

Plaintiffs argue summary judgment is appropriate with regard to the relief Defendants as well.

A relief defendant is a person who “holds the subject matter of the litigation in a subordinate or possessory capacity as to which there is no dispute.” *SEC v. Colello*, 139 F.3d 674, 676 (9th Cir.1998), quoting *SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir.1991). Such a person may be joined in a securities enforcement action “to aid the recovery of relief,” provided she “has no ownership interest in the property which is the subject of litigation.” *SEC v. George*, 426 F.3d 786, 798 (6th Cir.2005) (internal quotation marks omitted); see also *SEC v. Cavanagh*, 445 F.3d 105, 109 n. 7 (2d Cir.2006) (“*Cavanagh II*”); *Cherif*, 933 F.2d at 414. District courts have the power to order disgorgement from a relief defendant upon a finding that []he (1) is in possession of ill-gotten funds and (2) lacks a legitimate claim to those funds.

SEC v. Cavanagh, 155 F.3d 129, 136 (2d Cir.1998) (“*Cavanagh I*”).

Commodity Futures Trading Com’n v. Walsh, 618 F.3d 218, 225 (2nd Cir. 2010). The undisputed evidence establishes that substantial sums of money were expended either directly or indirectly from Prestige and Federated to Kenneth Lee’s wife and sons to which they had no ownership interest. David and Darren Lee, although never real employees of the entities, received thousands of dollars from the corporations. Millions of dollars provided by investors were funneled to support all of the Lees, including the purchase of homes, cars, boats, and payments for utilities, insurance and other household expenses. The relief Defendants have not provided any evidence to rebut the Plaintiffs’ evidence, and as such, the Plaintiffs are entitled to summary judgment with regard to the relief Defendants.

Plaintiffs also seek summary judgment on their state law claims under the Oklahoma Uniform Securities Act of 2004 (“OUSA”). Okla. Stat. tit. 71 § 1-301 provides that it is unlawful in Oklahoma for a person to offer or sell a security unless:

1. The security is a federal covered security;
2. The security, transaction, or offer is exempted from registration under [the Act]; or
3. The security is registered under [the Act].

The Act provides that the Administrator of the Oklahoma Securities Commission is granted authority to enforce the provisions of the Act. The Department argues that the investments offered and sold by Defendants are securities under the Act, that the securities were not registered, nor were they exempt from registration.

The OUSA defines a “security” as including investment contracts, and further it

includes as an “investment contract” an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor and a ‘common enterprise’ means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors[.]”

Okla. Stat. tit. 71 § 1-102(32)(d). In this case, it is clear that the investors invested money, in a common enterprise, with the expectation that they would profit from the efforts of Kenneth Lee. As such, the offers made by Defendants Lee and Yang on behalf of Defendants Prestige and Federated were securities under Oklahoma law and therefore subject to the provisions of the OUSA if the securities were offered and sold in Oklahoma.

Okla. Stat. tit. 71 § 1-601 governs when securities are “offered or sold” in Oklahoma for purposes of the Act. According to Okla. Stat. tit. 71 § 1-610(A), registration pursuant to Okla. Stat. tit. 71 § 1-301 does “not apply to a person that sells or offers to sell a security unless the offer to sell or the sale is made in this state or the offer to purchase or the purchase is made and accepted in this state.”

C. For the purpose of this section, an offer to sell or to purchase a security is made in this state, whether or not either party is then present in this state, if the offer:

1. Originates from within this state; or
2. Is directed by the offeror to a place in this state and received at the place to which it is directed.

Okla. Stat. tit. 71 § 1-610. Plaintiffs have presented evidence that Defendants offered and sold securities to persons living in Oklahoma. Certain of the offers to sell came through Defendant Yang and other were offered directly by Defendant Kenneth Lee via e-mail to persons in Oklahoma. As such, the Department has established that Defendants offered and

sold securities in Oklahoma. The Court has concluded that securities that should have been registered were sold in this action, and it is undisputed that the securities were not registered. There is no evidence that the securities fell within any of the enumerated statutory exceptions to registration, *see* Okla. Stat. tit. 71 §§ 1-301, 1-201 through 1-203. Additionally, the burden is on a defendant to establish an exception or exemption from registration, and all Defendants have failed in this regard. As such, Plaintiffs are entitled to summary judgment on their claim that Defendants violated the Oklahoma Uniform Securities Act by failing to register in violation of Okla. Stat. tit. 71 § 1-301.

