UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17352

In the Matter of

SAVING2RETIRE, LLC, AND MARIAN P. YOUNG,

Respondents.

DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF

Dated: April 16, 2019

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

STATUES

Securities Exchange Act of 1934

Investment Advisor Act of 1940

Advisers Act Rule

Division of Enforcement ("Division" or "DOE") of the Securities and Exchange Commission ("Commission") files this Post-Hearing Brief in support of its case against Respondents Saving2Retire, LLC ("S2R") and Marian P. Young ("Young"), and respectfully shows the following:

I. Procedural Background

The Commission first instituted this proceeding on July 19, 2016, alleging that S2R violated, and Young, as its sole owner and managing member, aided and abetted and caused S2R's violations of, Sections 203A and 204 of the Investment Advisers Act of 1940 ("Advisers Act") and Rule 204-2(a) thereunder by improperly registering with the Commission as an internet investment adviser when S2R did not qualify as such, failing to produce documents to the Commission's examination staff during the course of an examination and impeding the examination, and by failing to make or keep certain required records. [OIP, Investment Advisers Rel. No. 4457.] On May 17, 2017, a full evidentiary hearing was held ("2017 Hearing"). On October 19, 2017, following post-hearing briefing, an administrative law judge ("ALJ") issued an initial decision revoking S2R's registration, barring Young from the industry, imposing a cease and desist order against Respondents, and ordering S2R and Young to pay civil monetary penalties of $76,000 and $26,000, respectively.

On August 22, 2018, the Commission remanded the proceeding to the ALJ Office, vacated any prior opinions, and ordered a new hearing before a new ALJ. *Pending Admin. Proc.,* Securities Act of 1933 Rel. No. 10536, 2018 LEXIS 2058. Following the assignment to this Court, the parties agreed to have the Court decide the issues in post-hearing briefing without a new, in-person hearing, and agreed to the Court's admission into evidence the entire prior record of this case, including the transcript of, and all evidence presenting in, the 2017 Hearing. [*See* Admin. Proc. Rulings Rel. No. 62604 (Oct. 17, 2018)].

II. Summary of the Argument

Respondents S2R and Young are an investment adviser and its sole principal. Young improperly registered S2R with the Commission, failed to maintain certain books and records, and actively impeded the Commission's examination of S2R.

Under the "Internet Adviser Exemption" of the Investment Advisers Act of 1940 ("Advisers Act"), an investment adviser with less than $100 million in assets under management ("AUM") (which normally would be subject to state registration), may register with the Commission if it provides investment advice to all of its clients through an interactive website, with a de minimus allowance for advising less than 15 clients through other means ("Internet Adviser Exemption"). Saving2Retire is a small, one-person investment adviser with less than $5 million AUM that was registered with the Commission from 2011-2015 as an internet adviser, even though it has never had a single internet client.

In November 2014, the Commission's examination staff initiated a correspondence examination of S2R as part of an initiative to engage with investment advisers claiming reliance on the Internet Adviser Exemption for SEC registration. Young, S2R's owner, managing member, and sole employee, refused to provide basic documents to the Commission in connection with its exam, despite three requests from the Commission and multiple phone and email correspondence, and even though she was aware that all of the records of the investment adviser are, by law, subject to SEC examination. Young admitted that S2R never had a single internet client during the entire period it was registered as an internet adviser, and admitted that S2R did not even have a website until two years after its effective registration. When the exam staff obtained S2R's client records from the custodian, they revealed that S2R had at least 20 clients, and none of them were internet clients.

During the ensuing enforcement investigation, Young again refused to provide required

documents or appear for testimony in response to subpoenas. The Commission instituted this proceeding on July 19, 2016. To date, Respondents have not provided S2R's investment adviser documents. Young finally appeared for a deposition on November 1, 2016, and admitted all of the facts material here: S2R never operated as an internet investment adviser; Respondents failed to provide documents to the exam staff as required; and the books and records of S2R were not current. As a fiduciary and the owner of an investment adviser, her liability is established as a matter of law. These facts were also established at the 2017 Hearing, which the Court has admitted into evidence here by agreement of the parties.

The evidence in the record shows that the Division has met its evidentiary burden on each of its claims.

III. Argument and Authorities[1]

A. S2R is Liable for Willfully Violating, and Young is Liable for Willfully Aiding and Abetting and Causing S2R's Violations of, Advisers Act Section 203A.

Section 203A of the Advisers Act generally prohibits an investment adviser regulated by the state where it maintains its principle place of business from registration with the Commission unless it meets certain requirements. Rule 203A-1(a) sets the threshold requirement for SEC registration for most advisers at $100 million of regulatory assets under management ("AUM").[2] Rule 203A-2(e) exempts from the prohibition on Commission registration certain investment advisers that provide advisory services through the Internet. *See* Internet Adviser Exemption

[1] The Division fully incorporates herein its Proposed Findings of Fact and Conclusions of Law, which was filed concurrently with this Brief.

[2] The AUM threshold was "designed to distinguish investment advisers with a national presence from those that are essentially local businesses." *Exemption for Certain Investment Advisers Operating Through the Internet,* SEC Rel. No. IA-2091 (Dec. 12, 2002), 2002 WL 31778384 ("Internet Adviser Exemption Adopting Rel.").

Adopting Rel., 2002 WL 31778384, at *1.[3] Rule 203A-2(e) of the Advisers Act allows Internet Investment Advisers to register with the Commission with an AUM less than the minimum $100 million if the adviser "[p]rovides investment advice to all of its clients exclusively through an interactive website, except that the investment adviser may provide investment advice to fewer than 15 clients through other means during the preceeding twelve months." Advisers Act Rule 203A-2(e). These "Internet Investment Advisers" provide investment advice to all of their clients through interactive websites.[4] *See* Internet Adviser Exemption Adopting Rel., 2002 WL 31778384, at *1. As the adopting rule makes clear, the less than 15 non-Internet clients exception to the "all clients requirement" is a "de minimus" allowance. This narrow exception for Internet Investment Advisers is not intended to allow SEC registration by advisers: (1) with less than 15 clients; (2) who do not otherwise meet the threshold AUM requirements for federal registration; and (3) do not advise all—or in this case, *any*—of its clients through an interactive website. *See* Internet Adviser Exemption Adopting Rel., 2002 WL 31778384, at *3-4 (explaining that the Commission did not intend to undermine the National Securities Markets Improvement Act of 1996, which allocated regulatory responsibility over small advisers to state securities authorities); *see also SEC v. Zandford*, 535 U.S. 813, 819 (2002) and *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963) (stating that the securities laws should be broadly construed to promote their remedial purposes). The rule also requires the adviser relying on the exemption to maintain records demonstrating that it provides investment advice to its clients exclusively through

[3] Effective September 19, 2011, rule 203A-2(f) was renumbered as rule 203A-2(e) and the threshold was raised from $25 million to $100 million. *See Rules Implementing Amendments to the Investment Advisers Act of 1940,* SEC Rel. No. IA-3221 (June 22, 2011), 2011 WL 2482892.

[4] An interactive website is "a website in which computer software-based models or applications provide investment advice to clients based on personal information provided by each client through the website. The rule is thus not available to advisers that merely use websites as marketing tools or that use Internet vehicles . . . in communicating with clients." Internet Adviser Adopting Rel., 2002 WL 31778384, at *3.

an interactive website in accordance with the limits of the exemption. *Id.* at *5. This requirement can be met by maintaining records showing which of its clients the firm advised exclusively through its interactive website, and which, if any, of its clients the firm advised through non-Internet means. *Id.*

During all relevant periods, S2R had AUM of less than $5 million—far less than any applicable AUM threshold. [Transcript of 5/16/2017 Hearing ("Trans.") at 69:3-5.]

Young testified that:

- As the sole owner and managing member and chief compliance officer of the adviser, she owes fiduciary duties to her clients [Trans. 67:2-9; 68:20-22];

- From March 2011 through early 2015, S2R claimed that it was eligible for Commission registration, relying on the internet adviser exemption in Rule 203A-2(e) under the Advisers Act. [Trans. 70:1-5; Ex. 9 (Young Dep.), at 34:22-35:11]);

- Respondents never consulted an attorney and did not seek legal advice as to whether Rule 203A-2(e) applied to S2R's business. [Trans. 70:6-9.] Young did not hire any professionals, lawyers, or consultants to help her analyze whether S2R would qualify as an internet adviser. [Trans. 70:10-13];

- S2R did not even have a website until two years after its effective registration [Trans. 71:3-5];

- S2R never advised a single client through an interactive website, and never had a single dollar of revenue come in through an internet client. [Trans. 74:10-16];

- Young closed "the internet advisory . . . [w]hen it became apparent to me that I was out of my league, that I should not have been registered with the SEC because they were not going to give me consideration as a small firm, which I believed in the beginning, based on what I had read. And when that proved not to be the case, I need attorneys, I need this, I knew I couldn't afford it; so my remedy was to close down the company completely since it had never got off its foot anyway." ([Ex. 9 (Young Dep.). at 154: 9-25; Trans. 74:17-21];

- On March 14, 2016, the California Commissioner of Business Oversight denied S2R's investment adviser application and barred Young from any position of employment, management, or control of any investment adviser, broker-dealer, or commodity adviser. [Ex. 10; Trans. 89:2-7]; and

- Young is aware that the securities laws provide that the investment adviser must produce documents to the SEC when requested to do so. [Trans. 80:13-16.]

The lead SEC examiner, Javier Villareal, testified that he reviewed the client account records from Scottrade, the custodian who held all of S2R's accounts from the time it became SEC-registered, in order to count the clients whom S2R advised. Applying the Adviser Act definition of "client," Mr. Villareal determined that for the 12 month period ending November 2014, S2R had at least 20 clients. (Trans. 48:13-49:6; Exhibit 44.) Advisers Act Rule 202(a)(30)-1; Rule 203A-2(e)(3) (stating that an adviser may rely on the definition of client found in Rule 202(a)(30)).

In addition, Villareal found that S2R advised each of these clients. Specifically, each of the advisory fee contracts are signed by the client and by Young, authorize Scottrade to debit the client's account for advisory fees, and state that the client has entered into an agreement to pay management or advisory fees to S2R, the adviser. [Trans. 49:20-51-14; Ex. 23.] Clients pay advisory fees to compensate the adviser for providing investment advice. [Trans. 51:10-21.] Each contract contains a representation that the account holder authorizes and appoints S2R to manage his or her Scottrade brokerage account. [Trans. 51:22-52:19; Ex. 23.] Each contract provides that the "adviser is authorized to act for me and on my behalf and in the same manner and with the same force and effect as I might or could do . . . ." [*Id.*]

Importantly, each of S2R's clients were invested in Dimensional Fund Advisors, a mutual fund company whose funds can only be purchased through an investment adviser. [Trans. 49:7-19.] Dimensional Funds are not open to retail clients. [Trans. 49:12-19.] Thus, S2R's clients could not invest in those particular funds without S2R's adviser services.

Thus, there is no question that S2R advised more than 14 clients. At a minimum, the clients could not even invest in a Dimensional fund unless it utilized the services of an investment adviser. This fact is determinative. Thus, even if S2R advised its clients through an interactive

website, which it admittedly did not, it also could not register with the Commission as an internet adviser by relying on an argument that it advised less than 15 clients through other means and elevating the exception over the rule. Thus, S2R willfully violated Section 203A.

