UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16801

In the Matter of

BENNETT GROUP FINANCIAL SERVICES, LLC

and

DAWN J. BENNETT,

Respondents-Petitioners.

THE DIVISION OF ENFORCEMENT'S OPPOSITION BRIEF ON REVIEW OF THE INITIAL DECISION

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I. INTRODUCTION

Petitioners chose to forgo their hearing on the merits and instead defend this case with a constitutional argument that they knew had been rejected by the Securities and Exchange Commission repeatedly. Because petitioners have offered no reason to disrupt well-established Commission precedent finding that administrative law judges ("ALJs") are not "officers," for purposes of Article II, and because the record wholly supports the finding of liability and sanctions determined by ALJ James E. Grimes, petitioners' arguments should be rejected. The initial decision of default, *Bennett Grp. Fin. Servs., LLC, & Dawn J. Bennett*, Initial Decision Rel. No. 1033, 2016 WL 4035560 (July 11, 2016) (the "Initial Decision"), should be affirmed in its entirety.

II. STATEMENT OF THE CASE

The record—including the facts presented in the order instituting proceedings, *Bennett Grp. Fin. Servs., LLC & Dawn J. Bennett*, Exchange Act Rel. No. 75864, 2015 WL 5243888 (Sept. 9, 2015) (the "OIP"), and the other evidence submitted during the hearing—established petitioners violated the federal securities laws.

A. Bennett and Bennett Group Misrepresented the Size and Performance of Their Business

Dawn J. Bennett ("Bennett") is the founder, chief executive officer, and majority owner of Bennett Group Financial Services, LLC ("Bennett Group"). (OIP ¶ 7; Answer ¶ 7; Ex. 361, at 176–77.) She holds Series 7, 63, and 65 securities licenses. (OIP ¶ 7; Answer ¶ 7; Ex. 361 at 183.) Bennett Group is a financial services firm and was, until it withdrew its registration in 2013, an investment adviser registered with the Commission. (OIP ¶ 6; Answer ¶ 6.)

Bennett has previously been found liable in arbitrations involving allegations of fraud, misrepresentations and omissions, churning, and unsuitability, among other things. (Ex. 272; Ex. 274.)[1]

During the relevant period, petitioners were managing, at most, approximately $407 million in assets. This sum consisted of approximately $338 million in nondiscretionary brokerage assets, $67 million in pension consulting assets, and $1.1 million in advisory assets. (OIP ¶¶ 8, 21; Exs. 78–84, 149–61.)

But Bennett and her firm claimed to be managing much more. From 2009 through 2011, petitioners claimed for marketing purposes that they managed assets ranging from $1.1 billion to over $2 billion.

1. False Submissions to *Barron's*

In 2008, Bennett Group registered with the Commission as an investment adviser. (OIP ¶ 6; Answer ¶ 6.) Shortly thereafter, Bennett and her firm made their first submission to *Barron's* magazine, for inclusion in its "Top 100 Women Financial Advisors" issue of June 9, 2009. (Ex. 29; OIP ¶¶ 11–13; Answer ¶ 11; Ex. 361, at 66–67, 193–94.) According to the information provided by petitioners, and relied upon and republished by *Barron's*, Bennett and her firm had, at

[1] Bennett Group largely operated as a location for one of two broker-dealers: Royal Alliance Associates, Inc. ("Royal Alliance") (from February 2006 to October 2009) and Western International Securities, Inc. ("Western") (since October 2009). (Ex. 274.) Bennett Group employees, including Bennett, were registered representatives of the brokerage firms, and the overwhelming majority of the Bennett Group's revenue came by way of brokerage commissions, which were paid by the brokerage firms to Bennett individually, who then transferred them to Bennett Group. (E.g., OIP ¶ 6; Answer ¶ 6; Ex. 306; Ex. 365, at 19-20.)

the time, $1.1 billion in assets under management ("AUM"). (Ex. 29; OIP ¶ 12.) Bennett and her firm landed the Number 5 ranking on the list.[2] (Exs. 29, 89, 90; OIP ¶ 12.)

For the next couple of years, Bennett continued to overstate petitioners' AUM. In 2009, Bennett and her firm made another submission to *Barron's*, claiming managed assets of $1.3 billion. (OIP ¶ 12; Ex. 361, at 191–94.) This landed them as Number 26 on *Barron's* August 9, 2009, list of the "Top 100 Independent Financial Advisors."

And *Barron's* "2011 Top Advisor Rankings: Washington, D.C.," ranked Bennett and Bennett Group as number 2, based on petitioners' claim to have $1.8 billion in AUM. (OIP ¶ 12; Exs. 31, 33, 361, at 66–70.)

Petitioners sent the *Barron's* rankings to numerous current and prospective clients. In June 2010, petitioners sent dozens of emails noting that: "Last year, ***Barron's*** ranked Dawn Bennett as #4 in their 'Top 100 Women Financial Advisors.' Our firm has size, strength and stability with assets under management of $1.5 billion."[3] (Exs. 91–92, 94–148 (emphasis in original); *see also* Ex. 250.) Reprints of the *Barron's* article were often attached to the e-mails. (*E.g.*, Exs. 94, 103–07, 109–23, 125–26, 129–30, 133–40, 142–45, 147–48, 250, 321, 355.) In addition, in mid-2010, Bennett Group ordered 1,125 copies of the "Top 100 Women Financial Advisors" article and sent at least 125 copies to existing or prospective clients. (OIP ¶ 16; Exs. 162; 361, at 78–80.) And the firm's web site made prominent use of the 2009 Top 5 *Barron's* ranking. (Ex. 254.)

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[2] The *Barron's* article explained that "[t]he ranking . . . reflects the volume of assets overseen by the advisors and their teams, revenue generated for the firms and the quality of the advisors' practices." (Ex. 89; *see also* Ex. 165, at 11 & n.32 ("Financial publications such as *Barron's* . . . report information on the amount of assets managed when discussing, and, in some cases, ranking investment managers.").)

