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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.

HARD COPY

THE DIVISION OF ENFORCEMENT'S RESPONSE IN OPPOSITION TO RESPONDENTS' BRIEF IN SUPPORT OF THEIR PETITION FOR REVIEW

Dated: June 18, 2018

Respectfully submitted,

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MISCELLENOUS

The Division of Enforcement ("Division" or "DOE") of the Securities and Exchange Commission ("Commission") files this Response to the Brief in Support of the Petition for Review of the Initial Decision filed by Saving2Retire, LLC ("S2R") and Marian P. Young ("Young"), (together, "Respondents") and respectfully shows the following:

I. Background

The Commission 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 by failing to make or keep certain required records. [OIP, Investment Advisers Rel. No. 4457.]

On January 30, 2017, the Administrative Law Judge ("ALJ") granted in part the Division's Motion for Summary Disposition. [Admin. Proceedings Rulings Rel. No. 4565.] In that Order, the ALJ found that 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.

Following the ALJ's Order, the issues remaining to be heard were whether S2R willfully violated, and whether Young willfully aided and abetted and caused S2R to violate: (1) Section 203A of the Advisers Act by improperly registering with the Commission as an internet adviser; and (2) Rule 204-2(a)(4) by failing to make and keep true, accurate, and current check books, bank

statements, cancelled checks, and cash reconciliations of the investment adviser.

On October 19, 2017, following a contested hearing, the ALJ issued the Initial Decision, finding in the Division's favor on the remaining claims and imposing remedial relief. [Initial Decision, Initial Decision Rel. No. 1195.] The evidence in the record shows that the ALJ's Initial Decision should be affirmed.

II. STATEMENT OF FACTS[1]

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 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.)

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].)

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.)

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

[1] Citations to the transcript of the hearing of this matter are noted as "Trans. Line:Page." Citations to Exhibit numbers correspond to the Trial Exhibits admitted during the hearing.

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

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)

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.)

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.)

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

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.)

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].)

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

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.)

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.)

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.)

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.)

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.)

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 minimis exception, if any, because it advised more than 14 clients. (Trans. 56:16-57:3)

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 and Inspection ("OCIE") conducted a correspondence compliance examination of S2R. (Trans. 75:11-14.)

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.)

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)

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-)

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.)

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").)

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.)

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

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.)

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]

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].)

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

33. During the Division's 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).

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.)

35. Young did not know the contours of what the Fifth Amendment invocation means, but indicated 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.)

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.)

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.)

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.)

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

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).

III. Argument and Authorities

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 principal place of business from registering 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]

[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*

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.[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 preceding 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 minimis" 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

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Operating Through the Internet, SEC Rel. No. IA-2091 (Dec. 12, 2002), 2002 WL 31778384 ("Internet Adviser Exemption Adopting Rel.").

[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.

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, 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. [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 Advisers 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 was 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 is not open to retail clients. [Trans. 49:12-19.] Thus, S2R's clients could not invest in those particular funds without S2R's advisory 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; *Graham 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 of them 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 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 the very 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 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:

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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

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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).

C. The Remedies Imposed by the ALJ are Appropriate and in the Public Interest.

The ALJ found, on summary disposition, that 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. For these violations, and for the violations established at the hearing in this matter as discussed herein, remedial relief is proper.

1. The ALJ Properly Revoked S2R's Registration and Barred Young from Association 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, with the Division's subsequent investigation, and with the enforcement action resulting from Respondents' failure to cooperate. Indeed, to this day, Respondents have refused to even provide the Commission with a list of its 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 repeated and on-going. She has never acknowledged the wrongful nature of her conduct, 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. *Id.* at *6. Thus, pursuant to Section 203(f) of the Advisers Act, the Commission should affirm the ALJ's decision to 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 ALJ Properly Issued a Cease-and-Desist Order Against Respondents.

Section 203(k) of the Advisers Act, 15 U.S.C. § 80b-3(k), authorizes the imposition of 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 Commission 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, S2R and Young should be ordered 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 ALJ Properly Ordered Respondents to Pay Civil Penalties.

