INITIAL DECISION RELEASE NO. 351
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12822

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
AMAROQ ASSET MANAGEMENT, LLC	:	July 14, 2008
and DWIGHT ANDREE SEAN	:	
O'NEAL JONES	:	

APPEARANCES: Robert J. Durham and Robert L. Mitchell for the Division of Enforcement, Securities and Exchange Commission.

Ivan W. Golde for Respondents.

BEFORE: James T. Kelly, Administrative Law Judge.

On September 24, 2007, the Securities and Exchange Commission (SEC or Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) against Amaroq Asset Management, LLC (Amaroq), a registered investment adviser, and Dwight Andree Sean O'Neal Jones (Jones), its sole principal, pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (Advisers Act).

The OIP alleges that Amaroq failed to maintain advisory business records and make them available for review by the Commission's staff, as required by law. The OIP further charges that Amaroq failed to file three annual amendments to its Form ADV and failed promptly to notify the Commission when it changed the location of its principal business office. The OIP also alleges that, although Jones claimed that Amaroq discontinued its advisory business in 2004, Amaroq never notified the Commission of the purported discontinuation, as also required by law. To the contrary, until mid-2007, Amaroq continued to promote its wealth management program on the internet, where it represented that it was "subject to periodic SEC examinations."

The OIP accuses Amaroq of willfully violating Section 204 of the Advisers Act and Advisers Act Rules 204-1 and 204-2(f). It alleges that Jones willfully aided and abetted and caused Amaroq's violations. As relief for this misconduct, the Commission's Division of Enforcement (Division) seeks cease-and-desist orders against both Respondents. It also seeks to impose a civil monetary penalty against Jones. Finally, the Division requests an order suspending Jones from association with any investment adviser for twelve months.

I held a public hearing in San Francisco, California, on January 22-23, 2008. The parties have filed proposed findings of fact, proposed conclusions of law, and briefs, and the matter is ready for decision. I base my findings and conclusions on the entire record and the demeanor of

the witnesses who testified at the hearing.[1] I have applied "preponderance of evidence" as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981). I have considered and rejected all arguments, proposed findings, and proposed conclusions that are not discussed in this decision.

FINDINGS OF FACT

Respondents

Jones, age forty-five, is a resident of Missouri City, Texas (Answer; DX 6). He was registered as an associated person of Dean Witter Reynolds, Inc., from 1988 to 1996; of First Montauk Securities Corp. from 1996 to 2001; of HD Brous & Co., Inc., from 2001 to 2002; and of GunnAllen Financial, Inc. (GunnAllen), from 2002 to 2005 (Tr. 186; DX 6). Jones has held Series 3, 7, 24, 63, and 65 securities licenses at various times (Answer; DX 6 at SEC 1298).

Amaroq was organized as a limited liability company in Delaware on October 21, 1997 (DX 1). It has not been in good standing under Delaware law and ceased to exist as of April 15, 1999 (DX 2). Amaroq has never registered to transact intrastate business under the laws of the State of California (DX 3; RX 1).

Amaroq applied to the Commission for registration as an investment adviser on December 9, 1999, on Form ADV (DX 4). Amaroq stated that its principal place of business was at 280 S. Beverly Drive, # 504, Beverly Hills, California 90212. It represented that it kept all its books and records at its principal business address and that its fiscal year ended on December 31. Jones identified himself as Amaroq's "100% owner" and signed the application.[2]

The Commission granted Amaroq's registration under Section 203(c) of the Advisers Act, effective December 17, 1999 (DX 5). Under the terms of the exemption upon which the registration was granted, Amaroq was required to file an amendment to its Form ADV within 120 days, revising its Schedule I. If the amendment indicated that Amaroq would be prohibited by Section 203A of the Advisers Act from registering with the Commission, Amaroq was also required to file a completed Form ADV-W whereby it withdrew from registration with the Commission. See Advisers Act Rule 203A-2(d).

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[1] References in this Initial Decision to the hearing transcript, as amended by my Order of February 26, 2008, are noted as "Tr. ___." References to the Division's Exhibits and Respondents' Exhibits are noted as "DX ___" and "RX ___," respectively. References to the Division's Proposed Findings of Fact and Conclusions of Law and the Division's Post-Hearing Brief are noted as "Div. Prop. Find. ___," "Div. Prop. Concl. ___," and "Div. Br. ___." References to Respondents' Proposed Findings of Fact and Proposed Conclusions of Law and Post-Hearing Brief (a single document) are noted as "Resp. Prop. Find. ___" and "Resp. Br. ___." References to the Division's Post-Hearing Reply Brief are noted as "Div. Reply Br. ___."