[3] Bennett and Bennett Group were actually ranked number 5, not number 4.

2. False Statements in Bennett's "Myth Busting" Radio Program

In 2010, Bennett began hosting a weekly radio program, "Financial Myth Busting with Dawn Bennett," in which she often touted her and her firm's services. Bennett Group paid between $1,500 and $3,850 weekly for the time. (Ex. 360, at 65.)

a. False Statements about AUM

During the program, Bennett and her co-host frequently made statements about petitioners' AUM and ranking in *Barron's*, including (among others):

- "I built the company with $1.5 billion and for the last fifteen years, my clients have seen consistent returns in the green." (Ex. 74 [5/9/2010 Tr.], at p. 2.)
- [Co-host:] Bennett has been "recognized by *Barron's* as one of the top five financial advisors in the June 2009 issue." (Ex. 74 [5/9/2010 Tr.], at p. 3.)
- "1.5 billion that we have right now with money under management—and growing." (Ex. 73 [5/16/2010 Tr.], at p. 37.)
- "I am the CEO of Bennett Group Financial Services in Washington D.C. We have 1.5 billion of assets under management . . . ." (Ex. 71 [6/13/2010 Tr.], at p. 2.)
- [Co-host:] "Since one of the main purposes of the show is to allow the real investor a chance to tap into your expertise as you handle a billion and a half and upwards of assets at Bennett Group Financial Services, would you explain, please, what a SEP-IRA is?" (Ex. 69 [6/27/2010 Tr.], at p. 35.)
- ". . . with 1.6 billion under management, I am known to move and think fast." (Ex. 65 [8/1/2010 Tr.], at p. 2.)
- "I'm at the helm of 1.6 billion in assets of clients' financial dreams." (Ex. 64 [8/8/2010 Tr.], at pp. 2–3.)
- [Co-host:] "Dawn is the expert . . . . She manages 1.6 billion in investments. She's ranked in the top one percent worldwide in returns on investments so there's your bonafides for . . . Bennett Group Financial Services." (Ex. 63 [8/22/2010 Tr.], at pp. 18–19.)

- "Just to remind everybody, I actually have a financial advisory firm. I'm the real thing. We manage about 1.6 billion . . . ." (Ex. 61 [9/5/2010 Tr.], at p. 2.)
- "You know what, we have 1.6 billion under management . . . ." (Ex. 60 [9/12/2010 Tr.], at pp. 48–49.)
- "We have 1.6 billion under management." (Ex. 56 [10/10/2010 Tr.], at p. 50.)
- "1.8 billion that we have under management." (Ex. 54 [10/31/2010 Tr.], at p. 35.)
- "I don't think we would have two billion in assets if I wasn't [disciplined] . . . ." (Ex. 48 [12/12/2010 Tr.], at p. 14.)
- ". . . I do manage two billion in assets." (Ex. 46 [1/16/2011 Tr.], at p. 21.)
- "Well, you know, I rank in *Barron's* a lot." Ex. 46 [1/16/2011 Tr.], at p. 31)

Bennett and Bennett Group also claimed that they managed "$1.5 billion of client assets" on the Facebook page they maintained for the "Myth Busting" radio show. (OIP ¶ 20.)

b. *False Statements about Performance*

During her radio show, Bennett passed off the results of a Bennett Group "model portfolio" as actual client results, inflating her portfolio returns. (OIP ¶¶ 42–45.) For example, in August 2010, Bennett said that her clients had gains of 17.77%, "versus the negative 5.61 for the S&P 500." (Ex. 65, at 6.[4]) In September of the same year, she compared her clients' "10.2 percent" gain to the S&P 500 that was "only up about 50 basis points." (Ex. 59, at 51.) She also rattled off a set of historic "returns": "But I've got to tell you, last year we were up forty-two percent. Our three-year number was up seventeen percent. Our ten-year number was up twelve." (Ex. 59, at 32.) None of these figures represented actual client results. They were merely for a "model

[4] See also Ex. 65, at p. 14 (Bennett noting that her clients "exceed[ed] the S&P 500 index for the three-year number by almost twenty percent").

portfolio," and the "model" results differed materially from actual results—which Bennett failed to disclose to the show's listeners. (Exs. 163, at pp. 24–25).

Bennett knew this was wrong.[5]

3. False Statements in Communications with Clients

Bennett Group's marketing brochure, which petitioners distributed to clients and prospective clients, also falsely claimed "over $1.5 Billion in assets under management." (Ex. 168, at p. 5; Ex. 361, at 80–83.) It noted that Bennett "[h]osts a weekly one hour radio show on WMAL-630-AM" and that she is "[r]anked in the top 5 in the Barron's Top 100 Women Financial Advisors-2009" and "[r]anked in the top quartile in the Barron's Top 100 Independent Financial Advisors-2009." (Ex. 168, at pp. 7–8.) By September of 2010, petitioners touted over $1.6 billion in AUM. (Ex. 34.) Two months later, petitioners falsely claimed they had "$2 billion in holdings." (Ex. 253.)

As Bennett's former customers testified, Bennett lied about the size of her firm in conversations with them as well. For example, when Bennett met Phillips Peter in the spring of 2009, she told him that she "was in the top 1 percent of financial advisors and . . . had a business that was over a billion dollars." (1/27/2016 Tr. at 108.) Peter then moved about half of his portfolio to Bennett Group. (1/27/2016 Tr. at 110–12; Exs. 343–52.) In June 2009, Bennett directed Peter to the "Top 100 Women Financial Advisors" article, which caused him to transfer the

[5] In late 2008, Bennett Group's outside accountants advised that when describing performance, the firm either had to describe actual client results or, if the figures were based on model returns, specifically disclose them as such. (OIP ¶ 44; Ex. 269.) The accountants provided Bennett Group with a highlighted printout of the Division of Investment Management's no-action letter in Clover Capital Management, Inc. (Ex. 269.) Bennett Group's policies and procedures reflected Commission guidance against undisclosed use of model portfolio performance. (Ex. 180, at 72–74.)

rest of his assets to the Bennett Group. (1/27/2016 Tr. at 109–11; Exs. 29, 319, 343–52.) Peter was "[h]eavily" influenced by the *Barron's* ranking, because he "looked at *Barron's* as one of the pillars of reporting on the financial industry." (1/27/2016 Tr. at 115.) Ultimately, Peter lost millions at Bennett Group: in one year his account value fell from $25.9 million to $8.3 million. (Ex. 352.)

