

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 4565/January 30, 2017

ADMINISTRATIVE PROCEEDING  
File No. 3-17352

In the Matter of

SAVING2RETIRE, LLC, and  
MARIAN P. YOUNG

ORDER ON MOTIONS FOR  
SUMMARY DISPOSITION

The Division of Enforcement seeks leave to move for summary disposition and moves for summary disposition. Respondents have filed a motion for summary disposition but because they did not seek leave to do so, I merely consider their motion to the extent it is responsive to the Division's motion. *See* 17 C.F.R. § 201.250(c) ("A motion for summary disposition shall be made only with leave of the hearing officer."). For the reasons discussed below, I GRANT the Division leave to move for summary disposition and GRANT the Division's motion in part and DENY it in part.

***Background***

The Securities and Exchange Commission instituted this proceeding in July 2016. In the order instituting proceedings (OIP), the Division alleges the following. Respondent Saving2Retire, LLC, is an investment adviser with \$4.5 million in assets under management. OIP ¶ 2. Respondent Marian P. Young "is the sole owner, managing member and employee of Saving2Retire." *Id.* ¶ 3.

Saving2Retire registered with the Commission as an investment adviser despite having only \$4.5 million in assets under management, well below the monetary threshold necessary to register with the Commission for an adviser that is regulated or required to be regulated in the state in which it has its principal office and place of business. OIP ¶¶ 2, 10. Although Saving2Retire claimed it was eligible for Commission registration, relying on an exemption for advisers who provide investment advice solely through an interactive website, Saving2Retire had no internet clients. *Id.* ¶¶ 6-7. Further, Saving2Retire provided advice to at least fifteen non-internet clients, more than permitted under the exemption. *Id.* ¶ 8.

The Division also alleges that during the course of a Commission examination, Young failed to produce various documents Saving2Retire was required to keep. OIP ¶ 5.

Saving2Retire failed to maintain various books and records it was required by rule to maintain. OIP ¶ 9.

Based on these factual allegations, the Division asserts that Saving2Retire willfully violated, and Young willfully aided and abetted and caused violations of, Investment Advisers Act of 1940 Sections 203A (registration allegation) and 204 (examination and books and records allegations) and Advisers Act Rule 204-2(a) (books and records allegation).

After Respondents answered the OIP, the Division moved for summary disposition.

### *Discussion*

Commission Rule of Practice 250(c) governs the Division's motion for summary disposition. *See* 17 C.F.R. § 201.250(c). Subsection (c) provides that a "motion for summary disposition shall be made only with leave of the hearing officer" and "[l]eave shall be granted only for good cause shown." A motion for summary disposition must demonstrate, based on "undisputed pleaded facts, declarations, affidavits, deposition transcripts, documentary evidence or facts officially noted[,] . . . that there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law." *Id.* The Commission looks with disfavor on motions for summary disposition in cases designated as 120-day cases, because "fact-intensive issues such as a respondent's state of mind" are "generally . . . not susceptible to summary disposition." Amendments to the Commission's Rules of Practice, Securities Exchange Act of 1934 Release No. 78319, 81 Fed. Reg. 50212, 50225, 2016 WL 4037177 (July 29, 2016); *see id.* at 50225 n.118 (citing *Jay T. Comeaux*, Exchange Act Release No. 72896, 2014 WL 4160054, at \*4 n.30 (Aug. 21, 2014) (urging the parties "to consider whether, if the Commission has determined that a particular matter" should be designated as what is now a 120-day case, "it is an appropriate vehicle for a motion for summary disposition"))).

The Division has shown good cause to seek summary disposition. I therefore grant it leave to do so.

### *Registration allegations*

In general, an investment adviser with less than \$100 million in assets under management may not register with the Commission. 15 U.S.C. § 80b-3a(a)(1)(A); 17 C.F.R. § 275.203A-1(a).<sup>1</sup> Advisers Act Rule 203A-2(e) provides an exemption to this prohibition for an "[i]nternet [i]nvestment adviser[]" who "[p]rovides investment advice to all of its clients exclusively through an interactive website." 17 C.F.R. § 275.203A-2(e)(1)(i). An adviser who relies on this exemption is permitted to provide investment advice through other means to no more than fourteen clients in a given twelve-month period. *Id.*

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<sup>1</sup> Congress set the threshold at \$25,000,000, "or such higher amount as the Commission may, by rule, deem appropriate." 15 U.S.C. § 80b-3a(a)(1)(A). By rule, the Commission deemed \$100,000,000 the appropriate threshold. 17 C.F.R. § 275.203A-1(a).