Further, as a fiduciary and the owner of an investment adviser, Young's liability is established as a matter of law. For aiding and abetting liability under the federal securities laws, the Division must establish: (1) that a primary securities law violation was committed by another party; (2) awareness by the aider and abettor that his or her role was part of an overall activity that was improper; and (3) that the aider and abettor knowingly and substantially assisted the conduct that constitutes the violation. *Bogar,* 2013 WL 3963608, at *20; *Voss v. SEC,* 222 F.3d 994, 1000 (D.C. Cir. 2000). "A person cannot escape aiding and abetting liability by claiming ignorance of the securities laws." *Bogar,* 2013 WL 3963608, at *20; *In re Sharon M. Graham, et al.,* SEC Rel. No. 34-40727, 1998 WL 823072, at *7 n.33 (Nov. 30, 1998). The "knowledge" or "awareness" requirement can be satisfied by recklessness when the alleged aider and abettor is a fiduciary or an active participant. *Bogar,* 2013 WL 3963608, at *20.

For "causing" liability, the Division must establish: (1) a primary violation; (2) an act or omission by the respondent that was a cause of the violation; and (3) the defendant knew, or should have known, that his conduct would contribute to the violation. *Id.* A respondent who aids and abets a violation is also a cause of the violations under the federal securities laws. *Id.* Negligence is sufficient to establish liability for causing a primary violation that does not require *scienter*. *Id.*

As the sole actor on behalf of S2R, the only active participant in its business, and its managing member, Young aided and abetted and caused S2R's registration violations. She has been involved in the securities industry since the 1980s; she owns a registered investment adviser; and she provides advisory services in a fiduciary capacity to over 20 clients, managing millions of dollars of assets. As such, Young should have been aware of the registration requirements relating

to investment advisers, or should have become aware before operating in violation of those requirements for more than four years. Young never even consulted a lawyer or otherwise sought professional advice regarding whether the firm could properly register with the Commission as an internet adviser, even though she knew that the adviser never had a single internet client and did not even have a website at all for the first two years it was registered with the Commission. Despite her awareness of these facts, Young signed the firm's registration and subsequent Forms ADV each year stating that it was eligible for Commission registration because it provided investment advice to all of its clients exclusively through an interactive website. For all these reasons, her participation in the violation was at least reckless. Young is the only person at S2R responsible for insuring that the firm complied with the federal securities laws. The fact that she operated the business in violation of basic registration requirements is reckless as a matter of law.

Respondents have admitted to violating the law, and have admitted every material fact necessary to prove the registration violation.

B. S2R is Liable for Willfully Violating, and Young is Liable for Willfully Aiding and Abetting and Causing S2R's Violations of, Advisers Act Section 204(a) and Rules 204(a) (1) and 204(a)(2).

Advisers Act Section 204(a) provides that all records of [registered] investment advisers, "are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest or for the protection of investors." Advisers Act Section 204(a). Advisers Act Rule 204-2(a)(1) requires that registered investment advisers "make and keep true, accurate and current ... [a] journal or journals, including cash receipts and disbursements, records, and any other records of original entry forming the bases of entries in any ledger." Advisers Act Rule 204-2(a)(2) requires that registered investment advisers "make and keep true, accurate and

current ... [g]eneral and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts."

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.*

As Young admitted, S2R (through Young) failed to provide required records of the adviser to the Commission during the course of an SEC examination. The examination staff made three separate written requests for substantially the same documents with reasonable time for production, but the firm refused to provide the requested documents. The examination staff spoke with Young on two separate occasions explaining the requirements to provide documents; however, she still declined to provide them. At the 2017 Hearing, she admitted these facts:

8 Q Now, the request that you received was to an
9 investment advisor, not -- not a -- just a citizen. Your
10 request from the exam staff came to you as the sole
11 management member of an investment advisor, correct?
12 A That is correct.
13 **Q And you agree that the securities laws provide**
14 **that investment advisor must produce documents to the SEC**
15 **when requested to do so?**
16 A Yes, that is correct.
17 **Q In response to the SEC request, you did not**
18 **produce a balance sheet or a trial balance or a general**
19 **ledger, correct?**
20 A That is correct.

Q And you didn't produce cash receipts or disbursement journal, correct?

A Yes.

Q You did not produce income statements or cash flow statements?

Page 81

A Yes.

Q And I think you testified in your deposition that you didn't produce them because those documents were not current at the time; is that correct?

A Yes.

Q You did not keep current bank statements of the advisor, correct?

A I did not keep --

Q Yes.

A -- bank statements are available online for most banks.

Q Did you provide those documents to the Commission?

A No.

Q Did you keep cancelled checks from -- that belonged to the advisor?

A Cancelled checked? Again, most documents are available online if I have a need for them.

Q Did you keep them in your records as the advisor?

A Checks that I had written?

Q Cancelled checks.

A Cancelled checks. My registry was a duplicate registry, so they did not return cancelled checks.

Q Did you keep cash reconciliations of the

Page 82

1 **advisor?**

2 A I received one receipt per month, so, no, I

3 don't do cash reconciliations.

[Tr. 80:8 – 82:3.]

Young, the firm's principal and sole representative, aided and abetted and caused the firm's violation of Section 204 when she refused to provide the required records to the examination staff.

C. S2R is Liable for Willfully Violating, and Young is Liable for Willfully Aiding and Abetting and Causing S2R's Violations of, Advisers Act Rules 204-2(a)(4) and 204(a)(6).

1. Rule 204-2(a)(4)

Advisers Act Rule 204-2(a)(4) provides that every registered investment adviser "shall make and keep true, accurate and current . . . [a]ll check books, bank statements, cancelled checks and cash reconciliations of the investment adviser."

Young testified that she did not keep current bank statements or cancelled checks of the advisor (pointing instead to Scottrade's custody of the records), and that she did not keep cash reconciliations. [Trans. 81:6-82:3] Specifically, her testimony was:

Page 81

6 **Q You did not keep current bank statements of the**

7 **advisor, correct?**

8 A I did not keep --

9 **Q Yes.**

10 A -- bank statements are available online for

11 most banks.

12 **Q Did you provide those documents to the**

13 **Commission?**

14 A No.

15 **Q Did you keep cancelled checks from -- that**

16 **belonged to the advisor?**

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18 available online if I have a need for them.
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Page 82

1 **advisor?**
2 A I received one receipt per month, so, no, I
3 don't do cash reconciliations.

Young also told the Commission's exam staff that she was not maintaining the financial records the staff had requested. [Trans. 38:20-22.]

Thus, by Young's own admission, S2R willfully violated, and Young aided and abetted and caused S2R's violation of, Advisers Act Rule 204-2(a)(4).

2. Rule 204-2(a)(6)

Advisers Act Rule 204-2(a)(6) requires that registered investment advisers "make and keep true, accurate and current ... [a]ll trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser." On November 19, 2014, the examination staff requested copies of Saving2Retire's balance sheet, trial balance, cash receipts and disbursements journal, income statement, and cash flow statements as of the end of its most recent fiscal year and the most current year to date. On December 5, 2014, Young responded to the request by stating "not applicable" and not producing any documents. Young admitted this violation

Q In response to the SEC request, you did not

18 **produce a balance sheet or a trial balance or a general**

19 **ledger, correct?**

20 A That is correct.

21 **Q And you didn't produce cash receipts or**

22 **disbursement journal, correct?**

23 A Yes.

24 **Q You did not produce income statements or cash**

25 **flow statements?**

Page 81

1 A Yes.

2 **Q And I think you testified in your deposition**

3 **that you didn't produce them because those documents were**

4 **not current at the time; is that correct?**

5 A Yes.

6 **Q You did not keep current bank statements of the**

7 **advisor, correct?**

8 A I did not keep --

9 **Q Yes.**

10 A -- bank statements are available online for

11 most banks.

12 **Q Did you provide those documents to the**

13 **Commission?**

14 A No.

[Trans. 80:17-81:14.] Thus, by Young's own admission, S2R willfully violated, and Young aided and abetted and caused S2R's violation of, Advisers Act Rule 204-2(a)(6).

D. Remedial Relief is Appropriate.

Based on Respondent's admitted violations and those violations established at the 2017 Hearing, remedial relief is proper. The Court should revoke S2R's registration, bar Young from the securities industry, issue Respondents a cease-and-desist order, and impose second-tier penalties.

1. The Court Should Revoke S2R's Registration and Bar Young From Being Associated With an Investment Adviser.

Sections 203(e) and 203(f) of the Advisers Act authorize the Court to revoke the registration of any investment adviser, or of an associated person of an investment adviser, if it finds it is in the public interest and that, among other reasons, the adviser has willfully violated any provision of the Advisers Act or rules thereunder. S2R willfully violated, and Young willfully aided and abetted and caused S2R's violations of the Advisers Act, and they did so with deliberate or reckless disregard of the regulatory requirements governing its business. S2R, a one person investment adviser with AUM of less than $5 million and not a single internet client, is not properly registered with the Commission, and its registration as an investment adviser should be revoked. The record demonstrates that Respondents repeatedly refused to provide documents or to cooperate or participate with either the Commission examination, or with the subsequent enforcement action which resulted from Respondents' failure to cooperate. Indeed, to this day, Respondents have refused to even provide the Commission with a list of its own clients.

Rather than comply with its legal obligation to provide documents to the Commission upon request, Respondents went so far as to attempt to initiate an investigation by her Congressman of the SEC's request for information and of certain SEC staff.

Revocation is an appropriate remedy where, as here, an investment adviser has failed to cooperate with a Commission examination. *See, e.g., In the Matter of The Barr Financial Group, Inc.*, Admin. Proc. File No. 3-9918, Advisers Act Release No. 2179 (Oct. 3, 2003). [T]he failure to cooperate with a Commission examination constitutes 'serious misconduct' justifying strong sanctions. *Schield Mgmt. Co. and Marshall L. Schield,* Rel. No. 2477, Admin. Proc. File No. 3-11762, at *9 (Jan. 31, 2006).

In determining whether Young should be barred, the Commission considers: 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. *Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. *In the Matter of Gary M. Kornman,* SEC Rel. No. 335 (Oct. 9, 2007). As the Commission has often emphasized, the public interest determination extends to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. *Id.*

Young's unlawful conduct was egregious and recurrent. The record keeping requirements in Rule 204-2(a) are a "keystone of the [Commission's] investment adviser surveillance" system. *Hammon Capital Mgmt. Corp.*, Advisers Act Release No. 744, 1981 WL 36244, at *2 (Jan. 8, 1981). And as a securities professional, Young was "required to be knowledgeable about, and to comply with," these recordkeeping requirements. *See Abraham & Sons Capital, Inc.,* Exchange Act Release No. 44624, 2001WL 865448, at *8 (July 31, 2001). Further, Respondents owed their clients a fiduciary duty to exercise utmost care in their professional conduct. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963). Respondents, however, ignored these principles. Before speaking to Commission staff, Young was unaware of S2R's record keeping responsibilities. [Tr. 38.] She kept none of the client records that the Adviser Act Rules require, and she commingled her personal funds with those of S2R's clients. And she compounded those failures by impeding the Commission's examination.

Young has never acknowledged the wrongful nature of her conduct, or made assurances against future violations, even in her refusal to cooperate with the SEC examination. Absent an industry bar, Young's occupation will provide numerous opportunities for future violations. She

has over 30 years of experience in the securities industry and, absent a bar, could continue to associate with an investment adviser. Moreover, a strong deterrent against refusing to cooperate in an SEC examination is essential to the Commission's mission. Industry bars are essential to avoid the possibility of future violations. Thus, pursuant to Section 203(f) of the Advisers Act, the Court should impose an industry bar against Young, barring her from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. Young's deliberate attempt to evade her regulatory responsibilities by refusing to provide the requested books and records to the Commission demonstrates a fundamental unfitness to advise clients as a fiduciary.