Another customer, John Crowly, invested over $1 million with petitioners; Bennett told him that he was a small player, because she had more than a billion under management. (1/27/2016 Tr. at 89-90.) Bennett emailed Crowley a copy of the *Barron's* "Top 100 Women Financial Advisors" article, and Crowley continued to purchase and sell securities through petitioners. (1/27/2016 Tr. at 91–92, 95; Ex. 355.) Bennett Group's size was important to Crowley because "it meant that . . . our investments were being handled in the same way many other smart investors' were going to be handled, that other larger parties had made decisions to go with Bennett and that that afforded us the belief that they're a very credible organization." (1/27/2016 Tr. at 94–95.)[6]

Similarly, Bennett told Steven Santagati, that he "was a small fry in her portfolio" and that she would do him a "favor;" Bennett claimed to manage "billions of dollars, over a billion dollars in people's money." (1/27/2016 Tr. at 70-71.) Over time, Santagati invested his life savings—over $1 million—with petitioners. (1/27/2016 Tr. at 68.) Bennett sent the *Barron's* publications to him, and he continued to transfer money to her and continued to engage in securities transactions through her. (1/27/2016 Tr. at 69–70; Exs. 29–31.) Bennett also attempted to get Santagati to use his connections to solicit additional clients. (1/27/2016 Tr. at 71–72.) Ultimately, Santagati suffered over $1 million in losses. (1/27/2016 Tr. at 69.)

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[6] Professor Wermers discussed the salience of AUM (as well as performance) data, including the perception that firms with larger asset bases are less risky. (Ex. 165, at pp. 10–15.)

After ending his relationship with petitioners, Santagati contacted John Koorey, the former Operations Manager at Bennett Group. (1/27/2016 Tr. at 73–74; Ex. 364, at 44.) Santagati noted that Bennett was "managing billions of dollars," and asked "[i]f she's losing money for clients like this, how do they stay with her?" (1/27/2016 Tr. at 73.) Koorey laughed at Santagati, telling him: "Dawn does not manage billions of dollars. She says that, but she doesn't. She maybe, maybe manages high $300 million or $400 million in assets, but nothing close to what she claimed." (1/27/2016 Tr. at 73–74.)

B. There Were No Checks in Place at Bennett Group to Prevent or Correct the Misconduct

Although Bennett Group technically had a chief compliance officer, Timothy Augustin, he did not have the experience or authority needed to actually perform the compliance function. (Ex. 360, at 40-41, Ex. 181 at 14-15.) The firm's policies and procedures (Ex. 180) were inadequate. For example, they contained no provision concerning calculation of AUM. (Ex. 181, at 10.) Augustin did not, and could not, verify Bennett's claims about AUM or pre-approve the firm's advertising material, as required. (Ex. 181, at 12.)

In 2009 after the first *Barron's* piece came out, Augustin questioned Bennett about the claim of $1.1 billion in AUM, which came as "a bit of a surprise" because Augustin had not "seen the number before." (Ex. 360, at 213-14.) Bennett told Augustin that the claim was justified based on "cash on the outside . . . that she advises on." (Ex. 360, at 213–14.) Augustin had "no basis to judge whether [that claim] was right or wrong." (Ex. 360, at 214.)

The first time that Augustin even saw *Barron's* "2011 Top Advisors Rankings" was during his investigative testimony before the Division on December 4, 2014. (Ex. 360, at 151.) In that

issue, *Barron's* listed $1.8 billion in AUM. (Ex. 31.) According to Augustin, this number was "not representative of the assets that were certainly on the advisor." (Ex. 360, at 151.) And Augustin had "no idea" whether the claimed $1.8 billion in AUM could have been correct using a different denominator. (Ex. 360, at 150.)

C. **Bennett and Bennett Group Obstructed the Examination and Investigation**

In early 2011, the Commission's Philadelphia Regional Office conducted an examination of Bennett Group. The Office of Compliance Inspections and Examinations ("OCIE") uncovered a discrepancy between the verifiable brokerage assets and claimed pension assets (which together totaled about $400 million) and what petitioners touted publicly (over $1 billion). (1/27/2016 Tr. at 32–35; 41–42.) When confronted with this inconsistency, Bennett told OCIE staff that the difference consisted of "short-term assets" of three corporations for which Bennett Group "provided informal investment advice." (1/27/2016 Tr. at 42.)

Bennett and the firm submitted two letters, dated February 11, 2011 (Ex. 151) and February 25, 2011 (Ex. 35), in which they laid out their story concerning short-term cash management (1/27/2016 Tr. at 42–45). In the February 11, 2011 letter, petitioners stated that they provided "[i]nformal advice on short-term liquidity and some longer-term positions on a no-fee, unmanaged basis" for the following clients:

Dimension Data	$706,000,000
Omega World Travel	$150,000,000
Mount Vernon Ladies' Association	$100,000,000

(Ex. 151). When OCIE staff requested contracts, correspondence, investment recommendations, and other documents to substantiate that petitioners provided services to these clients, the firm was unable to provide them; Bennett claimed that all dealings were verbal. (1/27/2016 Tr. at 44–45.)