The Division argues that there is no dispute that Saving2Retire registered with the Commission despite having less than \$100 million in assets under management. Mot. at 10-11. It argues that Saving2Retire does not qualify as an internet investment adviser because its website was not functional until 2013, two years after it registered with the Commission, it never had any internet clients, and it advised more than fourteen clients through means other than the internet. *Id.* at 11.

Respondents do not deny that Young registered Saving2Retire with the Commission. They also do not deny that Saving2Retire had only \$4.5 million in assets under management. Indeed, Young's sworn testimony<sup>2</sup> shows that Young registered Saving2Retire with the knowledge that it did not meet the monetary threshold for registration and with the intent to rely on the internet adviser exemption. *See* Young Dep. at 30, 33-35.

The question, therefore, with respect to the registration allegation is whether there is a material factual dispute regarding Respondents' reliance on the internet adviser exemption. To rely on this exemption, Saving2Retire was required to "[p]rovide[] investment advice to all of its clients exclusively through an interactive website." 17 C.F.R. § 275.203A-2(e)(1)(i). Relying on Young's testimony that Saving2Retire's website was not operational until 2013—two years after Young registered Saving2Retire—and Saving2Retire never had any actual internet clients, the Division asserts that "by definition," Saving2Retire did not qualify for the exemption.<sup>3</sup> Mot. at 11; *see* Young Dep. at 31-32, 36-37.

Young counters—correctly—that in promulgating the internet advisers exemption, the Commission contemplated that internet advisers would necessarily require a grace period after registration before their website would be fully functional. Resp. at 3. When it promulgated the exemption, the Commission noted that internet advisers normally would not meet the monetary threshold for Commission registration. Exemption for Certain Investment Advisers Operating Through the Internet, Advisers Act Release No. 2091, 67 Fed. Reg. 77619, 77622, 2002 WL 31778384, at \*5 (Dec. 18, 2002). Additionally, because an internet adviser uses an interactive website, "the adviser's clients can come from any state, *at any time*, without the adviser's prior

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<sup>2</sup> The Division took Young's testimony after I denied her motion to quash. *Saving2Retire, LLC*, Admin. Proc. Rulings Release No. 4257, 2016 SEC LEXIS 3880 (ALJ Oct. 14, 2016). I may rely on Young's sworn testimony in adjudicating the Division's motion. *See* 17 C.F.R. § 201.250(c).

<sup>3</sup> To the extent the Division argues that Saving2Retire's website was not interactive, as required by the rule, Mot. at 11, I have disregarded the Division's argument because the argument is inconsistent with the Division's allegation that Saving2Retire "had an interactive website," OIP ¶ 7. The facts pleaded in the OIP are judicial admissions that bind the Division in this proceeding. *See Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003) ("the allegations in the Second Amended Complaint are judicial admissions by which [Plaintiff] was bound throughout the course of the proceeding." (internal quotation marks and alterations omitted)); *see also El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 876 (D.C. Cir. 2014); *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995).

knowledge.” *Id.* As a result of these facts, without an internet adviser exemption, internet advisers would potentially be required to register in every state. *Id.* The Commission then recognized that “[i]nternet Investment Advisers must typically register early in their development and testing phase in order to obtain venture capital, and many may not even be fully operational 120 days later.” *Id.*

Together, the Commission’s observations show that it contemplated an adviser being able to rely on the internet adviser exemption before the adviser has any internet clients and before it establishes a functional website. No doubt, an adviser could not rely on this exemption in perpetuity without both establishing a website and then advising its eventual clients exclusively through that website. In its reply, however, the Division does not address Respondents’ argument. I therefore am not in position to evaluate whether Respondents’ failure to attract internet clients or its two-year inability to develop a functioning website mean that the internet exemption did not apply to Saving2Retire.

The Division argues that even if Saving2Retire might otherwise qualify to rely on the internet adviser exemption, it violated the terms of the exemption by advising more than fourteen non-internet clients. Mot. at 11. The Division relies on the declaration of Javier Villareal, who is employed in the Commission’s Office of Compliance Inspections and Examinations. Villareal Decl. at 1. Villareal examined Saving2Retire. *Id.* at 1-2. As to Saving2Retire’s non-internet clients, he declares:

Rule 202(a)(30)-1 of the Advisers Act defines a single client as a natural person and any relative or spouse who has the same principal address.<sup>4</sup> The . . . statements [of the custodian for Saving2Retire’s client accounts] showed that [Saving2Retire] had 20 clients for the year prior to November 2014, with approximately \$3.4 million in AUM. Although the [custodian’s] records contained approximately 48 accounts, I counted all accounts under the same address as a single client, per the Advisers Act.