2. The Court Should Issue a Cease and Desist Order Against Respondents.

Section 203(k) of the Advisers Act, 15 U.S.C. § 80b-3(k), authorizes the Court to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate" any provision of the Advisers Act or the rules and regulations thereunder, as well as any other person that is, was, or would be a cause of the violation. In determining whether a cease-and-desist order is appropriate, the Commission considers numerous factors, including the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, the respondent's opportunity to commit future violations, the degree of harm to investors, the extent to which the respondent was unjustly enriched, and the remedial function to be served by the cease-and-desist order in the context of other sanctions being sought. *WHX Corp. v. SEC*, 362 F.3d 854, 859-60 (D.C. Cir. 2004) (appeal of administrative cease-and-desist order); *KPMG v. SEC*, 289 F.3d 109, 124-25 (D.C. Cir. 2002) (same). "The risk of future violations required to support a cease-and-desist order is significantly less than that required for an injunction, and, absent evidence to the contrary, a single past violation ordinarily

suffices to raise a sufficient risk of future violations." *In re Rodney R. Schoemann*, 2009 WL 3413043, at *12-13 (Oct. 23, 2009), *aff'd*, 2010 WL 4366036 (D.C. Cir. 2010). The Court should also "consider the function that a cease-and-desist order will serve in alerting the public that a respondent has violated the securities laws." *In re Fundamental Portfolio Advisers, Inc.*, 2003 WL 21658248, at *18 (July 15, 2003).

Here, the Court should order S2R and Young to cease and desist from committing or causing violations of and any future violations of Sections 203A and 204 of the Advisers Act and Rule 204-2(a) thereunder. Respondents' violations involved the failure to provide requested documents during the course of a Commission examination. Despite the staff's repeated requests for documents, Respondents' lack of cooperation continued until this proceeding was filed, and Young has never acknowledged her wrongdoing. "The industry cannot tolerate an investment adviser that, holding a fiduciary position, would undermine the regulatory system by deliberately thwarting a Commission examination." *Schield Mgmt. Co. et al.*, Rel. No. 2477, at *10. A cease and desist order is in the public interest.

3. The Court Should Order Respondents to Pay Civil Penalties.

Section 203(i) of the Advisers Act, 15 U.S.C. § 80b-3(i), authorizes the Court to impose a civil monetary penalty against a respondent who willfully violated, *inter alia,* the Advisers Act or the rules and regulations thereunder. A "willful" violation is one in which the actor intends to do the act which constitutes his violation; willfulness does not require showing that the violator acted with knowledge that his conduct was unlawful. *Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.D.C. 2000). Included within a violation of the Advisers Act is the aiding and abetting of principal violations. *SEC v. DiBella,* 587 F.3d 553, 571(2nd Cir. 2009).

Before assessing a civil penalty, the Court must conclude that it is in the public interest to do so. Whether a proposed penalty is in the public interest is considered in light of six factors: (1)

whether the violation involved fraud, deceit, manipulation, or a reckless disregard of a regulatory requirement; (2) whether any harm to others to others resulted from the violation; (3) the extent of the wrongdoer's unjust enrichment; (4) whether there are any prior violations; (5) whether there is a need to deter the wrongdoer or others from such violations; and (6) such other matters as justice may require. Advisers Act Section 203(i)(3) [15 U.S.C. § 78u-2].[5]

Penalties are statutorily authorized in three tiers and differ for "natural persons" and "other persons," or entities. 15 U.S.C. § 80b-9(e)(2). The original statutory penalty amounts have been adjusted over time for inflation. 17 C.F.R. § 201.1004. For acts committed after March 4, 2009, first-tier penalties may be imposed in the amount of $7,500 for individuals and $75,000 for entities per violation. 15 U.S.C. § 80b-9(e)(2)(A); 17 C.F.R. Pt. 201, Subpt. E, Table IV. Where the violative act involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, second-tier penalties may be imposed in the amount of $75,000 for individuals and $325,000 for entities per violation. 15 U.S.C. § 80b-9(e)(2)(B); 17 C.F.R. Pt. 201, Subpt. E, Table IV. If the violative act or omission involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, and directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission, a third-tier penalty may be imposed of $150,000 for individuals and $725,000 for entities per violation. 15 U.S.C. § 80b-9(e)(2)(C); 17 C.F.R. Pt. 201, Subpt. E, Table IV.

---

[5] Other factors that may also be considered are: (1) the egregiousness of the violations at issue; (2) the degree of Respondents' scienter; (3) the repeated nature of their violations; (4) their failure to admit their wrongdoing; (5) whether their conduct created substantial losses or the risk of substantial losses to other persons; (6) their lack of cooperation and honesty with authorities, if any; and (7) whether a penalty that would otherwise be appropriate should be reduced due to respondent's demonstrated current and future financial condition. *SEC v. Lybrand*, 281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003), *aff'd*, 425 F.3d 143 (2d Cir. 2005).

In this case, second tier penalties are appropriate due to Respondents' reckless disregard of the regulatory requirements at issue, including the requirement to cooperate with Commission examinations. Respondents did not cooperate in the examination and did not produce the financial records as requested. This is serious misconduct that was repeated over several years, and occurred despite clear warnings from the Commission's staff about the obligation to cooperate and the penalties for not doing so. Respondents' clear misconduct demonstrates either that they fundamentally misunderstand the regulatory obligations to which they are subject, or that they hold those obligations in contempt. Thus, remedial relief is warranted. *See, e.g., In the Matter of The Barr Financial Group, Inc.*, Admin. Proc. File No. 3-9918, Advisers Act Release No. 2179 (Oct. 3, 2003).

Public deterrence is necessary to inform others, including other registered investment advisers, that investment advisors cannot ignore the requirement that they provide their records to the Commission and cooperate in Commission investigations. Further, Respondents do not acknowledge their wrongdoing, but instead, continue to stonewall, actually blaming the Commission at the hearing for "drag[ging] all these people down from Fort Worth to put a trial on in a case where someone doesn't want to play anymore[]." [Trans. 65:2-11.]

Thus, second tier penalties are appropriate in an amount to be determined by the Court.

CONCLUSION

For all the reasons stated above, the Division requests that the Court find for the Division and impose the relief requested.

CERTIFICATE OF SERVICE

In accordance with Rule 150 of the Commission's Rules of Practice, I hereby certify that true and correct copy of the foregoing document was served on the following persons on April 16, 2019, by the method indicated:

By UPS and email:
Honorable Brenda P. Murray
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

By UPS and email (*ycgc@comcast.net*):
Saving2Retire, LLC
Marian P. Young
11323 Siamese Lane
Sugar Land, TX 77478

/s/Jennifer D. Reece
Jennifer D. Reece

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17352

In the Matter of **SAVING2RETIRE, LLC, AND MARIAN P. YOUNG,** **Respondents.**	**DIVISION OF ENFORCEMENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

FINDINGS OF FACT

A. Respondents Are Fiduciaries and Young is an Experienced Securities Professional.

1. Saving2Retire is a registered investment adviser (Trans. 67:5-7), and Young, as is its sole owner and managing member, is an associated person of an investment adviser. (Trans. 67:2-4.) Young owes fiduciary duties to her clients. (Trans. 68:20-22.)

Page 67 :
Q You are the sole owner and managing member of Saving2Retire, LLC?
A Yes, I am.
Q Saving2Retire is a commission-registered investment advisor, correct?
A That is correct. It was.

Page 68
Q As the sole owner and managing member of the advisor, you owe fiduciary duties to your clients?
A That is correct.

2. During all relevant periods, S2R operated out of Young's private residence in Sugar Land, Texas, and had no other employees. (Ex. 9 [Young Dep. 18:1-10; 28:25-29:2].) S2R managed client accounts on a non-discretionary basis and Young claims it had approximately $4

million to $4.5 million in assets under management. (Ex. 9 [Young Dep. at 33:21-34:5; 89:5-6].)

Page 18:1-10:

1 Q. What is the principal place of business for
2 Saving2Retire?
3 A. The principal place of business is 11323
4 Siamese lane, Sugar Land, Texas 77478.
5 Q. That is also your home address?
6 A. That is correct.
7 Q. Has the business always been operated out of
8 your home?
9 A. Not always. Saving2Retire has always been
10 operated out of my home.

Pages 28:25-29:2:

25 Q. And Saving2Retire -- are there any other
1 employees other than you?
2 A. No.

Pages 33:21-34:5:

21 Q. During the period 2011 to 2015, what were
22 Saving2Retire's assets under management?
23 A. Saving2Retire had zero clients for the
24 internet. And the existing clients were approximately
25 in the 4, $4 1/2 million range for total assets.

1 Q. What has been the highest assets under
2 management -- the highest point of the assets under
3 management between 2011 and 2015?
4 A. I don't know exactly. I would say
5 approximately 4 1/2 million.

3. Young has over 30 years of experience in the securities industry. Before becoming the sole manager, owner, and Chief Compliance Officer of S2R, Young was a registered representative from the mid-1980s to approximately 1996. (Trans. 67:22-68:1.) In 1997, Young formed Young Capital Growth Company, an investment management consulting firm, which she operated until she formed S2R in 2011. (Trans. 68:2-11.)

Page 67
22 Q Before becoming the sole manager, owner, and
23 chief compliance officer of Saving2Retire, you were a
24 registered representative from the mid 1980s to
25 approximately 1996?

Page 68
1 A Mid 1980s -- that seems correct.
2 Q In 1997, you formed Young Capital Growth
3 Company, an investment management consulting firm,
4 correct?
5 A Investment management consulting -- it was a
6 investment advisory firm.
7 Q An investment advisory firm?
8 A Yes.
9 Q And you operated that investment advisory firm
10 until you formed Saving2Retire in 2011?
11 A That is correct.

4. As S2R's Chief Compliance Officer, Young is responsible for ensuring that S2R complies with its regulatory requirements, including Advisory Act requirements. (Trans. 68:12-16.)

Page 68
12 Q As Saving2Retire's chief compliance officer,
13 you are responsible for ensuring that Saving2Retire
14 complies with its regulatory requirements, including
15 advisory act requirements?
16 A That is correct.

5. Young signed the firm's registration and subsequent Forms ADV for the years 2011 through 2015. (Trans. 68:17-19.)

Page 68
17 Q You signed the firm's registration and
18 subsequent forms ADV for the years 2011 through 2015?
19 A That is correct.

B. S2R Relied on the Internet Adviser Exemption for SEC Registration, But Never Had A Single Internet Client.

6. From March 2011 through early 2015, S2R claimed that it was eligible for

Commission registration, relying on the internet adviser exemption in Rule 203A-2(e) under the Advisers Act. (Trans. 70:1-5)

Page 70
1 Q In order to be registered with the Commission
2 beginning in 2011, Saving2Retire relied on what's known
3 as the Internet Advisor Exemption set forth in the
4 Advisor's Act, correct?
5 A Correct.

7. Respondents never consulted an attorney and did not seek legal advice as to whether Rule 203A-2(e) applied to S2R's business. Young did not hire any professionals, lawyers, or consultants to help her analyze whether S2R would qualify as an internet adviser. (Trans. 70:6-13.)

Page 70
1 Q In order to be registered with the Commission
2 beginning in 2011, Saving2Retire relied on what's known
3 as the Internet Advisor Exemption set forth in the
4 Advisor's Act, correct?
5 A Correct.