Just after the examination concluded, OCIE staff discovered the 2011 *Barron's* ranking, in which petitioners claim AUM of $1.8 billion. (Ex. 31.) Although the submission for this ranking had been completed before the examination began (1/27/2016 Tr. at 36; Ex. 33), Bennett and the firm failed to provide it to OCIE staff. (1/27/2016 Tr. at 35–36). When confronted with the fact that neither the questionnaire (Ex. 33) nor the resulting ranking (Ex. 31) had been provided to OCIE staff, Bennett told the staff that "it wasn't considered advertisement" because it "wasn't distributed to clients yet" (1/27/2016 Tr. at 35–36).

OCIE referred the matter to the Division of Enforcement (the "Division"). During the subsequent investigation, Bennett's story evolved. In an attempt to minimize the discrepancy between her purported and actual AUM, Bennett more than doubled the amount of assets that she claimed to be managing for Dimension Data from $706 million to $1.575 billion. (*E.g.*, Ex. 361, at 262.) Further, between her first investigative testimony (in December 2013) and her second (in January 2015), she produced what she said were newly discovered documents to substantiate her claims about short-term cash management. (Exs. 75–77, 177–79)

The investigation established that petitioners' claims were false and that the documents they provided were inauthentic.

1. False Claims Concerning Dimension Data

Bennett testified that she provided short-term cash management advice for Dimension Data to Dan Celoni, the former chief financial officer for the Americas at Dimension Data, and that she

met with Celoni personally. (Ex. 361, at 255.) Bennett also provided an affidavit from former Dimension Data employee Wesley Johnston in which Johnston claimed to have heard from Celoni and Adrian Liddiard (Celoni's predecessor) about Bennett's services. (Ex. 85 ¶ 8.) Bennett also produced three "Project Request Forms" (Exs. 75–77), which she said indicated the amounts of Dimension Data short-term cash for which she provided advice at three points in time (Ex. 361, at 214–15, 261–62). A December 2010 project request form for Dimension Data reflected that petitioners managed "$1,575,000,000." (Ex. 76.)

But Dan Celoni testified that, although he knew who Bennett was, he had never met her. (Ex. 362 at 23–24.) Celoni testified that the only services Bennett provided Dimension Data related to the 401(k) plan for the company's U.S.-based employees.[7] (Ex. 362, at 58–59.) Celoni was unaware of any Americas-based Dimension Data employee executing (or having the authority to execute) any securities transactions for the company. (Ex. 362, at 81–82, 96.) Any investment decisions, including with respect to short-term cash, were made at company headquarters in South Africa. (Ex. 362, at 43.)

In addition, the Group Treasurer for Dimension Data in Johannesburg, South Africa, Brian Howard, testified that Dimension Data never had close to $1.575 billion in cash assets. (1/27/2016 Tr. at 49, 52.) Howard—who oversaw Dimension Data's finances and investments—further testified that he had never communicated with Bennett or anyone else at Bennett Group, that to the best of his knowledge no investment recommendations were ever sought or received from them, and that all investment decisions for the company were made in South Africa, without involvement from Dimension Data's U.S.-based employees. (1/27/2016 Tr. at 50–53.)

[7] Bennett was terminated from her 401(k) role in February 2011. (Ex. 174.)

Finally, Wesley Johnston, who knew Bennett as a personal acquaintance and brokerage customer (Ex. 363, at 20–24; Ex. 361, at 344–45, 347–49), admitted in testimony that the affidavit he provided for her was false. Contrary to his affidavit, Johnston never received any briefings from Celoni or his predecessor regarding Bennett's advice on Dimension Data's short-term cash investments. (Ex. 363, at 69.)

2. False Claims Concerning Omega World Travel

Petitioners made varied and inconsistent claims to OCIE and Division staff about Omega World Travel ("Omega"). In their February 11, 2011 letter, petitioners claimed to advise Omega on $150 million in cash. (Ex. 151.) During the investigation, Bennett testified that from 2008 onward she provided advice to Omega for about $50 million to $100 million. (Ex. 361, at 53-54.) Documents that petitioners produced during the investigation indicated that they advised Omega on $20 million to $25 million. (Exs. 75–77.) Bennett testified that Daniel Bohan of Omega would "give [her] a call on a weekly basis" about Omega's short-term cash management, and that she had in-person meetings with Daniel Bohan at Omega's offices. (Ex. 361, at 49–50.)

None of these claims was true, as established by Gloria Bohan, the chief executive officer of Omega and Daniel Bohan's wife. Gloria Bohan testified that Daniel Bohan passed away in 2010 and had been incapacitated by illness since 2004. (1/27/2016 Tr. at 99.) Gloria Bohan testified that she was not aware of <u>any</u> services provided by Bennett or Bennett Group to Omega, other than for the employee 401(k) plan. Gloria Bohan never communicated with Bennett or Bennett Group regarding the investment of any Omega corporate assets. (1/27/2016 Tr. at 100–01.) Gloria Bohan testified that Omega did not even have $25 million available for investment. In fact, Omega, a local travel agency, depended on lines of credit to operate. (1/27/2016 Tr. at 101–02.)

3. False Claims Concerning Mount Vernon Ladies Association

In the February 11, 2011 letter, petitioners claimed that they advised Mount Vernon Ladies Association ("Mount Vernon") on $100 million in cash. (Ex. 151) Bennett also claimed to have provided pension consulting services for Mount Vernon, for approximately $6.5 million in assets. (Exs. 80–82, 84, 361, at 203.) Bennett testified that she provided services to Mount Vernon until 2011. (Ex. 361, at 56-57.)

Petitioners also produced copies of twelve "Weekly Call" documents,[8] which contained typed lists of questions for phone calls with Mount Vernon's Barton Groh with handwritten notes. (Ex. 179.) Bennett testified the records substantiate weekly calls with Groh about Mount Vernon's pension plan, which then morphed into discussions about short-term cash. (Ex. 361, at 409.) According to Bennett, the handwritten notes were her contemporaneous notes from conversations with Groh. (Ex. 361, at 413.) The "Weekly Call" documents have dates ranging from October 9, 2009 through April 9, 2010. (Ex. 179.)