Plaintiffs next contend that Defendants Lee and Yang failed to register as agents as required by Okla. Stat. tit. 71 § 1-402(A) of the OUSA, and that Prestige and Federated employed unregistered agents in violation of section 1-402 of the OUSA. Title 71 § 1-402(A) provides that “[i]t is unlawful for an individual to transact business in this state as an agent unless the individual is registered under this act as an agent or is exempt from registration as an agent under subsection B of this section.” Okla. Stat. tit. 71 § 1-402(D) provides “[i]t is unlawful for a broker-dealer, or an issuer engaged in offering, selling, or purchasing securities in this state, to employ or associate with an agent who transacts business in this state on behalf of broker-dealers or issuers unless the agent is registered under subsection A of this section or exempt from registration under subsection B of this section.” Plaintiffs have presented undisputed evidence that by virtue of their efforts and activities in soliciting investors to purchase securities issued by Prestige and Federated, that Lee and Yang are agents of the corporate entities. Yang admitted his role as an independent

contractor of Defendants and Lee undoubtedly controlled both entities. Both men have transacted business in Oklahoma as agents of the Prestige/Federated enterprise. Furthermore, it is undisputed that Lee and Yang have not been registered as agents, or in any other capacity, under the Act, nor have Defendants asserted or presented evidence that they are entitled to an exemption from registration. Accordingly, Plaintiffs are entitled to summary judgment on the issue of Lee and Yang acting as unregistered agents in violation of Title 71 § 1-402.

Plaintiffs also seek summary judgment on their contention that Prestige and Federated, acting as a common enterprise, associated with unregistered agents in violation of Okla. Stat. tit. 71 § 1-402. As set forth above, Defendant Lee was the president, lead trader, chairman, beneficial owner and/or principal portfolio manager of Prestige and Federated. Yang was an independent contractor of the enterprise and received commissions for soliciting pool participants. Both Lee and Yang used email addresses tied to the enterprise to communicate with investor. As such, Plaintiffs are entitled to summary judgment on their claim that Defendants Prestige and Federated employed or associated with unregistered agents in violation of Okla. Stat. tit. 71 § 1-402.

Plaintiffs also seeks summary judgment on their claim that Defendants violated Okla. Stat. tit. 71 § 1-501(2), which makes it unlawful for a person, directly or indirectly, “to make an untrue statement of material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading,” in connection with the offer or sale of a security. As with the Commission’s

claims for fraud under the CEA, the Court finds that Plaintiffs have established that Defendants made material misrepresentations in connection with the offer or sale of a security. As such, Plaintiffs are entitled to summary judgment on their claim under Okla. Stat. tit. 71 § 1-501(2).

Plaintiffs also seek summary judgment on their claim that the Defendants employed a device, scheme, or artifice to defraud in violation of Okla. Stat. tit. 71 § 1-501(1). Section 1-501(1) makes it unlawful for a person, directly or indirectly, “to employ a device, scheme, or artifice to defraud,” in connection with the offer or sale of a security. As above with regard to their federal claims, Plaintiffs have established that Defendants employed a scheme to defraud, specifically they enticed pool participants to invest with Kenneth Lee by making untrue statements of material fact regarding his history with trading which led pool participants to believe Kenneth Lee, via the corporations, was a successful trader who consistently achieved positive returns. Lee clearly acted with intent to deceive, manipulate, and defraud. Kenneth Lee was the admitted principal of both corporations. He not only solicited funds based on false statements, but continued to perpetuate the fraud by creating and circulating false monthly statements. Defendant Lee also misappropriated participant funds for his own personal use and for the use of his family. Both Defendant Kenneth Lee and Defendant Yang knew the Legacy Trading System was a fiction. With regard to Defendant Yang, in all respects his conduct evidences recklessness, that is “an extreme departure from the standards of ordinary care.” *See Trivectra v. Ushijima*, 144 P.3d 1, 16 (Haw. 2006)(scienter requirement for violation of Uniform Securities Law § 501, HRS §

485-25(a)(1) is satisfied with either a showing of intent or recklessness). Plaintiffs have presented evidence that Defendant Yang he produced financial disclosure documents without independently verifying any of the information therein before disseminating such information to investors, and he further misled investors by indicating that he was merely a participant, failing to reveal his commissioned status with the Prestige/Federated enterprise. As a result, Plaintiffs are entitled to summary judgment on their claim under Okla. Stat. tit. 71 § 1-501(1).