8. From the time Young formed S2R in 2011 through 2016, S2R had never had a single internet client, and never had a single dollar of revenue come in through an internet client. (Trans. 74:10-16.)

Page 74
10 **Q From the time you formed Saving2Retire in 2011**
11 **through 2016, Saving2Retire never advised a single**
12 **internet client; is that correct?**
13 A That is correct.
14 **Q And never had a single dollar of revenue come**
15 **in through an Internet client?**
16 A That is correct.

9. Young admits that, at least between the years 2011 and 2013, S2R did not have an interactive website. (Trans. 71:3-5.)

3 Q Okay. So between 2011 and September, 2013,

4 Saving2Retire did not have an active Website?
5 A That's correct.

C. S2R Provided Investment Advice to More than 14 Clients.

10. All of Respondents' client accounts were held at Scottrade beginning at the time S2R became registered with the Commission as an investment adviser. (Trans. 69:21-25.)

Page 69
21 Q Would you agree that all of your client
22 accounts were held at Scottrade beginning at the time
23 that you became registered with the Commission as an
24 investment advisor?
25 A Some time shortly after, yes.

11. Young refused to provide to the SEC a list of clients by name or account number. Instead, she provided what purported to be a list of every one of S2R's clients, listing only 8 clients and identifying them as "Clients A-H." (Ex. 15; Trans. 76:9-17.) She testified that Scottrade, the custodian, would have the accurate client list. (Ex. 9 [Young Dep. at 90:9-22].)

Trial Trans Page 76
9 Q You never produced a list of clients by -- by
10 specific name or account number, correct?
11 A That is -- by -- not -- by account numbers,
12 yes, that is correct.
13 Q Instead, you provided to the Commission, what
14 purported to be a list of every one of your clients
15 listing only eight clients and identifying them as
16 Clients A through H?
17 A Correct.

Deposition Pages 89:16-90:8, 90:9-22

9 Q. Okay. Well, if you had to create this
10 information today, where would you go to look?
11 A. I would go -- today I would go to either the
12 website, on the broker/dealer website. I would go there
13 and create them.
14 Q. To Scottrade?
15 A. Yes, I would go to Scottrade.
16 Q. Okay. Saving2Retire does not keep a list
17 itself of all clients and their account information?

18 A. I do keep a list when I'm billing through
19 Scottrade. I would give the end-of-a-month balance or
20 something right before billing.
21 Q. But that's done through Scottrade?
22 A. Yes, it's done through Scottrade.

12. Young does not count her relatives as "clients." (Trans. 76:18-22.)

18 Q You don't consider a client, quote, client,
19 someone who you're related to?
20 A No.
21 Q Is that correct? You don't?
22 A That is correct.

13. According to the Scottrade records, S2R had 20 clients for the one year time period ending November 30, 2014. (Ex. 44; Trans. 48:13-49:6.)

Page 48
13 Q What time period did you focus on specifically
14 for this summary?
15 A Her registration period. But we requested
16 documents for her registration period, but based on the
17 rule, it states the de minimus rule is for the preceding
18 12 months, so we focused on November, 2014, and the
19 previous 12 months.
20 Q How did you determine how many clients Ms.
21 Young or Saving2Retire advised?
22 A So in reading the rule, it's -- it's -- in
23 Section E, it specifically tells you the definition to
24 go -- what rule to go to for the specific definition of a
25 client.
Page 49
1 Q So you applied the -- the definition of client
2 that's found in the Investment Advisor Act?
3 A Yes, ma'am.
4 Q In applying that definition, you determined
5 that there were how many advisory clients?
6 A 20.

14. Each of the clients was invested in Dimensional Fund accounts, which are not available to retail clients, and must be purchased through an investment adviser. (Trans. 49:7-19.)

Page 49
7 Q What types of funds, after -- when you reviewed

8 the account statements, what types of funds, in general,
9 were the client accounts invested in?
10 A From my recollection, she used Dimensional Fund
11 Advisors, a mutual fund company for most of her clients.
12 Q And explain what that is?
13 A Dimensional Fund Advisor is a mutual fund
14 company that you can only purchase for clients through an
15 investment -- through an investment advisor.
16 Q So not just anyone can invest in these funds?
17 A Correct. They are not open to retail clients.
18 Q You have to go through an investment advisor?
19 A Correct.

15. Each of the 20 clients and Ms. Young signed an advisory fee contract in which the client states that he or she has entered in to a separate agreement to pay management or advisory fees to S2R. (Ex. 23; Trans. 49:23-51:9.)

Page 49
23 Q Let's turn to Exhibit 23. Explain what Exhibit
24 23 is.
25 A This is part of the new account statement
1 paperwork, and it's titled, "Investment advisor limited
2 trading and advisory fee authorization."
3 Q These documents were obtained from Scottrade?
4 A Yes, ma'am.
5 Q And is this a compilation of the investment
6 advisor trading agreements that were taken from the
7 client account records?
8 A Yes, ma'am.
9 Q What specifically did you look at with regard
10 to the advisory fee contracts in Exhibit 23?
11 A I wanted to see what authority she had. So
12 here, she's -- the client is agreeing to under
13 authorization for advisory fees that I authorize
14 Scottrade to debit my account for advisory fees, and it
15 lists at the bottom, investment advisory information, the
16 account number, her fee account number, and her signature
17 and her -- the name of her company.
18 Q Okay. So read that first sentence on the top
19 of the page under, "Authorization to pay advisory fee."
20 A It states, "I have entered into a separate
21 agreement to pay management or advisory fees to my
22 advisor."
23 Q And is there a similar representation for each

24 one of these client accounts?
25 A Yes, ma'am.

Page 51
1 Q And then on the kind of fourth of the way down
2 in that first box, authorization for advisory fees, the
3 box is checked that says, "I authorize Scottrade to debit
4 my account for advisory fees," correct?
5 A Correct.
6 Q And is there a -- is the box -- is there an
7 identical box checked on each one of these client account
8 forms?
9 A Yes, ma'am.
10 Q What did that signify to you?
11 A That she's holding herself out as the
12 investment advisor of these accounts, and she is
13 informing her clients -- her clients were agreeing to pay
14 her advisory fees.

16. Each of the clients authorized and appointed Young/S2R to "act on the client's behalf and in the same manner and with the same force and effect" as the client could do, and authorized Scottrade to follow the adviser's instructions with respect to enumerated powers, including buying and selling securities, and receiving information about the client's account (including online account information, account statements, trade confirmations, and tax information). (Ex. 23, *e.g.*, SECFWRO-FW-03993-000592; Trans. 51:22-52:19.)

Page 51
22 Q And if you'll look at just Page 2, for example,
23 the second page of Exhibit 23, will you read just that
24 first paragraph under the account owner authorization
25 investment advisor trading powers?

Page 52
1 A "I/we as the undersigned account owners hereby
2 authorize and appoint the investment advisor listed below
3 and its employees and agents, if applicable, to manage my
4 Scottrade brokerage account. The advisor is authorized to
5 act for me and on my behalf and in the same manner and
6 with the same force and effect as I might or could do,
7 and Scottrade is authorized to follow my investment
8 advisors instructions as it's directly instructed by me

9 with respect to the following authorized powers."
10 Q Then it enumerates some powers that the
11 investment advisor has on behalf of the client?
12 A Yes.
13 Q This gives the investment advisor the authority
14 to take certain actions with respect to the client
15 accounts?
16 A Yes.
17 Q And is there a -- an identical representation
18 for each of the client accounts?
19 A Yes.

17. Clients of an investment adviser pay management or advisory fees to an advisor as a way of compensating the advisor for providing investment advice. (Trans. 51:15-21.)

Page 51
15 Q And in your experience, why does a client pay
16 management or an advisory fee to an advisor?
17 A For the investment advice of that investment
18 advisor, to manage their accounts.
19 Q It's a way of compensating the advisor for
20 providing investment advice?
21 A Yes, ma'am.

18. The SEC examination concluded, among other things, that S2R was not properly registered with the SEC as an internet adviser because: (1) it was not providing investment advice exclusively through an interactive website; and (2) it surpassed any applicable de minimus exception, if any, because it advised more than 14 clients. (Trans. 56:16-57:3)

Page 56
16 Q Based on your examination of Saving2Retire, did
17 you reach any conclusions about whether Saving2Retire was
18 properly registered as an Internet investment advisor
19 with the SEC?
20 A I did.
21 Q What did you conclude?
22 A My conclusion was that she was not properly
23 registered under the Internet investment advisor role.
24 Q And why was that?
25 A First, she was not providing investment advice

Page 57
1 solely through an interactive Website, and then second,
2 she surpassed the de minimus exception by exceeding the
3 number of accounts that was allowed.

D. Respondents Failed to Produce Requested Documents to OCIE Examination Staff As Required By Law.

19. In November 2014, the staff of the Commission's Office of Compliance Examinations ("OCIE") and Inspection conducted a correspondence compliance examination of S2R. (Trans. 75:11-14.)

11 Q Okay. Beginning in approximately November,
12 2014, the SEC conducted a compliance examination of
13 Saving2Retire, correct?
14 A Correct.

20. As the managing member of an investment adviser, Young is aware that all of the records of the investment adviser are, by law, subject to examination by representatives of the Commission. (Trans. 75:19-76:8.)

Page 75
19 Q As the managing member of an investment
20 advisor, you were aware that all of the records of the
21 investment advisor are, by, law, subject to examination
22 by representatives of the Commission?
23 A Would you repeat the question?
24 Q As a managing member of an investment advisor,
25 you were aware that all of the records of the investment

Page 76
1 advisor are, by law, subject to examination by
2 representatives of the Commission?
3 A I'm not sure what I was aware of at that time.
4 The reason I'm trying to think when were you aware of it.
5 I'm not sure what exactly I was aware of at that time.
6 Q Have you since become aware that that is the
7 case?
8 A Yes.

21. On November 19, 2014, the staff of the Securities and Exchange Commission sent

a document request to S2R. In the document request, the firm was notified that the Commission was conducting an examination pursuant to Section 204 of the Advisers Act. (Ex. 9 [Young Dep.] at 55:6-56:1; Ex. 2)

> Page 55
> **6 Q. Let's look at Exhibit 1 that you have before**
> **7 you. The attachment to -- the first attachment is a**
> **8 letter to you written by Linda Hoffman, CPA, supervisory**
> **9 staff accountant, dated November 19th, 2014, regarding**
> **10 the examination.**
> **11 Do you recall this letter? Do you recall**
> **12 receiving this letter?**
> 13 A. I cannot recall the exact letter. It seems
> 14 familiar.
> **15 Q. Do you generally recall being informed in**
> **16 writing that the staff of the Securities and Exchange**
> **17 Commission is conducting an examination of Saving2Retire**
> **18 as part of the office of compliance and inspection and**
> **19 examinations initiative to engage with the population of**
> **20 investment advisers that had never been examined?**
> 21 A. That is correct.
> **22 Q. And do you generally recall, as this letter**
> **23 sets forth, that you were asked to provide specific**
> **24 information that was on a enclosed list of documents**
> **25 that were requested from Saving2Retire?**
>
> Page 56
> 1 A. That is correct.

22. On December 5, 2014, the staff received a document production from Young that contained a few pages of documents addressing some of the information requested in the November 19, 2014 letter, but which lacked most of the requested documentation. Young's response stated, among other things, that "[g]athering information in any additional specificity would be burdensome to my business in time and income lost. My clients believe and I share their belief that additional specificity violates the protections our Constitution provides its citizens. Marian Young, managing member." (Ex. 3.)