But Barton Groh testified that Mount Vernon's relationship with Bennett was terminated in October 2009—over a year before Bennett listed Mount Vernon as a client in her letter to OCIE staff. (1/27/2016 Tr. at 83–84; Ex. 175.) Contrary to what is reflected in the "Weekly Call" documents, Groh did not have weekly or other periodic calls with Bennett in 2010. Bennett provided no services to Mount Vernon at that time. (1/27/2016 Tr. at 85–86.)

Groh also testified that, prior to their termination in 2009, petitioners provided services for only a portion of Mount Vernon's endowment, which was at most $35 million—nowhere near the $100 million petitioners claimed. (1/27/2016 Tr. at 80–82.) Further, Groh testified that Mount

[8] According to petitioners, the originals of these documents were lost in an office move.

Vernon's pension work was given to the Principal Financial Group, and not Bennett Group, despite Bennett Group's pitch for the work. (1/27/2016 Tr. at 82–83.)

D. **Petitioners Lied to the District of Columbia's Securities Regulator**

In October 2013, the District of Columbia Department of Insurance, Securities and Banking ("DISB") wrote Bennett asking about the claims in the June 2009 "Top 100 Women Financial Advisors" *Barron's* article, including the claim of "assets under management of more than a billion dollars." (Ex. 87 (emphasis in original).) Bennett responded on December 31, 2013 (Ex. 86), just a couple weeks after her first investigative testimony before the Division.

In her response, Bennett maintained that in 2009, "our client's [sic] brokerage accounts had assets in excess of $1 Billion (and still do)." (Ex. 86.) The firm's own records establish this statement is false. (Exs. 78-84, 150, 153-57, 159-61.) Bennett's letter also contradicted the (equally false) story that petitioners had told the Commission's examination and investigative staff (i.e., that the AUM mostly consisted of short-term cash that was held away).

E. **Petitioners Failed to Appear at Their Hearing and ALJ Grimes Issued an Initial Decision of Default**

In December 2015, less than a month before their scheduled hearing, petitioners announced their intention to default. (12/31/15 Tr. at 23.) Petitioners acknowledged that by failing to appear at the hearing they would be defaulting, that the facts of the OIP would be found true, and the hearing would be decided against them. (12/31/15 Tr. at 26–27.) *See also Bennett Grp. Fin. Servs., LLC & Dawn J. Bennett*, Administrative Proceedings Rulings Rel. No. 3453, slip op. at 1 n.1 (Dec. 31, 2015).

ALJ Grimes conducted a hearing on January 27, 2016. (1/27/16 Tr.) The Division presented live testimony of eleven witnesses, prior sworn testimony of six additional witnesses, and over three hundred exhibits.

ALJ Grimes issued the Initial Decision, finding that petitioners willfully violated Section 17(a) of the Securities Act of 1933 (the "Securities Act"),[9] Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"),[10] Exchange Act Rule 10b-5,[11] and Section 206(1) and (2) of the Investment Advisers Act of 1940 (the "Advisers Act").[12] ALJ Grimes also found that Bennett Group willfully violated, and Bennett willfully aided and abetted and caused the violations of, Section 206(4) of the Advisers Act[13] and Advisers Act Rules 206(4)-1(a)(5) and 206(4)-7.[14] ALJ Grimes ordered petitioners to cease and desist from further violations of these provisions, barred Bennett from the securities industry, ordered petitioners to pay disgorgement of $556,102 plus prejudgment interest, and ordered civil penalties for Bennett and Bennett Group of $600,000 and $2.9 million respectively.

III. LEGAL STANDARD

The Commission considers ALJ decisions *de novo* based on its independent review of the record. *J.S. Oliver Capital Mgmt.*, Exchange Act Rel. No. 78098, 2016 WL 3361166, at *23 (June 17, 2016).

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[9] 15 U.S.C. § 77q(a)
[10] 15 U.S.C. § 78j(b)
[11] 17 C.F.R. § 240.10b–5
[12] 15 U.S.C. § 80b–6(1), (2)
[13] 15 U.S.C. § 80b–6(4)
[14] 17 C.F.R. §§ 275.206(4) –1(a)(5), 275.206(4) –7

When a party defaults by failing to appear at an administrative hearing, Commission Rule of Practice 155(a)[15] provides that the allegations of the order instituting proceedings may be deemed true. The Commission may determine the proceeding against that party upon consideration of the record, including the allegations in the order instituting proceedings which have been deemed true.

IV. ARGUMENT

A. The Commission Should Reject Petitioners' Constitutional Claims, as It Has When Others Have Raised the Same Arguments

Petitioners argue at length that the Commission's method of hiring its ALJs violates the Appointments Clause of the Constitution. U.S. Const. art. II, § 2, cl. 2. But as petitioners concede (Brief of Petitioners In Support of Petition for Review, Sept. 21, 2016 ("Pet. Br.") 3), the Commission has repeatedly held that Commission ALJs are employees, not constitutional officers, and thus are not subject to Article II's requirements. *See, e.g., Timbervest, LLC*, Investment Advisers Act Rel. No. 4197, 2015 WL 5472520, at *23-26 (Sept. 17, 2015); *Raymond J. Lucia Cos., Inc.*, Exchange Act Rel. No. 75837, 2015 WL 5172953, at *21-23 (Sept. 3, 2015).

And, as petitioners also concede (Pet. Br. 4-5), the D.C. Circuit has recently agreed with the Commission that ALJs are not constitutional officers. *Raymond J. Lucia Cos. v. SEC*, --- F.3d ---, 2016 WL 4191191 (D.C. Cir. Aug. 9, 2016). Petitioners argue that the Commission and the D.C. Circuit are both wrong, but they have not offered any basis for the Commission to reconsider its conclusions and instead merely repeat arguments that the Commission has already rejected. *See, e.g., John J. Aesoph, CPA*, Exchange Act Rel. No. 78490, 2016 WL 4176930, at *19-21 (Aug.

[15] 17 C.F.R. § 201.155(a).