Plaintiffs also seek summary judgment on their claim that Defendants violated Okla. Stat. tit. 71 § 1-501(3). That section makes it unlawful for a person “directly or indirectly, “to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person,” in connection with the offer and/or sale of a security. Defendants undoubtedly and purposefully misled pool participants into believing that Kenneth Lee via Prestige and Federated was a successful trader. Defendants created and distributed to prospective pool participants marketing materials replete with blatantly false statements including, but not limited to, representations that the corporations consistently achieved high returns without a single month of losses between 1987 and March 2003. Defendants did not disclose at any time that during the allegedly profitable period Kenneth Lee, trader and president was in prison for a portion of that period.¹¹ Defendants also fabricated monthly account statements and reports reflecting the positive returns generated

¹¹ Numerous investors stated in their declarations that knowledge of Lee’s imprisonment for fraud would have affected their decision to invest with him.

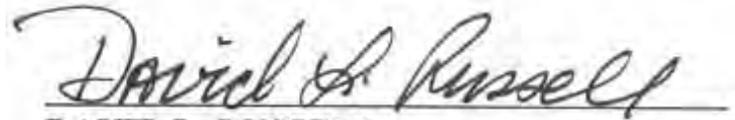
as a result of trading with the fictional Legacy Trading System. Despite reporting only gains to participants, the reality was that the entities sustained trading losses exceeding \$4.3 million dollars. Even when he knew he could not repay investors, Defendant Lee continued to assert that he was suffering only temporary setbacks in trading, but that the gains would be realized upon maturation of the long term investments. Defendants clearly engaged in acts, practices, and a course of business that operated and would operate as a fraud or deceit upon investors, in connection with the offer and sale of securities. As such, Plaintiffs are entitled to summary judgment on their claim pursuant to Okla. Stat. tit. 71 § 1-501(3). Plaintiffs are entitled to summary judgment on all of their claims under the OUSA.

Having granted summary judgment in favor of the Plaintiffs with regard to liability on their claims against the Defendants, the Court turns to two recent filings by Defendants. Defendants Darren Lee and Simon Yang filed individual Requests for Damages. In order to seek damages against the Plaintiffs, the Defendants would have needed to amend their answers to include counterclaims. However, in light of the Court's conclusion that summary judgment is appropriate in favor of Plaintiffs against Defendant Yang and relief Defendant Lee, and because Defendants have not made sufficient factual allegations to sustain claims, especially in light of the evidence presented by the Plaintiffs in support of their motion for summary judgment, the Defendants' motions are DENIED.

For the reasons set forth herein, the Plaintiffs' motion for summary judgment is GRANTED with regard to Defendants' liability. Unless the parties request a jury trial within five days of entry of this Order, the Court will conduct a non-jury trial on the issue of

damages and penalties on November 8, 2010. Defendant Darren Lee's Request for Damages is DENIED. Defendant Simon Yang's Request for Damages is DENIED.

IT IS SO ORDERED this 27th day of October 2010.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA**

**U.S. COMMODITY FUTURES)
TRADING COMMISSION and)
OKLAHOMA DEPARTMENT OF)
SECURITIES ex rel. IRVING L. FAUGHT,)**

Plaintiffs,)

v.)

CASE NO CIV-09-1284-R

**PRESTIGE VENTURES CORP.,)
Panamanian corporation, FEDERATED)
MANAGEMENT GROUP, INC.,)
a Texas corporation, KENNETH WAYNE)
LEE, an individual, and SIMON YANG)
a/k/a XIAO YANG a/k/a SIMON CHEN),)
an individual,)**

Defendants; and)

**SHEILA M. LEE, an individual,)
DAVID A. LEE, an individual, and)
DARREN LEE, an individual,)**

Relief Defendants.)

ORDER

On November 8, 2010, this matter came to trial before this Court on the issues of sanctions and penalties to be ordered against Defendants and Relief Defendants. Plaintiffs U.S. Commodity Futures Trading Commission (the “Commission”) and Oklahoma Department of Securities (“ODS”) appeared by its counsel; and Defendant Simon Yang appeared pro se. The Receiver, Stephen J. Moriarty (“Receiver”), appeared in person.