[2] The application also identified Roni Joseph Hardy (Hardy), a California attorney, as a "member" of Amaroq. Hardy did not have any beneficial ownership in Amaroq and stated that he would devote only 5% of his time to Amaroq's business. Hardy ceased to be affiliated with Amaroq in 2000 or 2001 (Tr. 18-19). He died in June 2006.

National Regulatory Services Reminds Amaroq and Jones to Prepare for an Eventual SEC Examination

Between 1999 and 2003, Amaroq engaged National Regulatory Services (NRS) of Lakeville, Connecticut, to assist it in making certain regulatory filings (Tr. 254; RX 1). On March 18, 2002, William Cavell (Cavell) of NRS wrote to Jones at Amaroq (RX 1 at NRS 45). Cavell told Jones: "I think you and the firm need help to better organize things from a regulatory point of view and to prepare for the eventual SEC examination." Cavell also sent Jones a sample SEC examination checklist of records the Commission's staff would want Amaroq to provide for review. Cavell reminded Jones: "You should check what you have and what you need."

One month later, on April 17, 2002, Cavell sent a follow-up communication to Jones (RX 1 at NRS 18). Cavell told Jones: "This reminds me of my recommendation to you that you let NRS assist with your investment adviser regulatory requirements and to help you prepare for the eventual SEC examination."

Jones did not recall if he had any concerns in 2002 about Amaroq's readiness for an SEC examination, and he did not recall any conversations with Cavell about that subject (Tr. 253, 260). Jones expressed the view that NRS "always tried to add more to what they did" (Tr. 254). Amaroq has not been a client of NRS since approximately 2003 (RX 1 at NRS 2).

2000-2003: Amaroq Files Four Untimely Amendments to Its Form ADV

Section 204 of the Advisers Act requires investment advisers to make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Advisers Act Rule 204-1(a)(1) requires a registered investment adviser to amend its Form ADV at least annually, within ninety days of the end of its fiscal year. In addition to these annual filings, an adviser must amend its Form ADV "promptly" if certain information changes, including the location of its principal office and place of business. See Form ADV General Instructions, Item 4, Fed. Sec. L. Rep. (CCH) ¶ 57,101 at 44,352. Each amendment to Form ADV is a "report" within the meaning of Section 204 of the Advisers Act. See Advisers Act Rule 204-1(e).

Amaroq filed four amendments to its Form ADV with the Commission between August 2000 and March 2002 (DX 12-DX 15). Jones signed each of these amendments. These amendments stated that Amaroq continued to operate at the same business address in Beverly Hills. They also represented that Amaroq continued to remain eligible for SEC registration because it had assets under management of $25 million or more. Three of these amendments inaccurately stated that Amaroq was organized under the laws of the State of California and that Amaroq did not have a World Wide Web site address (DX 13-DX 15).

After filing an amendment to its Form ADV for the period ended December 31, 2001, Amaroq did not file any other annual amendments to Form ADV during 2003 or 2004 (Tr. 13, 20-21, 42). In December 2004, William Fiske (Fiske), a staff attorney in the Commission's Los Angeles office, wrote two letters to Amaroq concerning Amaroq's delinquent amendments to Form ADV (Tr. 13-15). The December 2004 letters provided Amaroq with information on how

to make its delinquent filings. In addition, the letters made it clear that, in the event Amaroq was no longer conducting an advisory business, the firm needed to withdraw its registration with the Commission (Tr. 15). Amaroq failed to respond to either of the December 2004 letters from Fiske (Tr. 16).

In May 2005, Fiske tried to contact Amaroq using the Beverly Hills telephone number identified in the firm's Form ADV filings, but found that the line was disconnected (Tr. 16-17). After further inquiry, Fiske learned that Jones then lived in the San Francisco Bay area (Tr. 17-19, 45).

June 2005 to November 2005: Jones
Promises to Make Amaroq's Delinquent Filings

On June 10, 2005, Fiske spoke by telephone with Jones (Tr. 19). Fiske informed Jones that Amaroq was delinquent in filing annual amendments to its Form ADV for fiscal years 2002, 2003, and 2004 (Tr. 20-21, 42). Jones confirmed that Amaroq had previously provided advisory services from its Beverly Hills address. He represented that the firm continued to provide advisory services, but had relocated to Friendswood, Texas (Tr. 20, 24-25).