Section 203(i) of the Advisers Act, 15 U.S.C. § 80b-3(i), authorizes the Commission to impose civil money penalties in cease-and-desist proceedings on any person who has violated any provision of the Advisers Act or "was a cause of the violation." [15 U.S.C. § 80b-3(i)(1)(B).]

In considering whether a proposed penalty is in the public interest, the Commission considers: (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. [15 U.S.C. § 80b-3(i)(3)].[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

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[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).

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.

In this case, the ALJ imposed the following penalties against Young: a second-tier penalty of $15,000 for aiding and abetting and causing a violation of Section 204(a) of the Advisers Act; a $10,000 civil penalty for aiding and abetting and causing violations of Advisers Act Rule 204-2(a)(1), (2), (4) and (6); and a first-tier penalty of $1,000 related to the violations of Advisers Act Section 203A. The ALJ also ordered Saving2Retire to pay a penalty of $45,000 for the violation of Section 204(a) and $30,000 for the violation of Rule 204-2(1), (2), (4), and (6). Finally the ALJ ordered Saving2Retire to pay a $1,000 first-tier penalty for violating Advisers Act Section 203A. The penalties are appropriate due to Respondents' reckless disregard of the regulatory requirements at issue, including the requirement to cooperate with Commission examinations. The ALJ properly found that 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 advisers 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 Division

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.]. As the ALJ properly found, "[c]ontrary to their assertions, Respondents' conduct involved more than minor mistakes, and was egregious and recurrent." [Initial Decision at 26.] Moreover, the ALJ, having witnessed Young's testimony during the proceeding, concluded that "Young has neither made assurances, sincere or otherwise, against future violations nor shown that she recognizes the wrongful nature of her conduct." [Initial Decision at 28.]

D. Respondents' Constitutional Challenges Fail.

1. The Commission's Ratification Order and the ALJ's Ratification Decisions Foreclose Any Appointments Clause Challenge.

Respondents object (Pet. 8) to these proceedings on the ground that "the administrative law judge was not appointed in accordance with the Appointments Clause," but that objection ignores the Commission's two-tiered ratification process that cured any potential defect in the proceedings. In its November 30, 2017 Order, the Commission ratified the prior appointment of its ALJs and remanded the matter to ALJ Grimes, who, after providing the parties with the opportunity to submit any new evidence and brief any issues they deemed relevant, decided to ratify all prior actions taken by an ALJ in this proceeding.

Ratification allows for the "adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him." 1 Floyd R. Mechem, *A Treatise on the Law of Agency* § 347 (2d ed. 1914); *Black's Law Dictionary* (10th ed. 2014) (ratification renders an act "valid from the moment it was done"). The "ratification of an unauthorized act is deemed to be equivalent to a prior authority to perform it." Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 545 (1890). A ratification "may

be inferred" from the parties' conduct, 1 *A Treatise on the Law of Agency*, § 430, and may be "written or unwritten, express or implied," *A Treatise on the Law of Public Offices and Officers*, §§ 545, 547.

Two factors are critical in determining whether a principal has validly ratified an agent's previously unauthorized act. First, the principal must have had the authority to perform the act, both when the agent undertook it and at the time of ratification. *See* 1 *A Treatise on the Law of Agency, supra*, §§ 347, 354; *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994); *United States v. Heinszen & Co.*, 206 U.S. 370, 382 (1907); *Restatement (Third) of Agency* § 4.04(1) & cmt. b (2006). Second, the conduct of the principal must lead a third party to "reasonably . . . conclude that the act of another in [the principal's] behalf has been adopted and sanctioned" by the principal. Floyd R. Mechem, *A Treatise on the Law of Agency* § 146 (1888).

Those factors are satisfied here. Both at the time of the initial appointment and when it issued its November 30 Order, the Commission was authorized to appoint its ALJs. *See* 5 U.S.C. § 3105 (agencies "shall appoint as many administrative law judges as are necessary"); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-13 (2010) (Commission is a Head of Department empowered to appoint inferior officers.). The Commission indisputably could have made the initial appointments itself, and it is beyond doubt that it can, and has, "adopted and sanctioned" those actions when it "ratifie[d] the agency's prior appointment" of its ALJs.