23. On December 11, 2014, the staff spoke with Young about the lack of production of

certain documents from the original document request. During that call, the staff discussed the firm's responsibility to provide documents under the Advisers Act, and indicated that additional documents would be required. (Ex. 4; Trans. 36:18-25; 37:1-5; 37:14-38:8; 39:22-)

Page 36
18 **Q What happened after the SEC received this**
19 **response? What was the next step in the -- in the**
20 **examination?**
21 A So that's when I came on board, when this
22 response was provided. I took a look at these -- her
23 response, the documents that she provided. We reached
24 out to her to schedule a conference call, and we held a
25 conference call.

Page 37
1 **Q Can you describe that call that you held? First**
2 **of all, who was on the call?**
3 A Sure. Ms. Young was on the call, myself, the
4 exam manager, Linda Hoffman, and then her supervisor,
5 Michael Gunst.

14 **Q What was the purpose of that call?**
15 A To discuss her requirements to produce
16 documents and just to learn a little bit more about the
17 firm since this was inadequate -- since her response was
18 inadequate.
19 **Q Did you try to explain to her what the rules**
20 **were that required -- that required the advisor to**
21 **produce documents to the SEC upon request?**
22 A We did. First, we -- during the course of the
23 conversation, we tried to say, "Why didn't" -- you know,
24 "Why didn't you provide this?" She would say, "why do I
25 have to produce that?" Very defensive and evasive. I

Page 38
1 actually had the rule book with me and I said this rule
2 states as a registered investment advisor, you have to
3 maintain all these records. As a registered investment
4 advisor you are subject to examinations, and then we even
5 went back to the form that we discussed earlier
6 requiring -- stating all the rules about how you're
7 supposed to produce documents and why you're supposed to
8 produce them.

Page 39
22 Q What happened next? What was the next step?
23 A So that -- so after having that discussion with
24 her, we tried to make it very clear that you're -- as a
25 registered investment advisor with the SEC, that you're

Page 40
1 subject to examination. You're supposed to provide all
2 these records. These are all the records that the rules
3 state are required to maintain. We said that we are
4 going to be sending her an e-mail with the same document
5 request, and that she could provide them on a rolling
6 basis. And by "rolling basis," I mean start giving us
7 what you have immediately instead of a specific deadline
8 in the future. We tried to be open and work with her,
9 you know, start giving us documents as soon as possible
10 to alleviate our risk, our concerns.

24. The staff sent a follow up e-mail to Young on December 11, 2014 memorializing the production of those additional documents requested during the telephone call. Young agreed to produce the documents on a rolling basis and to complete the production no later than December 19, 2014. On December 12, 2014, Young sent an email to the staff indicating that she would not be able to produce documents until the following week. (Exhibits 4, 5.)

25. On December 19, 2014, the lead examiner, Javier Villarreal, called Young to verify that the documents would be produced as agreed. Young returned that call and indicated that she would not produce any additional documents. She also indicated that she would be withdrawing the firm's registration with the Commission. Mr. Villarreal informed her that regardless of whether she intended to withdraw the firm's registration, she was still required to produce the requested documents. At that point, she abruptly ended the conversation and hung up. (Trans. 42:11-43:19.)

Page 42
11 Q Okay. And then after that point, you had
12 another follow-up call with Ms. Young?

13 A I did. So as the follow-up request said,
14 "Please provide documents no later than December 19th,"
15 on the 12th, she said she was ill and she wasn't going to
16 provide documents. So on the morning of December 19th, I
17 called her. She didn't answer, but I left a voicemail
18 saying who I was, you know, part of the examination, are
19 you going to be providing the documents that we requested
20 and that you said that you would. I left a message and
21 then she called me back that afternoon.
22 Q What did Ms. Young say during that phone call
23 that afternoon?
24 A Initially she said that she was going to be
25 withdrawing her registration. She would not be providing

Page 43
1 any of these documents. Then she said that -- went on a
2 bit of a rant saying we have too much regulation, we're
3 not keeping in mind that she's a small business, we are
4 asking for too much, she wasn't aware of all these rules
5 and regulations. I let her -- I tried to give her the
6 opportunity to speak, and then I tried to reiterate,
7 well, you're still -- you're still registered as
8 investment advisor. You're still subject to the
9 examination. These are all things that you are supposed
10 to maintain. She said, well, I'm not going to provide
11 them. I'm not -- this is it. I'm like, "Well, the
12 examination has been open. We still have to continue
13 with it." I tried to get her to either see if I could
14 schedule a follow-up call with management or to see if I
15 could patch in a manager, but she abruptly ended the call
16 and said, no, I'm not providing anything else.
17 Q So she refused to provide any additional
18 documents?
19 A Yes.

26. On January 5, 2015, the SEC sent a letter to Young setting forth the chronology of requests that had been made to Respondents, and making a final request that S2R produce all documents previously requested by January 12, 2015. (Ex. 6; Ex. 9 [Young Dep.] at 112:14-18 (stating that the letter "seems accurate").)

Page 112:14-18:

14 Q. Okay. But is there anything in that paragraph

15 that you -- as you sit here today, that you think is not
16 accurate?
17 A. They were conducting an exam, et cetera. It
18 seems accurate.

27. The next day, on January 6, 2015, Young contacted her Congressman to conduct an inquiry into the fact that the SEC had requested client information from S2R. (Ex. 7; Ex. 9 [Young Dep.] at 113:10-115:18.)

Pages 113:10-115:18:

10 Q. I'm handing you what's been marked as
11 Deposition Exhibit 6.
12 (Plaintiff's Exhibit No. 6 was marked for
13 identification.)
14 Q. Do you recognize this document?
15 A. Yes.
16 Q. What is this?
17 A. I contacted my congressman, Pete Olson's,
18 office, yes.
19 Q. Can you describe what this document is?
20 A. It's -- they asked me to send in my -- whatever
21 I wanted with the congressional office to look into, and
22 so this is me filling out this document for the
23 congressional office.
24 Q. Okay. So the issue that you were bringing to
25 your congressman was that, in the first page, it says –

1 I mean in the first paragraph, The Securities and
2 Exchange Commission, Fort Worth Regional Office Marshall
3 Gandy Associate Regional Director. As part of exam and
4 request for client information such as their account
5 number and statements some of clients contacted have
6 indicated they do not want this information sent to
7 government.
8 So you were contacting your congressman why?
9 A. For clarification on the privacy laws. I could
10 not get any information from the SEC on what are the
11 privacy laws and what are the rights of the clients when
12 they do not want to send that information in. Since I
13 could not get any response from them, I reached out to
14 the congressional office to see -- to give me some kind
15 of guidance on what is the requirements from the public
16 when they do not want that information sent in.

17 So this was a result of that seeking
18 information to get some clarification on what are the
19 rights of the -- of the public.
20 Q. Where in this page does it talk about the
21 rights of your clients?
22 A. I mention here that, as part of the exam for --
23 the information was very short. A lot of it is verbal.
24 They just wanted an overview to keep it quick and then
25 in order for them to reach out and see. But all of this

1 was part of that process of trying to find an answer
2 that would allow me not to go against the wishes of
3 them, of my clients, since this is what their concerns
4 were. So that's what -- the answers I was trying to
5 receive. I could not get any answers from the SEC as
6 any kind of guidance, which I thought was different
7 because of the fact that normally they would tell you a
8 little bit.
9 But in this particular case, no. And then as a
10 result of not able to get any information on what to do,
11 then my remedy to the SEC was just to close down the
12 company and move on.
13 Q. Okay. So this document says you give your
14 personal authorization to Congressman Olson and/or his
15 staff designated by him to make a proper inquiry on your
16 behalf concerning the SEC Fort Worth regional office,
17 Marshall Gandy?
18 A. Right.

28. Respondents failed to produce any of the requested documents. (Ex. 9 [Young Dep.] at 113:6-9.)

Page 113:6-9:

6 Q. Okay. But whether it was this request or
7 another request, beyond what Savings2Retire initially
8 provided, there were no additional documents?
9 A. That is correct.

29. Young did not produce a balance sheet, trial balance, general ledger, cash receipts and disbursements journal, income statements, and cash flow statements to the SEC, because "those documents were not current at that time." (Ex. 9 at 106:3-107:7; Trans. 40:21-41:17.)

Pages 106:3-107:7:

Q. So the records -- well, let's just -- did you provide -- or did Saving2Retire provide to the SEC a balance sheet, trial balance, general ledger, cash receipts and disbursements journal, income statements, and cash flow statements as of the end of its most recent fiscal year, which would be ending December 2013, and the most current year-to-date, which would be ending December -- I mean October 2014? Did you --
A. There were -- those documents were not current at that time because that I keep my documents and do the reconciliations at the end of the year to close out the year. I do it all at that point. There were no documents that would have been available for that time period without going back and trying to re-create to close out the year. So that was not available for me to send.
Q. It was not provided. Correct?
A. It was not available. I did not have it in a form to send it to the SEC at that time.
Q. Okay. These were not records that the adviser kept at the time?
A. The way my accounting was done was that I traditionally –

Q. Just -- I don't want to know your accounting. I just want to know --
A. Those records were not available at that time to send to the SEC.
Q. They did not exist?
A. They were not available to send, meaning they were not current, they had not been reconciled.

Trans. Page 40

Q And were any of these documents ever provided?
MR. COWAN: Excuse me. What exhibit are we on now?
MS. BRANDT: Exhibit 4.
MR. COWAN: Thank you.

Page 41
A No.
BY MS. BRANDT:
Q For example, did Saving2Retire ever produce a

general ledger?
A No.
Q Did Saving2Retire ever produce cash receipts or disbursements journal?
A No.
Q Did Saving2Retire ever produce income statement or cash flow statements?
A No.
Q Did Saving2Retire ever produce the brokerage statements for all of its clients?
A No.
Q Did Saving2Retire ever produce the bank statements for the advisor?
A No.

30. Young did not keep current bank statements or cancelled checks of the adviser, and did not keep cash reconciliations. [Trans. 81:6-82:3]

Page 81
Q You did not keep current bank statements of the advisor, correct?
A I did not keep --
Q Yes.
A -- bank statements are available online for most banks.
Q Did you provide those documents to the Commission?
A No.
Q Did you keep cancelled checks from -- that belonged to the advisor?
A Cancelled checked? Again, most documents are available online if I have a need for them.
Q Did you keep them in your records as the advisor?
A Checks that I had written?
Q Cancelled checks.
A Cancelled checks. My registry was a duplicate registry, so they did not return cancelled checks.
Q Did you keep cash reconciliations of the

Page 82
advisor?
A I received one receipt per month, so, no, I don't do cash reconciliations.

E. Exam Deficiency Letter

31. The SEC examination found the following deficiencies, among others, and reported them to Young as Managing Member of S2R in a letter dated February 4, 2015 ("Deficiency Letter"):

- Section 204 – Failure to Produce Records During the Course of an Examination

  . . .

  Saving2Retire has willfully violated Section 204(a) because it refused to provide records of the adviser to the examination staff in the course of an examination. The examination staff made three separate written requests for substantially the same documents with reasonable time for production, but the firm refused to provide the requested documents. The staff spoke with you on two separate occasions explaining the requirements to provide documents; however you still declined to provide them. [Internal footnote omitted.]

- Rule 204-2(a) – Books and Records

  . . .

  The adviser is not in compliance with Rule 204-2(a) because the adviser is not maintaining the required books and records and/or the records are not current. For example, you are not maintaining the required financial records such as a general ledger, balance sheet trial balance, cash receipts and disbursements journals, income statement and bank statements. Additionally, you stated during the telephone interview that your books and records are not current. While the adviser is planning to withdraw its registration from the SEC, the adviser is still required to maintain these records and to provide them to the examination staff upon request.