Jones stated that he had personally filed Amaroq's Form ADV amendments in recent years (Tr. 20, 46-47). Fiske explained to Jones that, in order for a Form ADV filing to take effect, the filer must perform an online "completeness check." Jones then told Fiske that he did not recall performing such a completeness check when he had attempted to make Amaroq's Form ADV filings. Jones agreed to bring Amaroq's Form ADV filings current. He stated that doing so would not be a problem because he had hard copy printouts of the electronic filings for the missing years (Tr. 21). Fiske gave Jones detailed instructions as to how to make Amaroq's delinquent filings. He gave Jones an additional grace period of two weeks, until June 24, 2005, to make the overdue filings (Tr. 23, 26).

Following the June 10 telephone conversation, Fiske sent an e-mail message to an address provided by Jones (Tr. 24-25). The e-mail summarized the substance of Fiske's call with Jones and also attached copies of the two December 2004 letters Fiske had sent to Amaroq previously.

Several months later, Fiske noted that Amaroq had still failed to file its delinquent amendments to Form ADV for 2002, 2003, and 2004. As a result, on October 18, 2005, Fiske sent Jones a letter informing Jones that the Commission's staff intended to recommend enforcement action against Amaroq (Tr. 27). Following this notice, on November 16, 2005, Jones asked for additional time to file Amaroq's delinquent Forms ADV for 2002, 2003, and 2004. Among other things, Jones stated that he had become "caught up" with family members who were impacted by Hurricane Katrina (Tr. 28). Fiske denied the request for additional time. In late November 2005, Amaroq filed delinquent amendments to its Form ADV for 2002 and 2003 (Tr. 42; DX 7, DX 16).[3] These two amendments did not update Amaroq's business address.

[3] Amaroq filed amendments to Form ADV for fiscal years 2002 and 2003 on November 28 and 29, 2005, respectively (DX 7, DX 9, DX 16). Both filings represented that Amaroq was still

According to Fiske, Jones stated that Amaroq was managing $112 million in client funds in November 2005 (Tr. 29, 49). Jones denies making this statement, but acknowledges that Amaroq managed "very close to" $100 million by late 2003 (Tr. 188, 234). Amaroq filed annual amendments to its Form ADV two weeks after Jones's final conversation with Fiske. These filings represented that Amaroq had $31 million under management as of December 31, 2002, and $44.1 million under management as of December 31, 2003 (DX 7, DX 16). In testifying about these events, Fiske refreshed his recollection by referring to contemporaneous notes that he had prepared (Tr. 16-17, 30-32). Jones's testimony was vague, and he was unable to recall the particulars of his conversations with Fiske (Tr. 245-49). In general, I place greater weight on Fiske's testimony and limited weight on Jones's testimony about these events.

Amaroq did not file amendments to its Form ADV for its fiscal years ended December 31, 2004, 2005, or 2006 (DX 9). Nor did Amaroq withdraw from registration from 2004 through 2007 (DX 10). On January 22, 2008—the first day of the hearing in this matter—Jones filed a Form ADV-W to withdraw Amaroq's registration with the Commission (Tr. 119, 233, 237-38, 252-53; DX 10A).

August 2006 to January 2007: Amaroq Fails to Update Its Business Address, to Preserve Its Books and Records, and to Submit to an Examination

Section 204 of the Advisers Act also provides that every investment adviser shall make and keep, for prescribed periods, such records as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. All the records of such investment advisers are subject at any time to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

Advisers Act Rule 204-2(a) requires every investment adviser registered under Section 203 of the Advisers Act to make and keep true, accurate, and current books and records relating to its investment advisory business. Under Advisers Act Rule 204-2(e), such books and records must be maintained and preserved for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record. Under Advisers Act Rule 204-2(f), an investment adviser subject to Rule 204-2(a), before ceasing to conduct business as an investment adviser, shall arrange for and be responsible for preserving books and records required to be maintained for the remainder of the five-year period and shall notify the Commission of the exact address where such books and records will be maintained during such period.

When Amaroq filed its Form ADV in 1999, and each time Amaroq amended its Form ADV, the firm represented that it kept its required books and records at its principal place of business in Beverly Hills (DX 7, DX 12-DX 16).

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eligible to remain registered with the Commission because it had more than $25 million in client assets under management (DX 7, DX 16).

On August 29, 2006, Thomas Dutton (Dutton), a staff examiner based in the Commission's San Francisco office, spoke by telephone with Jones (Tr. 51, 64). Dutton told Jones that he wanted to schedule an examination of Amaroq. Jones responded that he was in the process of moving Amaroq's operations to Texas, and that the firm's records were being shipped to Texas from Beverly Hills (Tr. 64-65, 194). In response, Dutton instructed Jones to update Amaroq's principal business address, as required, by amending its Form ADV (Tr. 67, 91). Dutton concluded that, if Amaroq was in fact relocating to Texas, it might be appropriate to refer the examination to the Commission's office in Fort Worth, Texas (Tr. 69, 91-92, 195).