Defendant Kenneth Wayne Lee and Relief Defendants David A. Lee, Darren Lee, and Sheila M. Lee did not appear.

On October 27, 2010, the Court granted Plaintiffs' Motion for Summary Judgment, finding Defendants liable for violations of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 1 et seq. (2006), Commission Regulations ("Regulations"), 17 C.F.R. §§ 1.1 et seq. (2009), and the Oklahoma Uniform Securities Act of 2004 ("OUSA"), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2009). (Doc. No. 120). The Court further found that Relief Defendants Sheila Lee, David Lee, and Darren Lee directly or indirectly received substantial sums of money to which they had no legitimate ownership interest or entitlement from Defendants Prestige Ventures Corp. ("Prestige") and Federated Management Group, Inc. ("Federated") (hereinafter referred to collectively as the "Prestige Enterprise"). Having considered the submissions by the Plaintiff and Defendant Yang at the trial, the Court hereby finds as follows.

FINDINGS OF FACT

1. The Prestige Enterprise received at least \$10,656,921 from investors between March 5, 2003 and November 30, 2009 (the "Relevant Time Period").
- 2.. The Prestige Enterprise returned \$3,357,732 to investors during the Relevant Time Period.
3. The Prestige Enterprise received \$469,507 in investments from Simon Yang and disbursed \$133,500 to him during the Relevant Time Period.

4. The Prestige Enterprise received \$17,108 from Sheila Lee and disbursed \$728,953 to or for the benefit of Sheila Lee during the Relevant Time Period.

5. The Prestige Enterprise received \$190 from David Lee and disbursed \$574,464 to or for the benefit of David Lee during the Relevant Time Period.

6. The Prestige Enterprise received \$15,162 from Darren Lee and disbursed \$654,101 to or for the benefit of Darren Lee during the Relevant Time Period.

7. Kenneth Lee and Sheila Lee's residence, having a legal description of Lot 30, Phase 2A, Berkleigh at Parkwest, Mt. Pleasant, Charleston County, South Carolina, street address 1660 Jorrington Street, Mt. Pleasant, South Carolina ("Kenneth and Sheila Lee Residence"), was purchased with funds received by the Prestige Enterprise from investors and is an asset of the Prestige Enterprise.

8. Darren Lee's residence, having a legal description of Lot 165, Tract J, Phase II, Palmetto Hall at Dunes West, Mt. Pleasant, Charleston County, South Carolina, street address 2676 Palmetto Hall Boulevard, Mt. Pleasant, South Carolina ("Darren Lee Residence"), was purchased with funds received by the Prestige Enterprise from investors and is an asset of the Prestige Enterprise.

9. A boat (2004 Edgewater 175 cc, Boat registration number 1016BR, Hull number DMA03840H304) registered to David Lee and Darren Lee, along with an engine (2004 Yamaha F115, #68VL1018414, Engine serial number MAA0712198) and trailer (2004 Trailer, AA6515-17, #40ZBA1712Z3P101627) (hereinafter collectively referred to as the

“Edgewater Boat”), were purchased with funds received by the Prestige Enterprise from investors and are assets of the Prestige Enterprise.

CONCLUSIONS OF LAW

1. Section 6c(d)(1) of the Act, and Regulation 143.8, provide that the Commission may seek, and a District Court of the United States shall have jurisdiction to impose, a civil monetary penalty for violations of the Act and Regulations in the amount of not more than the greater of I) triple the monetary gain to each person for the violation, or ii) \$110,000 for violations committed between November 27, 1996 and October 22, 2000, \$120,000 for violations committed between October 23, 2000 and October 22, 2004, \$130,000 for violations committed between October 22, 2004, and/or \$140,000 for violations committed on or after October 23, 2008.

2. Upon a proper showing, this Court may enter a permanent injunction to enforce compliance with the Act and any rule, regulation or order thereunder. 7 U.S.C. § 13a-1.

In order to be entitled to injunctive relief, [the CFTC must] show a reasonable likelihood that [a defendant] would violate the Act in the future. The factors to be considered are “the egregiousness of the defendant’s actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant’s assurances against future violations, the defendant’s recognition of the wrongful nature of his conduct, and the likelihood that the defendant’s occupation will present opportunities for future violations.”