- Rule 203A-2(e) – SEC Registration Eligibility

  . . .

  In the Form ADV filings with the Commission, Saving2Retire claimed that it was eligible to register with the Commission because it provided investment advice to all of its clients exclusively through an interactive website, except that the adviser may provide investment advice to fewer than 15 clients through other means during the preceding twelve months. Based on documents obtained from the Saving2Retire's custodian it has provided investment [advice] to more than 15 clients in the prior 12 months. Therefore, Saving2Retire is not qualified for Commission registration under Section 203A.

(Ex. 8.)

32. Respondents did not respond to the Deficiency Letter. (Ex. 9 at 122:8-12].)

Page 122:8-12:

Did you ever send a letter to the SEC where you describe the steps that you would take or intend to take with respect to each of the matters listed in the deficiency letter?
A. I'm not aware of that at this point.

F. Young Produced No Documents and Failed to Appear for Testimony During the SEC Investigation.

33. During the enforcement investigation of this matter, the SEC sent investigative subpoenas to Respondents on May 6, 2015 for documents, and for Young's testimony on July 30, 2015, August 25, 2015, and August 31, 2015. (Ex. 9, 11, 13, 14.) Young did not appear for testimony, and Respondents did not produce any documents. (Ex. 9 at 151:18-152:15; 159:2-164:4; 165:8-167:8; 170:2-5).

Page 151
Q. This is Bates numbered SECFWRO-FW03993-000032 through 000053. Do you recognize this document?
A. I don't recognize it, per se, but it's addressed to me. So I don't recognize it, per se.
Q. Okay. This is a letter sent via UPS to you -- Saving2Retire and to you attaching -- it's dated July 30th, 2015, and it's attaching a subpoena requiring you to testify before the SEC on Wednesday, August 26, 2015.
Page 152
Do you recall receiving that subpoena?
A. I don't recall, per se. I see my signature on the back of that, but I don't recall it, per se.
Q. So your signature on the UPS proof of delivery which shows on document Bates numbered ending 53 -- is that your signature?
A. Yes, it is.
Q. So you did receive the UPS package?
A. That's what it indicates, yes.
Q. And whether or not you recall receiving this particular document, do you recall that you were subpoenaed to testify in this time frame?
A. Yes.
Q. And did you appear for testimony?
A. No.

Page 153 (regarding August 25 testimony date)
19 Q. And in the letter you state that you will not
20 be appearing for your testimony when you were subpoenaed
21 to appear. Correct?
22 A. Correct.

Page 159

2 (Plaintiff's Exhibit No. 14 was marked for
3 identification.)
4 Q. And this is a compilation of emails Bates
5 stamped SEC 45 through SEC 101. The first page is an
6 email from Catherine Floyd to you at two different email
7 addresses, dated Tuesday, August 25th, 2015 at 7:58
8 a.m., with an attachment and reads, Ms. Young, we
9 understand from your letter that you will not be coming
10 to our Fort Worth office for testimony on Wednesday,
11 August 26, 2015. To accommodate your financial
12 situation, we are willing to travel to Houston to take
13 your testimony. The new date, time, and location is in
14 the attached subpoena. Please let me know if you have
15 any questions.
16 First of all, do you recognize this document?
17 A. Yes.
18 Q. Okay. And did you receive a new subpoena as
19 this letter -- the attachment to this new subpoena
20 requiring you to appear for testimony on Monday, August
21 31st, 2015?
22 A. I don't recall the new subpoena.
23 Q. You don't recall receiving that subpoena?
24 A. I don't recall specifically that one.
25 Q. Well, if you'd turn to page SEC 68, it is the

Page 160
1 UPS delivery confirmation showing that it was delivered
2 to your home address on Thursday, August 27th, 2015. Do
3 you have any reason to believe that that's not accurate?
4 A. Well, did I sign for it?
5 Q. I don't see your signature on here.
6 A. No, then I can't say for sure I received that.
7 Q. Do you have any reason to believe that the
8 delivery confirmation from UPS is false?
9 A. Well, if they didn't have me sign it -- I don't
10 know what their procedures would be if I'm traveling or
11 away. But if I didn't sign it, I can't be sure that I

12 received it.
13 Q. Okay. But again, do you have any reason to
14 believe that it was not delivered to your house?
15 A. I can't say for sure whether it was delivered
16 or not.
17 Q. If you'll turn to SEC 70, looks like you got
18 it. This is an email from you to Catherine Floyd dated
19 Friday, August 28th, 2015, at 10:48 a.m. And you write,
20 Ms. Floyd, I cannot make a hearing set for Monday.
21 Sometime in late September will be a better time frame
22 for me. By then my medical/health issue should be more
23 stable. Thank you for your consideration. Marian
24 Young.
25 First of all, do you recognize this document?

Page 161
1 A. Yes.
2 Q. And do you recall sending an email to Ms. Floyd
3 informing her that you would not be appearing for your
4 deposition scheduled for that following Monday?
5 A. Yes, correct.
6 Q. And what were your medical issues at the time?
7 A. They're ongoing, as I just mentioned to you
8 before. And it was sometime during that time period. I
9 don't remember exactly. I do know that because of the
10 inquiry I was having various high spikes in blood
11 pressure. So --
12 Q. How severe was your medical condition at the
13 time?
14 A. Well, enough that I have to take medication for
15 it. It's pretty severe.
16 Q. Were you homebound?
17 A. I cannot tell you exactly on that date what was
18 going on, but I don't know exactly.
19 Q. Do you remember a time period in August 2015
20 where you were hospitalized?
21 A. No, I have not been hospitalized.
22 Q. What about -- did you have any travel
23 restrictions during that time?
24 A. No, I know of no travel restrictions.
25 Q. Okay. If you'll turn the page one more to SEC

Page 162
1 71, it's a letter from Catherine Floyd to you dated
2 August 28th, 2015, at 2:35 p.m. And it states, Ms.
3 Young, since you are unable to appear for testimony on

Monday, August 31st, 2015, we will be sending you a subpoena with a new date and time. Please note that you will be required to appear for testimony at the Texas State Securities Board in Houston, Texas, on September 14th, 2015 at 9 a.m.
Do you recognize this document?
A. I do not recognize that one.
Q. Do you recall the subject matter?
A. I don't recall that one, no.
Q. Do it -- is it your position that you did not receive this?
A. I can't be for sure, but I do not recall.
Q. Do you recall receiving a subpoena requiring you to appear for testimony at the Texas State Securities Board in September?
A. No, I do not recall receiving a subpoena to appear at the Texas State Securities Board.
Q. Okay. And then if you'll look at the next page, is SEC 72. This is an email from Ms. Floyd to you at three different email addresses attaching an August 31st, 2015, letter and subpoena. And the email says, Please see the attached subpoena with a new date and

Page 163
time.
Do you recall receiving this?
A. I do not recall receiving this.
Q. Do you have any reason to believe that you did not receive it?
A. I don't recall receiving it.
Q. Do you have problems with your email delivery?
A. Sometimes it will bounce to spam, depending on who it's coming from. Sometimes because I use an aggregator for the mail, I notice that it will not come in for some reason, and then sometimes it show up. But there are some filters that the mail companies put on. If it's something they don't recognize as a contact, they will throw it in spam, or whatever.
Q. Okay. And this was also sent via UPS. Do you recall receiving the subpoena that's attached requiring you to appear for testimony on Monday, September 14th, 2015? Do you recall receiving it via UPS?
A. I don't recall receiving it.
Q. So is it your testimony that you did not receive the subpoena either via email or via UPS?
A. My normal habit is anytime I receive a

23 documentation or correspondence from the SEC or any
24 regulator, I respond back to that document or email.
25 And so if I did not respond back, it's because I did not

Page 164
1 receive it.
2 Q. Did you appear for testimony on Monday,
3 September 14th at the Texas State Securities Board?
4 A. No, I did not.

Page 165
8 Q. So this is the next day, Friday, September
9 11th, 2015, following the email that was sent that we
10 just looked at. This is an email from you to Ms. Floyd
11 and Ms. Gunn at the SEC dated Friday, September 11th,
12 2015, at 11:43 a.m. And it reads, Dear Ms. Floyd, I
13 have no additional disclosures that are different from
14 what I've already sent to the California regulator and
15 your office.
16 And then it goes on to say that, I believe I'm
17 in my -- I am within my legal rights under the fifth
18 amendment of the U.S. Constitution to notify you of
19 such, that I have no additional disclosures and do
20 invoke that right. I am still trying to get help with
21 some answers, but as of yet I have none. Thereby, I
22 cannot attend a hearing.
23 First of all, do you recognize this document?
24 A. Yes, I do.
25 Q. Is this an email that you drafted?

Page 166
1 A. Yes, I did.
2 Q. Okay. And you sent this email?
3 A. Yes, I did.
4 Q. And can you explain -- well, is this in
5 response to the subpoena requiring you to testify on
6 September 15th?
7 A. It's in response to a subpoena. I cannot be
8 sure which subpoena request it was.
9 Q. Okay. Well, in the last paragraph when you say
10 I cannot attend a hearing, what hearing are you talking
11 about?
12 A. The hearing I'm referring to is the subpoena
13 request hearing.
14 Q. The testimony that you were subpoenaed to
15 appear on September 15th?

16 A. That hearing.
17 Q. At some point you got the subpoena or you were
18 notified that you needed to appear?
19 A. I think you mentioned two different subpoenas.
20 Q. Uh-huh.
21 A. I know I received a subpoena. I'm not quite
22 sure I received the second subpoena, but I do know I
23 received a subpoena request.
24 Q. Okay. And you think that the hearing that
25 you're referring to was the deposition that was

Page 167
1 scheduled for the following Monday?
2 A. The subpoena is what I was referring to on
3 that.
4 Q. Uh-huh. Okay. And were you intending to
5 invoke your rights under the fifth amendment as to your
6 testimony or as to the documents or as to what?
7 A. I can't be sure at this point, but I do know
8 that was my response to a subpoena request.

Ex. 9, Page 170
2 Q. Other than correspondence, you did not produce
3 any documents or records of Saving2Retire to the SEC in
4 the 2015 time frame?
5 A. No, I don't believe so.

34. On September 11, 2015, Young sent a letter to the SEC informing the staff that she would not appear for testimony as noticed and would not be producing documents. She stated, "I believe I am within my legal rights under the Fifth Amendment of the US Constitution to notify you of such; that I have no additional disclosures and do invoke that right." However, Young never memorialized her Fifth Amendment invocation in a sworn statement. (Ex. 9 at 165:6-167:8; Ex. 17.)

Pages 165:6-167:8

6 (Plaintiff's Exhibit No. 15 was marked for
7 identification.)
8 Q. So this is the next day, Friday, September
9 11th, 2015, following the email that was sent that we
10 just looked at. This is an email from you to Ms. Floyd

and Ms. Gunn at the SEC dated Friday, September 11th, 2015, at 11:43 a.m. And it reads, Dear Ms. Floyd, I have no additional disclosures that are different from what I've already sent to the California regulator and your office.
And then it goes on to say that, I believe I'm in my -- I am within my legal rights under the fifth amendment of the U.S. Constitution to notify you of such, that I have no additional disclosures and do invoke that right. I am still trying to get help with some answers, but as of yet I have none. Thereby, I cannot attend a hearing.
First of all, do you recognize this document?
A. Yes, I do.
Q. Is this an email that you drafted?