During the August 29 call, Dutton asked Jones about the status of Amaroq's investment advisory business (Tr. 65). Jones responded that Amaroq then had twenty-seven clients with $117 million under management (Tr. 65). Jones stated that Amaroq used nine third-party money managers to manage client funds, and that Amaroq typically received a percentage of the third-party managers' investment advisory fees (Tr. 65-66).[4]

Jones failed to update Amaroq's address as he had promised (Tr. 68). As a result, Dutton telephoned Jones again on September 13, 2006 (Tr. 68). In a return message the next day, Jones stated that he would "definitely" update Amaroq's filings to reflect the address change by September 20, 2006 (Tr. 68-69). On October 11, 2006, because Jones still had failed to update Amaroq's address, Dutton left another telephone message for Jones at a number Jones had provided. Jones failed to return the call (Tr. 70).

On November 1, 2006, Dutton reached Jones by telephone because Amaroq's filings still failed to reflect its Texas address (Tr. 70). Jones claimed that he had updated Amaroq's filings two weeks earlier. Jones promised to look into the problem and call Dutton back. Jones never called back (Tr. 70-71).

On November 29, 2006, Dutton reached Jones by telephone and stated that he wanted to set a date for an examination of Amaroq (Tr. 71-72, 195). Jones first represented that the advisory records were in Texas (Tr. 72). He then told Dutton that Amaroq's books and records were "sparse, if any" (Tr. 92-93, 95, 116, 194). Jones did not tell Dutton why the records were "sparse" (Tr. 95). Jones agreed to appear at the Commission's San Francisco office and produce records for an examination of Amaroq on December 21, 2006 (Tr. 72).

Following this telephone call, Dutton sent a list of documents to be produced for examination to a facsimile number Jones had provided (Tr. 72-73; DX 17). On three occasions from December 5 through December 19, 2006, Dutton left telephone messages at numbers provided by Jones to remind Jones of the examination (Tr. 74-76). Jones failed to return any of these calls.

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[4] Jones did not recall telling Dutton he was moving Amaroq's records to Texas (Tr. 261). He testified that Dutton must have been mistaken (Tr. 261). Jones did not remember telling Dutton he would update Amaroq's address on Form ADV (Tr. 261-62). Jones also testified that Dutton must have been mistaken about Amaroq's engaging nine investment advisers to manage money (Tr. 273-74). I accept Dutton's testimony on these issues as fully credible. I reject Jones's testimony on these issues as incredible.

On December 21, 2006, Jones failed to appear for the scheduled examination of Amaroq, and also failed to produce any of the requested documents (Tr. 76).[5] On December 22, 2006, the examination staff sent Jones a letter by certified mail, asking that Jones contact the staff promptly to reschedule the examination (Tr. 76-77; DX 24). Jones failed to respond to this letter (Tr. 78). On two occasions in early January 2007, Dutton left telephone messages for Jones at several different numbers Jones had provided (Tr. 78-79). Jones failed to return any of these calls (Tr. 196).[6] At that juncture, Dutton referred the matter to the Division for investigation and possible prosecution (Tr. 79, 111).

Amaroq Holds Itself Out on the Internet
as "Subject to Periodic SEC Examinations"

When Amaroq amended its Form ADV between 2000 and 2005, the firm stated that it did not have a World Wide Web site address (DX 7, DX 13-DX 16). In fact, Amaroq did maintain a presence on the World Wide Web, through Amaroq Financial Services, Inc., another company owned by Jones (Tr. 184-85, 226-27, 229-30; DX 19-DX 21).

During the time that Amaroq failed to produce documents and submit to an examination by the Commission's staff, Amaroq continued to hold itself out to the public as a registered investment adviser, through its Form ADV filings with the Commission and through its web site. Among other things, as of January and August 2007, the web site represented that Amaroq was an investment adviser registered with the Commission and "subject to periodic SEC examinations" (Tr. 277-78; DX 20 at SEC 1732, DX 21 at SEC 521). Jones testified: "Just because you have a Web site up doesn't mean you're doing business" (Tr. 231).