CFTC v. Risk Capital Trading Group, Inc., 452 F.Supp.2d 1229, 1247 (N.D.Ga. 2006)(quoting *SEC v. Ginsburg*, 362 F.3d 1292, 1304 (11th Cir. 2004))(citation and quotation omitted).

3. The Court finds that in light of Defendants' prior conduct, notably Defendant Lee's prior conviction for fraud-related activities, Defendants defrauded investors out of millions of dollars, which were whittled away to thousands, yet continue to refuse to acknowledge in any manner their misdeeds, that there is a reasonable likelihood that Defendants will violate the Act in the future. For this reason, and for the reasons set forth in the Court's order granting Plaintiffs summary judgment, permanent injunctive relief is warranted.

4. "[T]he Court has the authority to award 'ancillary equitable relief,' including restitution." The purpose of restitution is to "restore the status quo and order [] the return of that which rightfully belongs to" the investors. *Commodity Futures Trading Com'n v. Brockbank*, 505 F.Supp.2d 1169, 1175 (D.Utah 2007).

5. The Court finds restitution is an appropriate remedy for Defendants, as more fully set out below.

6. Imposition of a substantial civil monetary penalty is appropriate in this case because certain Defendants' violations of the Act and Regulations were egregious.

THEREFORE, IT IS ORDERED THAT:

The Defendants and all persons insofar as they are acting in the capacity of their agents, servants, employees, successors, assigns, and attorneys, and all persons insofar as they are acting in active concert or participation with them who receive actual notice of such order by personal service or otherwise, shall each be permanently restrained, enjoined and prohibited from directly or indirectly:

1. engaging in conduct in violation of Sections 4k(2), 4m(1), 4o(1), 6(c) and 9(a)(3) of the Act, 7 U.S.C. §§ 6k(2), 6m(1), 6o(1), 9(c) and 13(a)(3) (2006), Sections 4b(1)(A)-(C) of the Act as amended by the CRA, to be codified at 7 U.S.C. §§ 6b(1)(A)-(C), Regulations 4.20(a)(1) and (b) and 4.21(a)(1) and (b), 17 C.F.R. §§ 4.20(a)(1) and (b) and 4.21(a)(1) and (b) (2009), and Sections 1-301, 1-402, and 1-501 of the OUSA;
2. trading on, or subject to the rules of, any registered entity (as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29)(2006));
3. entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 32.1(b)(1), 17 C.F.R. § 32.1(b)(1) (2009)) (“commodity options”), and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(I) of the Act as amended by the CRA, to be codified at 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(I)) (“forex contracts”) for their own personal account or for any account in which they have a direct or indirect interest;
4. having any commodity futures, options on commodity futures, commodity options, and/or forex contracts traded on their behalf;
5. controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity futures, options on commodity futures, commodity options, and/or forex contracts;
6. soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options, and/or forex contracts;

7. applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2009);

8. acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2009)), agent or any other officer or employee of any person registered, exempted from registration or required to be registered with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2009);

9. transacting business in and/or from the state of Oklahoma as an issuer, issuer agent, broker-dealer, broker-dealer agent, investment adviser and investment adviser representative, as those terms are defined by Section 1-102 of the OUSA;

10. transferring, selling, alienating, liquidating, encumbering, pledging, leasing, loaning, assigning, concealing, dissipating, destroying, converting, or otherwise disposing of any asset subject to this Order or any other asset of the Prestige Enterprise, except as provided in this Order; and

11. interfering with the Receiver's performance of his duties including, but not limited to, the acquisition and liquidation of assets of the Prestige Enterprise.

IT IS FURTHER ORDERED THAT:

1. The Receiver is hereby authorized to take possession of, market and sell the Kenneth and Sheila Lee Residence, the Darren Lee Residence and the Edgewater Boat. Receiver is hereby authorized to take all actions necessary to close such sales including, but

not limited to, (a) retention of real estate professionals, brokers and/or auctioneers, (b) execution of a deed, bill of sale or other conveyance document and (c) payment of a reasonable real estate commission and/or auctioneer fee.

2. Kenneth Lee, Sheila Lee, and any other occupant(s) of the Kenneth and Sheila Lee Residence, shall vacate the Kenneth and Sheila Lee Residence within twenty (20) days of the date of entry of this Order.