A. Yes, I did.
Q. Okay. And you sent this email?
A. Yes, I did.
Q. And can you explain -- well, is this in response to the subpoena requiring you to testify on September 15th?
A. It's in response to a subpoena. I cannot be sure which subpoena request it was.
Q. Okay. Well, in the last paragraph when you say I cannot attend a hearing, what hearing are you talking about?
A. The hearing I'm referring to is the subpoena request hearing.
Q. The testimony that you were subpoenaed to appear on September 15th?
A. That hearing.
Q. At some point you got the subpoena or you were notified that you needed to appear?
A. I think you mentioned two different subpoenas.
Q. Uh-huh.
A. I know I received a subpoena. I'm not quite sure I received the second subpoena, but I do know I received a subpoena request.
Q. Okay. And you think that the hearing that you're referring to was the deposition that was

scheduled for the following Monday?
A. The subpoena is what I was referring to on that.
Q. Uh-huh. Okay. And were you intending to

5 invoke your rights under the fifth amendment as to your
6 testimony or as to the documents or as to what?
7 A. I can't be sure at this point, but I do know
8 that was my response to a subpoena request.

35. Young did not know the contours of what the Fifth Amendment invocation means, but that she "did not understand enough to appear for testimony and did not want to prejudice [herself] without having more information." (Ex. 9 at 167:21-169:5.)

Pages 167

21 Q. Did you advise a lawyer about what your rights
22 were under the fifth amendment in responding to an SEC
23 subpoena?
24 A. I looked up the research myself on the response
25 to that and believe I was within to notify of my fifth

Page 168

1 amendment.
2 Q. My question was: Did you consult an attorney
3 on that?
4 A. No, I did not.
5 Q. So by invoking your fifth amendment -- and by
6 that -- what do you mean by that?
7 A. At the point, I was not fully aware of
8 everything going on with the SEC, the information
9 they're requesting. I felt like I was overwhelmed. I
10 didn't understand anything. I did not have no money for
11 legal advice. So I pretty much, under many other things
12 I read, felt like since I didn't have the advice I did
13 not want to prejudice myself in some way. So that was
14 why I invoked the fifth amendment.
15 Q. Did you feel like you had criminal exposure?
16 A. No, of course not.
17 Q. So you had no criminal exposure but you,
18 nonetheless, invoked your fifth amendment?
19 A. That is correct.
20 Q. And you don't know really the contours of what
21 the fifth amendment invocation means?
22 A. No. I thought it was appropriate in my case.
23 I had read it in some of the SEC documents that we were
24 allowed to use the fifth amendment. And I believe that
25 was the best course at that time.

Page 169
1 Q. Your point was, basically, you just did not
2 want to appear for testimony?
3 A. I did not -- per that, I did not understand
4 enough to appear for testimony and did not want to
5 prejudice myself without having more information.

G. Current Registration Status

36. As of January 2, 2015, S2R filed an amended Form ADV stating the firm is no longer eligible to be registered with the Commission. (Trans. 86:19-23.)

19 Q On or about January 2nd, 2015, Saving2Retire
20 filed an amended Form ADV stating that the firm is no
21 longer eligible to be registered with the Commission; is
22 that correct?
23 A That is correct.

37. Young testified: "I closed that internet advisory . . . [w]hen it became apparent to me that I was out of my league, that I should not have been registered with the SEC because they were not going to give me consideration as a small firm, which I believed in the beginning, based on what I had read. And when that proved not to be the case, I need attorneys, I need this, I knew I couldn't afford it; so my remedy was to close down the company completely since it had never got off its foot anyway." (Ex. 9 at 154: 9-25.)

Pages154: 9-25:

9 Q. Then you go on to say, "I certify under penalty
10 of perjury; that the following is true and correct: 1.
11 The business Saving2Retire, Internet Adviser, is
12 closed." And was that correct at the time?
13 A. That is correct.
14 Q. When did you close the internet adviser?
15 A. I closed that internet advisory shortly after
16 when I first notified the SEC as far as the remedy.
17 When it became apparent to me that I was out of my
18 league, that I should not have been registered with the
19 SEC because they were not going to give me consideration
20 as a small firm, which I believed in the beginning,
21 based on what I had read. And when that proved not to

22 be the case, I need attorneys, I need this, I knew I
23 couldn't afford it; so my remedy was to close down the
24 company completely since it had never got off its foot
25 anyway.

38. On November 18, 2015, Saving2Retire filed its Form ADV changing its principal place of business address back to its original Sugar Land, Texas address, and it filed for state registration in Texas, which is still pending. (Ex. 9 at 175:8-18.)

Page 175

12 Q. Is Saving2Retire currently registered with any
13 State Securities Board?
14 A. They're pending still in Texas. Texas is a
15 pending registration. And as soon as -- and then
16 otherwise, currently the registration is still active
17 with the SEC pending acceptance by one of the state
18 regulators.

39. S2R has never filed a Form ADV-W to withdraw its registration with the Commission. (Trans. 75:7-10; 94:4-19.)

Page 75
7 Q Have you filed a Form ADVW withdrawing your
8 registration?
9 A I was told by the call center -- no, I have
10 not.

Page 94
4 **Q So in the bottom paragraph of the first page of**
5 **RX5, you say, "I'm closing the Internet-only business,**
6 **which means I am not eligible for SEC registration"?**
7 A Correct.
8 **Q Why did you tell them that?**
9 A The basis for that registration was the
10 Internet advisor, so if I close that down, I'm no longer
11 eligible under their requirements.
12 **Q "I will be" – you put, "I will be withdrawing**
13 **that registration as soon as the transition is completed,**
14 **which I am estimating to be six to eight weeks." Did that**
15 **happen?**
16 A No. I closed down the site and then I tried to
17 get the state registration, so I could still continue

18 making a living and then I ran into a lot of roadblocks
19 there.

40. On March 14, 2016, the California Commissioner of Business Oversight denied S2R's investment adviser application and barred Young from any position of employment, management, or control of any investment adviser, broker-dealer, or commodity adviser. (Ex. 10.)

41. S2R violated, and Young aided and abetted and caused S2R's violations of, Advisers Act Section 204(a) and Rules 204-2(a)(1), 204-2(a)(2), and 204-2(a)(6) thereunder by failing to make S2R's records available to the Commission, by impeding the Commission's examination and investigation, and by failing to keep and maintain true, accurate, and current certain books and records. *In re Saving2Retire, et al.*, Admin. Proceedings Rulings Rel. No. 4565 (Order on Summary Disposition).

CONCLUSIONS OF LAW

1. "Investment advisers and their associated persons are fiduciaries." *In re Daniel Bogar, et al.*, SEC Rel. No. ID-502, 2013 WL 3963608, at *19 (Aug. 2, 2013).

2. As fiduciaries, Respondents are required "to act for the benefit of their clients . . . and to exercise the utmost good faith in dealing with clients, to disclose all material facts, and to employ reasonable care to avoid misleading clients." *SEC v. DiBella,* 2007 WL 2904211, at *12 (D. Conn. Oct. 3, 2007) (*quoting SEC v. Moran,* 922 F. Supp. 867, 895-96 (S.D. N.Y. 1996), *aff'd,* 587 F.3d 553 (2d Cir. 2009)).

3. Section 203A of the Advisers Act generally prohibits an investment adviser regulated by the state where it maintains its principle place of business from registration with the Commission unless it meets certain requirements. Rule 203A-1(a) sets the threshold requirement for SEC registration for most advisers at $100 million of regulatory assets under management ("AUM"). Rule 203A-2(e) exempts from the prohibition on Commission registration certain

investment advisers that provide advisory services through the Internet. *See* Internet Adviser Exemption Adopting Rel., 2002 WL 31778384, at *1.[1]

> Section 203A of the Investment Advisers Act of 1940 (the "Advisers Act") generally prohibits an investment adviser from registering with the Commission unless that adviser has more than $25 million of assets under management or is an adviser to a registered investment company. The Commission is adopting new rule 203A-2(f) under the Advisers Act to exempt from the prohibition on Commission registration certain investment advisers that provide advisory services through the Internet. An adviser is eligible for registration under the rule if the adviser provides investment advice to all of its clients exclusively through the adviser's interactive website, except that the adviser may advise fewer than 15 clients through other means during the preceding 12 months.

4. Rule 203A-2(e) of the Advisers Act allows Internet Investment Advisers to register with the Commission with an AUM less than the minimum $100 million if the adviser "[p]rovides investment advice to all of its clients exclusively through an interactive website, except that the investment adviser may provide investment advice to fewer than 15 clients through other means during the preceding twelve months." Advisers Act Rule 203A-2(e).

> (e) Internet investment advisers.
> (1) An investment adviser that:
> (i) Provides investment advice to all of its clients exclusively through an interactive website, except that the investment adviser may provide investment advice to fewer than 15 clients through other means during the preceding twelve months;
> (ii) Maintains, in an easily accessible place, for a period of not less than five years from the filing of a Form ADV that includes a representation that the adviser is eligible to register with the Commission under paragraph (e) of this section, a record demonstrating that it provides investment advice to its clients exclusively through an interactive website in accordance with the limits in paragraph (e)(1)(i) of this section; and
> (iii) Does not control, is not controlled by, and is not under common control with, another investment adviser that registers with the Commission under paragraph (b) of this section solely in reliance on the adviser registered under paragraph (e) of this section as its registered adviser.

[1] Effective September 19, 2011, rule 203A-2(f) was renumbered as rule 203A-2(e) and the threshold was raised from $25 million to $100 million. *See Rules Implementing Amendments to the Investment Advisers Act of 1940,* SEC Rel. No. IA-3221 (June 22, 2011), 2011 WL 2482892.

> (2) For purposes of paragraph (e) of this section, interactive website means a website in which computer software-based models or applications provide investment advice to clients based on personal information each client supplies through the website.
> (3) An investment adviser may rely on the definition of client in § 275.202(a)(30)–1 in determining whether it provides investment advice to fewer than 15 clients under paragraph (e)(1)(i) of this section.

5. Advisers Act Section 204(a) provides that all records of [registered] investment advisers, "are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest or for the protection of investors." Advisers Act Section 204(a).

> SEC. 204. (a) IN GENERAL.—Every investment adviser who makes use of the mails or of any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser (other than one specifically exempted from registration pursuant to section 203(b) of this title), shall make and keep for prescribed periods such records (as defined in section 3(a)(37) of the Securities Exchange Act of 1934), furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. All records (as so defined) of such investment advisers are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

6. Section 204 of the Advisers Act and Rule 204-2 require that investment advisers registered with the Commission maintain and preserve certain books and records. Rule 204-2(a) sets forth certain categories of books and records that registered investment advisers are required to "make and keep true, accurate and current" with respect to their investment advisory business. The required books and records include certain financial records, including cash receipts and disbursements, general and auxiliary ledgers reflecting asset, liability, reserve, capital, income and expense accounts; all check books, bank statements, cancelled checks and cash

reconciliations of the investment adviser; and all trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser.

> **§ 275.204-2 Books and records to be maintained by investment advisers.**
>
> **(a)** Every investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b-3) shall make and keep true, accurate and current the following books and records relating to its investment advisory business;
>
> **(1)** A journal or journals, including cash receipts and disbursements, records, and any other records of original entry forming the basis of entries in any ledger.
>
> **(2)** General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.
>
> . . .
>
> **(4)** All check books, bank statements, cancelled checks and cash reconciliations of the investment adviser.
>
> . . .
>
> **(6)** All trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser.