*Id.* at 3.

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<sup>4</sup> For purposes of defining the term “client,” the internet exemption references Rule 202(a)(30)-1. See 17 C.F.R. § 275.203A-2(e)(3). Rule 202(a)(30)-1(a)(1)(ii) says that “a single client” includes “[a] natural person, and . . . (ii) [a]ny relative, spouse, spousal equivalent, or relative of the spouse or of the spousal equivalent of the natural person who has the same principal residence.” 17 C.F.R. § 275.202(a)(30)-1(a)(1)(ii). The phrase “who has the same principal residence” is ambiguous. It presumably modifies all of the preceding people identified in subparagraph (ii) rather than simply those who are a “relative of the spouse or of the spousal equivalent of the natural person”; the use of the word “any” at the beginning of the subparagraph would otherwise render this definition exceptionally and unworkably broad. With whom the specified people must share a principal residence, in order to be considered a single client, is also not entirely clear. Like Villareal, I read the phrase “who has the same principal residence” as implicitly saying “who has the same principal residence *as the natural person.*”

There are a few problems with this aspect of the Division's argument. The internet adviser exemption does not speak to *having* fewer than fifteen clients; it speaks to "*provid[ing]* investment advice to fewer than 15 clients." 17 C.F.R. § 275.203A-2(e)(1)(i) (emphasis added). It may be that there will normally be a nearly complete overlap between the number of clients an adviser has and the number it advises. The rule is nonetheless directed to the number of non-internet clients who were provided advice. Villareal's declaration, however, does not address this number. And Young denied giving any advice to a number of people who her custodian listed as her clients. Young Dep. at 136-37.

Additionally, the Division has not submitted the statements from which Villareal conducted his inquiry. And, Young's sworn deposition testimony reflects that she disputes Villareal's conclusion. Young Dep. at 136. Respondents have also submitted an exhibit with handwritten notes purporting to show that Saving2Retire had less than fifteen clients. Resp. Ex. B. In light of Young's deposition testimony and Respondents' *pro se* status, I will construe their response liberally and forgive their failure to present a declaration or affidavit in support of their claims. See *Boguslavsky v. Kaplan*, 159 F.3d 715, 722 (2d Cir. 1998); cf. *McPherson v. Coombe*, 174 F.3d 276, 280-82 (2d Cir. 1999) (holding dismissal was inappropriate absent notice to a *pro se* litigant of the requirements of Federal Rule of Civil Procedure 56). Given Young's testimony, in conjunction with the notes that I will assume for purposes of this order are accurate, there is a material dispute as to whether Saving2Retire provided advice to more than fourteen non-internet clients. The hearing in this matter will present an opportunity to resolve this conflict.

The Division's motion with respect to the registration allegation is denied.

#### *Examination and books and records allegations*

Section 204(a) of the Advisers Act requires investment advisers to "make and keep" records required by Commission rule and provides that such records are "subject at any time . . . to . . . examinations by . . . the Commission." 15 U.S.C. § 80b-4(a). Advisers Act Rule 204-2 in turn requires investment advisers to keep accurate and current records, including journals, general and auxiliary ledgers, check books, bank statements, cancelled checks, cash reconciliations, trial balances, financial statements, and internal audit working papers. 17 C.F.R. § 275.204-2(1), (2), (4), (6).

The requirement that an adviser keep its books and records in "current and . . . proper form" is a "keystone" of the Commission's surveillance responsibility. *Hammon Capital Mgmt. Corp.*, Advisers Act Release No. 744, 1981 WL 36244, at \*2 (Jan. 8, 1981). Given the importance of an investment adviser's obligation to maintain current books and records, an adviser is not "entitled to delay" or obstruct the Commission in examining the adviser's records. *Id.*

The Division argues that it is entitled to summary disposition on its allegation that Saving2Retire willfully violated Section 204(a), and Young willfully aided and abetted and caused this violation, as a result of Respondents failure to produce certain documents during the Commission's examination of Saving2Retire. Mot. at 13; OIP ¶¶ 5, 11.

In his declaration, Villareal declares that the examination staff asked Saving2Retire to produce certain documents. Villareal Decl. at 4. He also states that although Young produced some documents, she failed to produce most of what the staff sought. *Id.* Villareal explains that after Respondents' incomplete document production, the staff spoke to Young by phone and sent a follow-up e-mail. *Id.* at 4-5. Although Young initially agreed to provide the requested documents, she later declined to do so. *Id.* at 5. The staff then sent Respondents another letter and Young responded by contacting her Congressman. *Id.* The staff sent a final letter before turning the matter over to the Division. *Id.* at 5-6.