3. Having previously concluded that the relief Defendants, Sheila Lee, Darren Lee and David Lee were in possession of ill-gotten funds to which they lacked a legitimate claim, the Court orders:

a. Sheila Lee shall disgorge the total sum of \$711,845.

b. Darren Lee shall disgorge the total sum of \$638,938.

c. David Lee shall disgorge the total sum of \$574,273.

4. Darren Lee, David Lee, and any other occupant(s) of the Darren Lee Residence shall vacate the Darren Lee Residence within twenty (20) days from the date of entry of this Order.

5. Prestige, Federated, and Kenneth Lee shall, jointly and severally, pay restitution totaling \$5,857,503.00 (plus prejudgment and post-judgment interest¹) to the Receiver for distribution to the Prestige Enterprise investors. This restitution obligation

¹ Prejudgment interest is a matter of discretion for the Court, and is based on the wrongful deprivation of an aggrieved party of its money, including deprivation of the opportunity to earn a return on that money. *See SEC v. Hasho*, 784 F.Supp. 1059, 1112 (S.D.N.Y. 1992). The Court concludes that given the blatant nature of the fraud and the widespread abuse of investors' money by Defendants, that prejudgment interest is appropriate.

represents the amount of funds that the Prestige Enterprise investors deposited into bank accounts controlled by Defendant Lee as a result of the course of illegal conduct alleged in the Complaint, less the amount of identified funds paid to investors. The amount to be paid to each investor shall be determined by the Court after recommendation by the Receiver.

6. Prestige and Federated shall, jointly and severally, pay a civil monetary penalty in the amount of \$18.2 million to the Commission, plus post-judgment interest, within ten (15) days of the date of the entry of this Order. This represents \$130,000 times the 140 known investors. Should Defendants Prestige and Federated not satisfy their civil monetary penalty obligation within fifteen (15) days of the date of entry of this Order, post judgment interest shall accrue on the obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961.

7. Kenneth Lee shall pay a civil monetary penalty in the amount of \$7.2 million to the Commission, reflecting three times his direct, personal monetary gain of approximately \$2.4 million, plus post-judgment interest, within fifteen (15) days of the date of the entry of this Order. Should Kenneth Lee not satisfy his civil monetary penalty obligation within fifteen (15) days of the date of entry of this Order, post judgment interest shall accrue on the obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961.

8. Simon Yang shall pay restitution totaling \$133,000 (plus prejudgment and post-judgment interest) to the Receiver for distribution to the Prestige Enterprise investors.

The amount reflects the amount paid to Simon Yang by Defendants during the relevant time period. The amount to be paid to each investor shall be determined by the Court after recommendation by the Receiver.

9. The Court finds that in view of the prior order of restitution set forth herein and disgorgement remedies already imposed and his inability to pay a civil fine, that no civil fine will be imposed as to Defendant Yang.

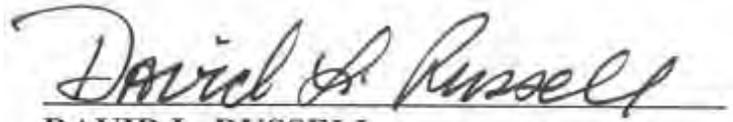
10. Simon Yang is precluded from making a claim for restitution or any return of funds or payment from Prestige, Federated, Kenneth Lee, the Receiver and/or the Receivership.

11 All payments by Defendants pursuant to this Order shall first be applied to satisfaction of the restitution obligations. After satisfaction of the restitution obligations, Defendants' payments pursuant to this Order shall be applied to satisfy the civil monetary penalty obligations.

12. Stephen J. Moriarty, as Receiver, is hereby authorized, empowered and directed to take all necessary and appropriate acts to carry out and implement this Order in accordance with its terms without further order of the Court. This includes, but is not limited to, the acquisition and liquidation of the assets of the Prestige Enterprise. Receiver shall make a report to the Court on all asset sales and will deposit the proceeds from such sales in a segregated account pending further Order of this Court.

13. After the termination of the Receivership, any restitution payment that is made shall be made in accordance with the terms of the order terminating the Receivership and/or discharging the Receiver.

IT IS SO ORDERED this 29th day of November, 2010.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE