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 PREHEARING BRIEF

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

Following the Court's Order on Motions for Summary Disposition, the only remaining issue is whether S2R willfully violated, and whether Young willfully aided and abetted and caused S2R to violate, Section 203A of the Advisers Act. Specifically, the Court left open the issue of whether S2R, an investment adviser with $4.5 million in assets under management who has admitted that throughout the relevant period, it advised all of its clients by means other than an interactive website, could nonetheless be properly registered as an internet adviser by virtue of the fact that for a period of time beginning two years after its effective registration, it maintained an interactive website.

There are no material facts at issue, and the matter is purely a legal one. A plain reading of the statute and its interpretive release establishes that S2R was not properly registered.

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.[1] *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 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,

[1] 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.

of its clients the firm advised through non-Internet means. *Id.*

In this case, Respondents attached as Exhibit "B" to their Motion for Summary Disposition, which motion was not properly filed or docketed, an unauthenticated document entitled "Invoice Information," containing some handwritten notes purporting to identify which of the listed invoice names Young considered to be "clients,"[2] and Young's argument that based on those notes and her assessment, S2R had 12 clients. The Court credited the document and Young's bare, unsworn and uncorroborated assertion as creating a fact issue as to "whether [S2R] provided investment advice to more than fourteen non-internet clients." Order, at p. 5.

Respectfully, the Division's position is that neither Exhibit B, nor the Respondents' self-serving denial raises a genuine issue of a *material* fact. Even assuming for the sake of argument that Young advised less than 15 non-internet clients, she has already admitted that she gave *no* investment advice to *a single* client via the interactive website. Thus, by her own sworn admission, she provided investment advice to all of her clients by means other than an interactive website, which is the exact opposite of what this rule addresses.

Young admitted in her deposition that:

- As the sole owner and managing member of the adviser, she owes fiduciary duties to her clients (App. 50 [Young dep. at 21:9-16]);
- 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. (App. 53 [Young Dep. at 34:22-35:11]; App. 2 [Villareal Dec. at ¶ 2]);
- Respondents never consulted an attorney and did not seek legal advice as to whether Rule 203A-2(e) applied to S2R's business. (App. 57 [Young Dep. at 51:19-52:2].) Young did not hire any professionals, lawyers, or consultants to help her analyze whether S2R would qualify as an internet adviser. (App. 66 [Young Dep. at 85:10-86:1]);

[2] Young admitted in her deposition that she does not count as clients her relatives or other persons she does not bill (App. 66 [Dep. at 88:2-8]), which does not comport with the legal definition of client in Advisers Act Rule 203(b)(3)-1. Therefore, Young's unsworn and self-serving calculations are unreliable and should be afforded no weight.

- S2R did not even have a website until two years after its effective registration (App. 54 [Young Dep. at 37:2-37:8]);

- From the time Young formed S2R in 2011 through 2016 (at least three years after the website was established), S2R never advised a single internet client. (App. 52 [Young Dep. at 30:22-32:3]);

- 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." (App. 83 [Young Dep. at 154: 9-25]); and

- 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. (App. 82 [Young Dep. at 150:8-151:13]; App. 110-11.)

Ultimately, however, Respondents' argument that S2R had less than 15 clients[3]—a fact not supported by the brokerage account records—is wholly immaterial: the *de minimus* exception to the "all clients" requirement of Advisers Act Rule 203A-2(e) never comes into play, because Respondents never provided investment advice through an interactive website to a single client, let alone all of its clients. *See* Division's Motion for Summary Disposition, at pp. 3-4 and Appendix p. 52 (Young Deposition transcript).

As a fiduciary and the owner of an investment adviser, Young's liability is established as a matter of law. Respondents have admitted to violating the law, and have admitted every material fact necessary to prove the registration violation.

[3] According to the verified Scottrade records obtained by the Commission examination staff and the sworn statement of the Division's witness, S2R had 20 clients for the one year time period ending November 30, 2014, with assets under management of approximately $3.4 million (App. 3 [Villareal Dec. ¶ 8].)

Dated: January 30, 2017

Respectfully submitted,

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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 January 30, 2017, by the method indicated:

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

By USPS Mail and email:
Marion P. Young & Saving2Retire
[redacted]
Sugar Land, TX [redacted]

Jennifer D. Brandt