Courts have uniformly endorsed ratification in analogous circumstances. In *Edmond v. United States*, 520 U.S. 651 (1997), petitioners sought to overturn convictions that had been affirmed by military judges whose appointments had been deemed invalid in an earlier decision. The Supreme Court rejected petitioners' challenge because an appropriate official had cured the

constitutional error by "adopting" the judges' appointments "as judicial appointments of [his] own" before the judges had affirmed the convictions. *Id.* at 654, 666. Other courts have likewise upheld ratifications following Appointments Clause and other constitutional challenges. *E.g.*, *CFPB v. Gordon*, 819 F.3d 1179, 1190-92 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2291 (2017)) (Director's "Notice of Ratification" simply "affirm[ed] and ratif[ied]" prior actions and the challenger offered no evidence that the Director failed to make a detached and considered judgment concerning matters he ratified); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602-03 (3d Cir. 2016) (ratification valid where action taken with "full knowledge of the decision to be ratified" and reflected "a detached and considered affirmation of the earlier decision"); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 115-16, 118-19 (D.C. Cir. 2015) (de novo record review sufficient for valid ratification; "new hearing" not required); *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212-14 (D.C. Cir. 1998); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996).

2. The ALJs' Removal Protections Do Not Violate the Constitution.

Respondents wrongly assert (Pet. 8) that "ALJs are impermissibly insulated from presidential removal."[6] Article II of the Constitution vests "[t]he executive Power . . . in a President of the United States of America," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.* § 3. Unlike its specific directives governing the power of

[6] Respondents' inclusion of this claim preserves it for further review. *See* 15 U.S.C. § 78y(a)(1) (if "aggrieved by a final order of the Commission," respondents may raise any preserved challenge before a court of appeals). But adjudicating the constitutionality of congressional enactments "has generally been thought beyond the jurisdiction of administrative agencies." *Elgin v. Dep't of the Treasury*, 132 S. Ct. 2126, 2136 (2012). Thus, while a federal court would be the ultimate arbiter of this type of constitutional claim, the Division nevertheless submits this response to explain that Congress's longstanding removal protections for ALJs do not violate the separation of powers.

appointment, "[t]he Constitution is silent with respect to the power of removal from office, where tenure is not fixed." *In re Hennen*, 38 U.S. 230, 258 (1839). The "power of removal" nonetheless has been viewed as "incident to the power of appointment." *Id.* at 259; *see also Myers v. United States*, 272 U.S. 52, 164 (1926) (the Constitution implicitly reserves to the President the "power of removing those for whom he cannot continue to be responsible").

The Supreme Court has long recognized that Congress may impose limited restrictions on the removal power. Congress may, for example, impose a for-cause removal restriction on the President's power to remove principal officers of certain independent agencies. *See Free Enter. Fund*, 561 U.S. at 493-94. And the Court has countenanced for-cause limitations on a principal officer's ability to remove inferior officers. *Id.* at 494.

In *Free Enterprise Fund*, however, the Court held that the "novel" and "rigorous" barrier to removing members of the Public Company Accounting Oversight Board by the Commission, whose members are presumed to enjoy "for cause" removal protection, left the President with insufficient ability to supervise the PCAOB's execution of the laws. 561 U.S. at 496. The Court noted that it had "previously upheld limited restrictions on the President's removal power" but only where "one level of protected tenure separated the President from an officer exercising executive power." *Id.* Two levels of "for cause" removal for an officer exercising "executive power," the Court held, "result[s] i[n] a Board that is not accountable to the President, and a President who is not responsible for the Board." *Id.*

Free Enterprise Fund does not compel the conclusion that the statute providing that the Commission ALJs' may be removed only for "good cause" (5 U.S.C. § 7521) violates the separation of powers. First, in his brief in *Raymond J. Lucia, et al. v. Securities & Exchange Commission* (S. Ct. No. 17-130), the Solicitor General offered an interpretation of ALJs' "good