5, 2016) (addressing and rejecting criticisms of Commission opinions holding that ALJs are employees).

B. The Record Wholly Supports the Finding that Petitioners Violated the Federal Securities Laws

Petitioners do not challenge ALJ Grimes' finding of liability. (Pet. Br. 1.) Indeed, as described above, the record leaves no ground to dispute that petitioners violated the federal securities laws.

1. The Record Demonstrates Violations of Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b–5.

Petitioners violated each of the subsections of Section 17(a) of the Securities Act and each of the subsections of Exchange Act Rule 10b–5. The principal elements required for liability under Section 17(a) or Rule 10b–5 are: (1) petitioners made a material misrepresentation or used a fraudulent device; (2) with scienter; (3) in the offer and sale of any securities (Section 17(a)) or in connection with the purchase and sale of a security (Rule 10b–5). *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999).[16]

[16] Although there are certain differences in the requirements under the various subsections of Section 17(a) and Rule 10b–5, none of those distinctions affects the result here. For example, unlike the other provisions, Section 17(a)(2) requires a showing that petitioners "obtain money or property" by means of material misstatements; this requirement is met because Bennett received commissions from clients and customers and subsequently transferred them to Bennett Group (OIP ¶ 6; Answer ¶ 6; Ex. 306; Ex. 365, at 18–20). And claims under Rule 10b–5(a) and (c) and Section 17(a)(1) and (a)(3) may require more than a single misstatement or omission; here, petitioners persistently inflated their AUM and performance figures on dozens of occasions in numerous contexts. They did so deliberately to recruit new business. Their myriad misstatements amount to a deceptive "device scheme or artifice to defraud," in violation of Rule 10b–5(a) and Section 17(a)(1), a deceptive "act, practice, or course of business" in violation of Rule 10b-5(c), and a "practice, or course of business" that "would operate as a fraud" on investors, in violation of Section 17(a)(3). *See, e.g., Dennis J. Malouf*, Securities Act Rel. No. 10115, 2016 WL

First, as described above, petitioners made dozens of false statements concerning their AUM and client performance, and the record supports the determination that these misstatements were material. The expert report of Professor Wermers contains extensive analysis to sustain his materiality conclusion. (Ex. 165.) And ALJ Grimes credited Professor Wermers' testimony. Initial Decision, 2016 WL 4035560, at *33. The materiality determination also accords with prior court cases and Commission decisions finding false statements concerning AUM and investor returns to be material. *See, e.g., SEC v. Nadel*, 97 F. Supp. 3d 117, 123-24 (E.D.N.Y. 2015) ("[A]ny reasonable investor would consider the accurate amount of assets under management to be a material fact to consider before investing."); *Warwick Capital Mgmt., Inc.*, Investment Advisers Act Rel. No. 2694, 2008 WL 149127, at *8 (Jan. 16, 2008); *SEC v. K.W. Brown and Co.*, 555 F. Supp. 2d 1275, 1309 (S.D.Fla. 2007); *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 377 (S.D.N.Y. 2007).

Second, the record demonstrates that petitioners acted with scienter. The sheer number of wildly inaccurate statements—concerning data points so basic to petitioners' business as AUM and performance—leaves no question that Bennett spoke intentionally. And Bennett's scienter can be imputed to Bennett Group. *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1106 (10th Cir. 2003); *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 812 (2d Cir. 1975). Petitioners' efforts to impede the examination and investigation further confirm that the false statements were made with scienter. *See SEC v. Weintraub*, No. 11-21549-CIV, 2011 WL 6935280, at *8 (S.D. Fla. Dec. 30, 2011)

035575, at *14-17 (July 27, 2016); *Francis V. Lorenzo*, Securities Act Rel. No. 9762, 2015 WL 1927763, at *11 (April 29, 2015).

(defendant's false and misleading statements and omissions to SEC staff during the investigation, which were made in attempt to cover up wrongdoing, confirmed scienter).

And third, the misconduct is connected to the "offer or sale" and "purchase or sale" of securities (as required by Section 17(a) and Section 10(b), respectively) because petitioners made the material misrepresentations and omissions to existing or prospective customers and clients. The nexus requirements are satisfied when asset managers falsify AUM to induce customers to place assets under management for securities trading. *SEC v. Locke Capital Mgmt., Inc.*, 794 F. Supp. 2d 355, 367 (D.R.I. 2011).

2. The Record Demonstrates Violations of Advisers Act Sections 206(1) and 206(2)

For essentially the same reasons, petitioners violated the antifraud provisions of the Advisers Act. Sections 206(1) and 206(2) of the Advisers Act "make it unlawful for an investment adviser to operate a fraud upon a client or prospective client." *Locke Capital Mgmt.*, 794 F. Supp. 2d at 368 (footnote omitted). Both Bennett Group and Bennett are "investment advisers" for purposes of the Act: Bennett Group was a registered investment adviser at the relevant time and Bennett was its Chief Executive Officer (OIP ¶¶ 6–7; Answer ¶¶ 6–7). *See* Advisers Act § 202(a)(11);[17] *Locke Capital Mgmt.*, 794 F. Supp. 2d at 368 n.7. And the facts that establish the violations of Securities Act Section 17(a) and Exchange Act Section 10(b) also support a violation of Sections 206(1) and 206(2) of the Advisers Act. *Id.* at 368; *Haligiannis*, 470 F. Supp. 2d at 383; *David Henry Disraeli*, Securities Act Rel. No. 8880, 2007 WL 4481515, at *8 (Dec. 21, 2007), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009).

[17] 15 U.S.C. § 80b–2(a)(11).