Despite receiving documentary and testimonial subpoenas, Young did not appear for testimony or produce documents during the Division's investigation. Brandt Decl. at 1-2.

During her sworn testimony in November 2016, Young admitted that she created Saving2Retire, that she is its "[s]ole" owner, manager, and employee and that she operates it out of her home. Young Dep. at 17-18, 28-29. She also admitted that she commingles Saving2Retire's funds and her personal funds. *Id.* at 25. Additionally, Young conceded that she did not provide the records requested by the Commission during its examination. *Id.* at 105-06, 108-09, 113, 130-31. And as of the time of the Commission's examination, Saving2Retire did not have a current balance sheet, trial balance, general ledger, or cash receipts and disbursements journal. *Id.* at 23, 106. It also did not have current income or cash flow statements. *Id.* at 23-24, 106. And these records were not current because Young did not "do the reconciliations" until "the end of the year." *Id.* at 106. Because these records were not current, Young said they were "not available." *Id.* at 106-07.

Respondents offer nothing relevant to counter the Division's claims.<sup>5</sup> The Division's evidence demonstrate that Saving2Retire, through Young's actions and omissions, willfully failed to comply with Section 204(a) by failing to make its records available and by impeding the Commission's examination and investigation. And Young willfully aided and abetted and caused Saving2Retire's violations.<sup>6</sup> The Division is thus entitled to summary disposition on its

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<sup>5</sup> Respondents purport to rely on Rule 204-2(d), but subsection (d) merely provides that an adviser may maintain records in a fashion that identifies clients "by numerical or alphabetical code or . . . similar designation." 17 C.F.R. § 275.204-2(d).

<sup>6</sup> To demonstrate aiding and abetting liability, the Division must show that Saving2Retire committed a primary securities violation, "knowledge or a general awareness by" Young of Saving2Retire's "wrongdoing," and that Young "knowingly or recklessly rendered substantial assistance to" Saving2Retire's primary violation. *Montford & Co., Advisers Act Release No. 3829, 2014 WL 1744130, at \*17 (May 2, 2014), pet. denied, 793 F.3d 76 (D.C. Cir. 2015).* Similarly, to show causing liability, the Division is required to show a primary violation, "an act or omission by [Young] that was a cause of the violation," and that Young "knew, or should have known, that [her] conduct would contribute to the violation." *Robert M. Fuller, Exchange Act Release No. 48406, 2003 WL 22016309, at \*4 (Aug. 25, 2003).* Young is Saving2Retire's sole owner, manager, and employee and her actions and omissions resulted in Saving2Retire's violations. She is therefore liable for aiding and abetting and causing those violations. *See The*

allegation that Saving2Retire violated, and Young aided and abetted and caused Saving2Retire's violation of, Section 204(a).

Although Villareal's declaration shows that Respondents did not disclose documents, it does not show that Saving2Retire failed to maintain required records. In other words, the fact Respondents failed to produce records does not mean Respondents failed to make and keep them. Young, however, admitted that certain records Saving2Retire was required to make and keep were not current, as required by Rule 204-2. *See* Young Dep. at 23-24, 106-07. This testimony is sufficient to warrant summary disposition as follows. The admitted failure to maintain a current cash receipts and disbursements journal represents a violation Rule 204-2(a)(1). The admitted failure to maintain a current general ledger is a violation of Rule 204-2(a)(2). The admitted failure to maintain a current trial balance, current balance sheet, and current income or cash flow statements is a violation of Rule 204-2(a)(6). As Saving2Retire is liable for these violations which Young—as Saving2Retire's sole owner, manager, and employee—aided and abetted and caused, the Division is entitled to summary disposition on most of its books and records allegations.<sup>7</sup>

The Division's motion with respect to the examination and books and records allegations is granted in part except as to Rule 204-2(a)(4).

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James E. Grimes  
Administrative Law Judge

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*Robare Grp., Ltd.*, Advisers Act Release No. 4566, 2016 WL 6596009, at \*11 (Nov. 7, 2016); *Montford & Co.*, 2014 WL 1744130, at \*17.

<sup>7</sup> The OIP includes the allegation that Respondents are liable for violating Rule 204-2(a)(4). The Division's motion does not address specific paragraphs under subsection (a). As subsection (a)(4), which concerns check books, bank statements, cancelled checks, and cash reconciliation, was not addressed in the declarations and sworn testimony submitted, the Division's motion is denied to the extent it relates to subsection (a)(4).