7. For aiding and abetting liability under the federal securities laws, the Division must establish: (1) that a primary securities law violation was committed by another party; (2) awareness by the aider and abettor that his or her role was part of an overall activity that was improper; and (3) that the aider and abettor knowingly and substantially assisted the conduct that constitutes the violation. *Bogar,* 2013 WL 3963608, at *20; *Graham v. SEC,* 222 F.3d 994, 1000 (D.C. Cir. 2000).

> *Bogar*: For "aiding and abetting" liability under the federal securities laws, three elements must be established: (1) a primary or independent securities law violation committed by another party; (2) awareness or knowledge by the aider and abettor that his or her role was part of an overall activity that was improper; and (3) that the aider and abettor knowingly and substantially assisted the conduct that constitutes the violation.
>
> *Graham*:
> Although variously formulated, three principal elements are required to establish liability for aiding and abetting a violation of section 10(b) and Rule 10b-5: (1) that a principal committed a primary violation; (2) that the aider and abettor provided substantial assistance to the primary violator; and (3) that the aider and abettor had

> the necessary "scienter"-i.e., that she rendered such assistance knowingly or recklessly. *See SEC v. Fehn,* 97 F.3d 1276, 1287-88 (9th Cir.1996); *Bloor v. Carro, Spanbock, Londin, Rodman & Fass,* 754 F.2d 57, 62 (2d Cir.1985); *SEC v. Falstaff Brewing Corp.,* 629 F.2d 62, 72 (D.C.Cir.1980); *Investors Research Corp. v. SEC,* 628 F.2d 168, 178 (D.C.Cir.1980); *see also SEC v. Steadman,* 967 F.2d 636, 641 (D.C.Cir.1992).

8. "A person cannot escape aiding and abetting liability by claiming ignorance of the securities laws." *Bogar,* 2013 WL 3963608, at *20; *In re Sharon M. Graham, et al.,* SEC Rel. No. 34-40727, 1998 WL 823072, at *7 n.33 (Nov. 30, 1998). The "knowledge" or "awareness" requirement can be satisfied by recklessness when the alleged aider and abettor is a fiduciary or an active participant. *Bogar,* 2013 WL 3963608, at *20.

> A person cannot escape aiding and abetting liability by claiming ignorance of the securities laws. *See Sharon M. Graham*, 53 S.E.C. 1072, 1084 n.33 (1998), aff'd, 222 F.3d 994 (D.C. Cir. 2000). The knowledge or awareness requirement can be satisfied by recklessness when the alleged aider and abettor is a fiduciary or active participant.

9. For "causing" liability, the Division must establish: (1) a primary violation; (2) an act or omission by the respondent that was a cause of the violation; and (3) the defendant knew, or should have known, that his conduct would contribute to the violation. *Id.* A respondent who aids and abets a violation is also a cause of the violations under the federal securities laws. *Id.* Negligence is sufficient to establish liability for causing a primary violation that does not require *scienter*. *Id.*

> For "causing" liability, three elements must be established: (1) a primary violation; (2) an act or omission by the respondent that was a cause of the violation; and (3) the respondent knew, or should have known, that his conduct would contribute to the violation. Robert M. Fuller, 56 S.E.C. 976, 984 (2003), petition for review denied, 95 F. App'x 361 (D.C. Cir. 2004). A respondent who aids and abets a violation also is a cause of the violation under the federal securities laws. *See Graham*, 53 S.E.C. at 1085 n.35. Negligence is sufficient to establish liability for causing a primary violation that does not require scienter.

10. Sections 203(e) and 203(f) of the Advisers Act authorize the Court to revoke the registration of any investment adviser, or of an associated person of an investment adviser, if it finds it is in the public interest and that, among other reasons, the adviser has willfully violated any provision of the Advisers Act or rules thereunder.

11. Revocation is an appropriate remedy where an investment adviser has failed to cooperate with a Commission examination. *See, e.g., In the Matter of The Barr Financial Group, Inc.*, Admin. Proc. File No. 3-9918, Advisers Act Release No. 2179 (Oct. 3, 2003), 81 SEC Docket 828, 843 (revoking investment adviser's registration and barring its president from associating with any investment adviser for, among other things, failing to cooperate with a Commission examination); *Schield Mgmt. Co. & Marshall L. Schield*, Release No. 2477 (Jan. 31, 2006) ("We have held previously that the failure to cooperate with a Commission examination constitutes 'serious misconduct' justifying strong sanctions.")

Schield Mgmt at *10-11:

> The industry cannot tolerate an investment adviser that, holding a fiduciary position, would undermine the regulatory system by deliberately thwarting a Commission examination. In this connection, we note that Respondents' lack of cooperation during the examination necessitated repeated requests for documents and the convening of a meeting among Commission staff, a Commission supervisor, Schield, and his attorney to demand prompt production of withheld documents. As the lead examiner testified at the hearing, the need for such a meeting was unprecedented in the over 150 examinations that she had conducted over her ten-year career. Despite that meeting and the staff's repeated requests for documents, Respondents' lack of cooperation continued until the injunctive action was filed. Moreover, because of Respondents' actions, Commission staff was compelled to spend a significant amount of money to safeguard the Firm's records. The record demonstrates that Schield was responsible for SMC's misconduct.
>
> *11 Taken as a whole, the factual allegations in the Complaint and the record evidence introduced at the hearing indicate that strong sanctions should be

> imposed on Respondents. Despite Respondents' repeated attempts to "minimize [the] gravity" of their misconduct, the sanctions imposed will serve both as a means of "protecting the public" from harm at Respondents' hands and "as a deterrent to others." As we stated previously in a similar context, Respondents' actions "demonstrate[] either that [Respondents] fundamentally misunderstand the regulatory obligations to which they are subject or that they hold those obligations in contempt." In either case, Respondents' misconduct warrants their exclusion from the securities industry. Accordingly, we hold that, under the circumstances, it is in the public interest to revoke SMC's investment adviser registration and to bar Schield from association with any investment adviser or broker-dealer.

12. "In evaluating whether an administrative sanction serves the public interest, [the Commission] consider[s], among other things, the egregiousness of a respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. [It] also considers the extent to which the sanction will have a deterrent effect. The appropriate sanction depends on the facts and circumstances of each case. *Id.*

13. Section 203(k) of the Advisers Act, 15 U.S.C. § 80b-3(k), authorizes the Court to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate" any provision of the Advisers Act or the rules and regulations thereunder, as well as any other person that is, was, or would be a cause of the violation.

14. "The risk of future violations required to support a cease-and-desist order is significantly less than that required for an injunction, and, absent evidence to the contrary, a single past violation ordinarily suffices to raise a sufficient risk of future violations." *In re Rodney R. Schoemann*, 2009 WL 3413043, at *12-13 (Oct. 23, 2009), *aff'd*, 2010 WL 4366036 (D.C. Cir. 2010). The Court should also "consider the function that a cease-and-desist order will serve in

alerting the public that a respondent has violated the securities laws." *In re Fundamental Portfolio Advisers, Inc.*, 2003 WL 21658248, at *18 (July 15, 2003).

15. Section 203(i) of the Advisers Act, 15 U.S.C. § 80b-3(i), authorizes the Court to impose a civil monetary penalty against a respondent who willfully violated, *inter alia,* the Advisers Act or the rules and regulations thereunder. A "willful" violation is one in which the actor intends to do the act which constitutes his violation; willfulness does not require showing that the violator acted with knowledge that his conduct was unlawful. *Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.D.C. 2000). "Included within a violation of the Advisers Act is the aiding and abetting of principal violations." *SEC v. DiBella,* 587 F.3d 553, 571(2nd Cir. 2009).

Wonsover:

> In the context of the provision at issue here, we have rejected the knowledge and the reckless disregard standards and defined willfulness thus:
>
> > It is only in very few criminal cases that "willful" means done with a bad purpose. Generally, it means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law [citation omitted].
>
> In *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798 (D.C.Cir.1965), we rejected the argument "that specific intent to violate the law is an essential element of the willfulness required to violate Section 15(b)" and noted that the argument "ha[d] been rejected by this court, by the Second Circuit, and by the Commission." 348 F.2d at 802-03. We further stated that "[i]t has been uniformly held that 'willfully' in this context means intentionally committing the act which constitutes the violation" and rejected the contention that "the actor [must] also be aware that he is violating one of the Rules or Acts." *Id.* at 803.

16. "A monetary penalty is designed to serve as a deterrent against securities law violations." *Lybrand,* 281 F. Supp. 2d at 729.

17. Before assessing a civil penalty, the Court must conclude that it is in the public interest to do so. Whether a proposed penalty is in the public interest is considered in light of six factors: (1) whether the violation involved fraud, deceit, manipulation, or a reckless disregard of a

regulatory requirement; (2) whether any harm to others to others resulted from the violation; (3) the extent of the wrongdoer's unjust enrichment; (4) whether there are any prior violations; (5) whether there is a need to deter the wrongdoer or others from such violations; and (6) such other matters as justice may require. Advisers Act Section 203(i)(3) [15 U.S.C. § 78u-2].

18. Other factors that may also be considered are: (1) the egregiousness of the violations at issue; (2) the degree of Respondents' scienter; (3) the repeated nature of their violations; (4) their failure to admit their wrongdoing; (5) whether their conduct created substantial losses or the risk of substantial losses to other persons; (6) their lack of cooperation and honesty with authorities, if any; and (7) whether a penalty that would otherwise be appropriate should be reduced due to respondent's demonstrated current and future financial condition. *SEC v. Lybrand,* 281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003), aff'd, 425 F.3d 143 (2d Cir. 2005).

> *Lybrand:* General factors that courts look to in imposing those penalties include (1) the egregiousness of the violations at issue, (2) defendants' scienter, (3) the repeated nature of the violations, (4) defendants' failure to admit to their wrongdoing; (5) whether defendants' conduct created substantial losses or the risk of substantial losses to other persons; (6) defendants' lack of cooperation and honesty with authorities, if any; and (7) whether the penalty that would otherwise be appropriate should be reduced due to defendants' demonstrated current and future financial condition.

19. Penalties are statutorily authorized in three tiers and differ for "natural persons" and "other persons," or entities. 15 U.S.C. § 80b-9(e)(2). The original statutory penalty amounts have been adjusted over time for inflation. 17 C.F.R. § 201.1004. For acts committed after March 4, 2009, first-tier penalties may be imposed in the amount of $7,500 for individuals and $75,000 for entities per violation. 15 U.S.C. § 80b-9(e)(2)(A); 17 C.F.R. Pt. 201, Subpt. E, Table IV. Where the violative act involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, second-tier penalties may be imposed in the amount of $75,000 for individuals and $325,000 for entities per violation. 15 U.S.C. § 80b-9(e)(2)(B); 17 C.F.R. Pt. 201,

Subpt. E, Table IV. If the violative act or omission involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, and directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission, a third-tier penalty may be imposed of $150,000 for individuals and $725,000 for entities per violation. 15 U.S.C. § 80b-9(e)(2)(C); 17 C.F.R. Pt. 201, Subpt. E, Table IV.

DATED: April 16, 2019

Respectfully submitted,

/s/Jennifer D. Reece

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CERTIFICATE OF SERVICE

In accordance with Rule 150 of the Commission's Rules of Practice, I hereby certify that on April 16, 2019, I served a true and correct copy of the foregoing document on the following persons by the method indicated:

By UPS and email:
Honorable Brenda P. Murray
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

By UPS and email (*ycgc@comcast.net*):
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/s/Jennifer D. Reece
Jennifer D. Reece