3. The Record Demonstrates Violations of Advisers Act Rule 206(4)–1(a)(5)

Petitioners' false statements through *Barron's*, on Bennett's radio program, and in their brochure constitute violations of Rule 206(4)–1(a)(5), which prohibits the direct or indirect distribution of any advertisement "[w]hich contains any untrue statement of a material fact, or which is otherwise false or misleading." Rule 206(4)–1(a)(5) was promulgated under Advisers Act Section 206(4), which proscribes acts, practices, or courses of business by investment advisers that are fraudulent, deceptive, or manipulative. Violations of Section 206(4) and the rules thereunder do not require scienter. *See Anthony Fields*, Investment Advisers Act Rel. No. 4028, 2015 WL 728005, at *14 (Feb. 20, 2015).

Bennett Group's use of the *Barron's* rankings and articles to promote its business and its distribution of them to customers and potential customers rendered them "advertisements." *See ZPR Inv. Mgmt.*, Investment Advisers Act Rel. No. 4249, 2015 WL 6575683, at *25 (Oct. 30, 2015) (Morningstar reports circulated and distributed by respondent were advertisements), *motion for reconsideration denied,* Investment Advisers Act Rel. No. 4417, 2016 WL 3194778. Likewise, Bennett's "Financial Myth Busting" radio program promoted Bennett Group's advisory services, as did Bennett Group's brochure.

Bennett violated Rule 206(4)–1(a)(5) by aiding and abetting Bennett Group's distribution of false and misleading advertisement material. *See Locke Capital Mgmt.*, 794 F. Supp. 2d at 368 (holding CEO liable for aiding and abetting distribution of marketing material).

4. The Record Demonstrates Violations of Advisers Act Rule 206(4)–7

The misconduct described above was exacerbated by Bennett Group's failure to implement written policies and procedures reasonably designed to prevent violations of the Advisers Act or to

comply with the other requirements of Rule 206(4)–7. No finding of scienter is required for this violation. *See Anthony Fields*, 2015 WL 728005, at *14.

Bennett Group's "Written Supervisory Policies and Procedures Manual" (Exs. 180) was inadequate and improperly implemented. The record, including the expert report and testimony of the Howard Schneider (Ex. 181; 1/27/16 Tr. at 54-64), provides detailed analysis of how Bennett Group deviated from Rule 206(4)–7 and industry practice by, among other things, (i) failing to adopt policies and procedures that addressed the calculation and advertisement of AUM; (ii) failing to follow performance manual disclosure requirements when discussing model portfolio results (Ex. 180, at 72-74); and (iii) failing to implement the performance manual requirement that the chief compliance officer review and pre-approve advertising material (Exs. 180, at 70; 360 at 84-85, 151).

Bennett more than aided and abetted this violation. She appointed a chief compliance officer with insufficient experience for the position and gave him no authority to develop or enforce appropriate compliance policies. (Exs. 360, at 36-48; 181, at 14-15.) Rather, she created a situation in which her word alone was enough for the firm to calculate AUM and to advertise in national ratings publications, on the radio, in marketing materials, and elsewhere.

C. The Sanctions Imposed by ALJ Grimes Are Appropriate

The public interest factors set forth in *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981), weigh heavily in favor of the substantial sanctions imposed by ALJ Grimes. The *Steadman* factors inform whether an administrative sanction serves the public interest. *Richard P. Sandru*, Investment Advisers Act Rel. No. 3646, 2013 WL 4049928, at *6 (Aug. 12, 2013). They include: (1) the egregiousness of the respondent's actions;

(2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations. *Steadman*, 603 F.2d at 1140. In this case, the *Steadman* factors support the imposition of cease-and-desist orders, a bar, disgorgement, and third-tier civil penalties.

Petitioners' conduct was egregious. Over the course of years, they repeatedly advertised false performance and AUM claims, including a staggering misstatement of AUM of over $1.5 billion. And petitioners continued this course of conduct even in the face of inquiries by regulators and impeded OCIE and Division staff from investigating. Far from isolated, petitioners' misstatements and omissions showed up over and over in various venues: three *Barron's* publications, dozens of e-mail messages, numerous radio show episodes, a brochure, the firm's Web site, and one-on-one conversations with clients. And there can be no question that the conduct at issue was intentional. Petitioners fabricated AUM and invented relationships that never even existed. They falsified documents to cover-up their lies. Petitioners have neither made assurances against future violations nor recognized the wrongful nature of their conduct. Rather, they maintain they did nothing wrong. (*See* Pet. Br. at 1.) The Commission has recognized that the failure to acknowledge wrongdoing or to show remorse "indicates that there is a significant risk that, given the opportunity, [the respondent] would commit further misconduct in the future." *Justin F. Ficken*, Exchange Act Rel. No. 58802, 2008 WL 4610345, at *4 (Oct. 17, 2008).

1. Petitioners Should Be Subject to Cease-and-Desist Orders

The *Steadman* factors demonstrate that Bennett and Bennett group pose a substantial threat to the public interest, clearly satisfying the standard for cease-and-desist orders. As the

Commission has explained, "absent evidence to the contrary, a single past violation ordinarily suffices to establish a risk of future violations," justifying a cease-and-desist order. *Richard P. Sandru*, 2013 WL 4049928, at *7.

2. Bennett Should Be Subject to a Permanent and Collateral Bar.

Because Bennett has willfully violated the Securities Act, the Exchange Act, and the Advisers Act, and because it is in the public interest, Bennett should be subject to a full and permanent collateral bar. The Exchange Act and the Advisers Act authorize the imposition of this relief. Exchange Act §§ 15(b)(4)(D), 15(b)(6)(A)(i);[18] Advisers Act §§ 203(e)(5), 203(f).[19] Bennett's response to her regulators highlights the willfulness of her misconduct. She is unfit for any future role in the securities industry.

Other cases involving inflated AUM and performance figures have resulted in permanent industry bars. *See, e.g., Leila C. Jenkins*, Initial Decision Rel. No. 451, 2012 WL 681585, at *5–6 (ALJ Feb. 10, 2012); *Warwick Capital Mgmt., Inc.*, 2008 WL 149127, at *10-11.