cause" removal protection that comports with constitutional constraints. Drawing from constitutional avoidance principles, the Solicitor General explained (SG Br. 51) that, even where ALJs are embedded "in a structure involving more than one layer of tenure protection," a proper construction of "good cause" may alleviate constitutional concerns. The statutory scheme, the Solicitor General stated (SG Br. 47), must be understood to allow "[a]gency heads [to] be able to remove ALJs who refuse to follow agency policies and procedures, who frustrate the proper administration of adjudicatory proceedings, or who demonstrate deficient job performance." Under that view, Section 7521 should be "interpreted to permit an agency to remove an ALJ for personal misconduct or for failure to follow lawful agency directives or to perform his duties adequately." *Id.* at 45. At the same time, an ALJ may not be removed "'at the whim or caprice of the agency or for political reasons,'" *Id.* at 49 (quoting *Ramspeck v. Federal Trial Exam'rs Conference*, 345 U.S. 128, 142-43), and "an ALJ would still be protected from removal for invidious reasons otherwise prohibited by law," *Id.* at 50.

According to the Solicitor General, that interpretation of Section 7521 avoids the constitutional defects at issue in *Free Enterprise Fund*. There, "the PCAOB's members could be removed only under an 'unusually high standard' that required a 'willful' violation of the law, a 'willful' abuse of their authority, or an 'unreasonable' failure to enforce legal requirements"; here, by contrast, "[t]he intrusion on presidential authority is significantly less." SG Br. 51 (quoting *Free Enterprise Fund*, 561 U.S. at 503). "ALJs could accordingly be held accountable, by the Heads of Departments and the President who appoint them, for failure to execute the laws faithfully." *Id.*[7]

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[7] The Solicitor General also stated that Section 7521(a)—which allows for removal "only for good cause established and determined by the Merit Systems Protection Board [MSPB] on

Second, crucial to the Court's decision to invalidate the dual for-cause structure in that case was the fact that PCAOB Board members exercised quintessential "executive" functions—and not solely "quasijudicial" functions. 561 U.S. at 496, 502, 505, 507 n.10. Indeed, the Court refused to extend its holding to ALJs, who "of course perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers." *Id.* at 507 n.10. The Solicitor General in *Lucia* similarly drew a line (SG Br. 45, 50) between quasijudicial duties and purely executive functions when he explained that the President, acting through principal officers, cannot remove an ALJ "to influence the outcome in a particular adjudication," and noted the need to "respect[ ] the independence of ALJs in adjudicating individual cases."

That is reflective of the Supreme Court's longstanding recognition that Congress's ability to enact limited removal protections depends in part on the functions of the office being created. In *Wiener v. United States*, 357 U.S. 349 (1958), for example, the Court upheld statutory removal restrictions of War Claims Commission members because the members performed "quasijudicial" rather than purely executive functions. *Id.* at 353-54. And in *Morrison v. Olson*, 487 U.S. 654 (1988), the Court upheld good-cause restrictions on the removal of an "independent counsel," who was an executive officer with the power to investigate allegations of crime by high officers, because the restrictions provided structural independence necessary to the

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the record after opportunity for hearing before the Board"—should be construed so that "the MSPB's review is limited to determining whether factual evidence exists to support the agency's proffered good faith grounds." SG Br. 39, 52. Such an approach ensures that the Department Head retains primary control in the decision to remove an ALJ. But the Commission need not address this aspect of the statutory scheme; regardless of how the MSPB's role in the removal process is understood, agencies like the Commission "possess the authority to reassign responsibilities away from ALJs while awaiting MSPB review of a removal decision." *Id.* at 53, 55. Consequently, "[t]hat authority avoids the possibility that an ALJ might continue to adjudicate cases beyond the point at which the Department Head has lost confidence in the ALJ's ability to exercise appropriate judgment." *Id.* at 55.

proper functioning of the particular office, and the independent counsel had "limited jurisdiction and tenure and lack [of] policymaking or significant administrative authority." *Id.* at 689-91, 695-96.

Accordingly, Congress has the latitude to impose removal restrictions to ensure the structural independence necessary for ALJs to properly perform their quasijudicial functions—which is precisely what the Commission explained when rejecting a removal challenge premised on *Free Enterprise Fund*. *See Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *27 (Sept. 17, 2015).

CONCLUSION

For all the reasons stated above, the Division requests that the Commission affirm the Initial Decision.

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 June 14, 2018, by the method indicated:

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