3. Petitioners Should Be Subject to Disgorgement of $556,102 Plus Prejudgment Interest

The egregious violations at issue here warrant disgorgement. The Division offered four alternative methods for calculating disgorgement and advocated the most conservative approach, which ALJ Grimes endorsed. The disgorgement number represents estimated commissions paid to petitioners on new accounts opened between December 2009 and February 2011, the time period when petitioners were touting false AUM and performance numbers. (1/27/2016 Tr. at 131–32; Ex. 354.)

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[18] 15 U.S.C. §§ 78o(b)(4)(D), 78o(b)(6)(A)(i)
[19] 15 U.S.C. §§ 80b–3(e)(5), 80b–3(f).

The Division need not calculate disgorgement with exactitude; the law requires only a "reasonable approximation" of the ill-gotten gains. *See Larry C. Grossman*, Exchange Act Rel. No. 79009, 2016 WL 5571616, at *22 (Sept. 30, 2016); *SEC v. Sierra Brokerage Servs., Inc.*, 608 F. Supp. 2d 923, 968 (S.D. Ohio 2009), *aff'd*, 712 F.3d 321 (6th Cir. 2013). Once the Division makes this showing, the burden shifts to the respondent to demonstrate that the Division's disgorgement figure is not a reasonable approximation. *SEC v. Teo*, 746 F.3d 90, 105 (3d Cir. 2014).

Petitioners have put forth nothing to meet this burden.

Nor could they. The approach of measuring disgorgement based on compensation earned during the period of misconduct constitutes a reasonable approximation that has been accepted in other cases. *See, e.g., Locke Capital Mgmt.*, 794 F. Supp. 2d at 369; *SEC v. Bard*, No. 1:09-CV-1473, 2011 WL 5509500, at *3 (M.D. Pa. Nov. 10, 2011).

Prejudgment interest is required to be paid on an order of disgorgement and is computed at the underpayment rate established under Section 6621(a)(2) of the Internal Revenue Code. 17 C.F.R. § 201.600.

4. Petitioners Should Each Be Subject to Civil Penalties for Four Third-Tier Violations

ALJ Grimes imposed civil penalties of $600,000 on Bennett and $2,900,000 on Bennett Group. These amounts consisted of four third-tier penalties for each petitioner. Initial Decision, 2016 WL 4035560, at *46-47.

The misconduct here calls for third-tier penalties. Securities Act Section 8A,[20] Exchange Act Section 21B,[21] and Advisers Action Section 203(i)[22] provide for third-tier penalties where the violation involved (i) fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement and (ii) an act or omission that 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. These violations involved substantial fraud and deceit. And by taking in large sums of investor money (and in at least some cases losing it), the petitioners at a minimum created a significant risk of substantial losses.

In terms of the number of violations, there were literally dozens—at least eighteen radio shows, three *Barron's* publications, numerous e-mail messages, the marketing brochure, the firm's Web site, and multiple direct conversations with clients. At the suggestion of the Division, ALJ Grimes grouped this list into four violations: (i) the *Barron's* articles, (ii) radio show claims regarding AUM, (iii) radio show claims regarding performance, and (iv) all other communications with current or prospective clients. Initial Decision, 2016 WL 4035560, at *47.

Given the severity of the misconduct, it is appropriate to impose the maximum penalties for each of these four groups.[23] Petitioners' conduct was egregious and long-running, and it involved significant deceit (including with regulators). Further, Bennett has a prior record of misconduct.

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[20] 15 U.S.C. § 77h–1(g)(2)(C)

[21] 15 U.S.C. § 78u–2(b)(3)

[22] 15 U.S.C. § 80b–3(i)(2)(C)

[23] The violations occurred after March 3, 2009, and before March 5, 2013; therefore the maximum third-tier civil penalty is $150,000 per violation for Bennett and $725,000 per violation for Bennett Group. *See* 17 C.F.R. § 201.1004. Adjustments to Civil Monetary Penalty Amounts, 74 Fed. Reg. 9159, 9160 (Mar. 3, 2009).

Imposing the maximum third-tier penalty for each group of violations will send an important message to the industry: that acts of fraud and obstruction will be met with substantial sanctions. Our regulatory regime relies upon the honesty of its participants, a standard Bennett and her firm fell far below.

V. CONCLUSION

The Initial Decision should be affirmed in its entirety.

Respectfully submitted,

Dated: October 21, 2016.

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STATEMENT OF FILING BY FACSIMILE AND OVERNIGHT COURIER

I hereby certify that, on this twenty-first day of October, 2016, with respect to In the Matter of Bennett Group Financial Services, LLC and Dawn J. Bennett, Administrative Proceeding File No. 3-16801, I caused a true and correct copy of the Division of Enforcement's Opposition Brief on Review of the Initial Decision to be filed via facsimile and overnight courier with the Office of the Secretary of the U.S. Securities and Exchange Commission pursuant to Commission Rule of Practice 151, 17 C.F.R. § 201.151, at the following address:

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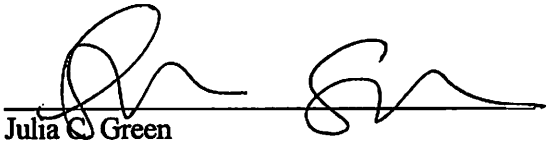

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CERTIFICATE OF SERVICE

I hereby certify that, on this twenty-first day of October, 2016, with respect to In the Matter of Bennett Group Financial Services, LLC and Dawn J. Bennett, Administrative Proceeding File No. 3-16801, I caused a true and correct copy of the Division of Enforcement's Opposition Brief on Review of the Initial Decision (together with the accompanying Statement of Filing by Facsimile and Overnight Courier) to be served upon the following by courier and electronic mail:

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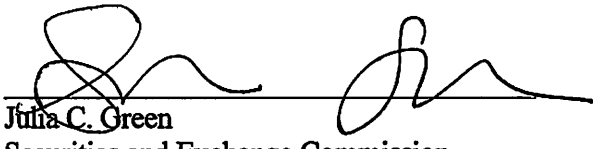

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