DISCUSSION AND CONCLUSIONS

A. Respondents' Defenses

Jones Was Not Personally Responsible
for Amaroq's Books and Records

Jones claimed that he was not involved in filing Amaroq's paperwork because he had delegated that responsibility to others (Answer; Tr. 191-94, 224, 240, 248-49). Among other things, Jones asserted that NRS, an outside vendor, was responsible (Tr. 191, 232); that an unidentified person at GunnAllen, where Jones was a registered representative, told him that GunnAllen was responsible (Tr. 28, 182-83, 224); and that Amaroq was exempt from filing

[5] Jones testified that he was traveling in connection with a consulting job unrelated to the securities industry. He remembered that "we (sic) got stuck and I was unable to get back" (Tr. 195). According to Jones, "our flight was—ridiculous flight, sitting on the runway and all these other things" (Tr. 195).

[6] Jones testified that he left California and went to Texas to take care of his wife, who was "gravely ill" (Tr. 196-97).

under the so-called "Merrill Lynch rule" (Tr. 180; RX 22).[7] The record shows that Amaroq has had no client relationship with NRS since 2003 and that Jones has not been associated with GunnAllen since July 2005. Respondents have abandoned the "Merrill Lynch rule" defense in their post-hearing pleadings.

Jones told Fiske that he had personally filed Amaroq's Form ADV amendments in recent years and that bringing Amaroq's Form ADV filings current would not be a problem because he had hard copy printouts for the missing years. Respondents did not rebut Fiske's testimony on these points.

Nonetheless, Jones asserted that the principal villain was Nicole Waddy (Waddy), Amaroq's office manager. Jones has known Waddy since she was seven years old, but Jones now believes he mistakenly placed his trust in her. When Fiske and Dutton alerted Jones to Amaroq's delinquent filings, Jones told Waddy to take care of the matter (Tr. 191-92, 256). However, Jones did not follow through to make sure that Waddy had done so (Tr. 249). When Jones finally learned that he could not rely on Waddy, he found it difficult to correct her errors and omissions, because Waddy was the only one "entitled" to make electronic filings with the Investment Adviser Registration Depository (IARD) on behalf of Amaroq (Resp. Prop. Find. ## 9-11; Resp. Br. at unnumbered page 3).[8]

Jones provided no details about Waddy's age, education, and prior experience in the securities industry. He did not explain the training (if any) he gave Waddy before delegating Amaroq's filing responsibilities to her. Ultimately, Jones accepted responsibility for Waddy's

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[7] See Certain Broker-Dealers Deemed Not To Be Investment Advisers, 70 Fed. Reg. 20,424 (Apr. 19, 2005), vacated, Fin. Planning Ass'n v. SEC, 482 F.3d 481 (D.C. Cir. 2007).

[8] Jones testified that changing the "entitlement" proved "cumbersome" and "time-consuming" because Waddy would not give him her pass code (Tr. 222-23, 250) and because "the system" would not let anyone else except the entitled person make Amaroq's filings (Tr. 233-34, 252).

An investment adviser must complete three forms to make electronic filings with the IARD. A subscriber (typically, an officer of a registered investment adviser) must first establish an Entitlement Program account on behalf of the adviser. The adviser must then file a "Firm Account Administrator Form," designating an account administrator to maintain the account. An adviser must have a primary account administrator and the IARD recommends that an adviser also have an alternate account administrator. An adviser can have several of both. An adviser may file an "Entitlement Modification Form" at any time to change its account administrator and alternate account administrator.

In order for an account to be set up properly, an adviser must send funds sufficient to cover all registration and annual fees. Without the necessary funds, any filing will not pass a completeness check and will not be filed. Both the IARD and the Financial Industry Regulatory Authority maintain in-depth descriptions on their respective web sites and provide e-mail and telephone assistance. In light of the guidance provided by Fiske, and the absence of details about Jones's efforts to make Amaroq's IARD filings, I do not give much weight to Jones's explanation of the difficulties he encountered.

performance (Tr. 190, 305-06). He testified: "Could have done more. No doubt about it. Hindsight is 20/20. It absolutely is. We could have done more and we should have trusted less. Lesson learned." (Tr. 306).

Amaroq Lost Its Earliest
Books and Records in a Fire

During the Division's investigation and at the hearing in this matter, Jones also offered explanations for his failure to produce records and appear for examination that were inconsistent with his prior communications with the Commission's staff.

First, Jones testified that he could not honor the Commission's request to examine Amaroq's earliest books and records because these documents had been destroyed in a fire (Tr. 238-39). There is some evidence that a fire occurred in an office building on Beverly Drive near Wilshire Boulevard in Beverly Hills on November 10, 2001 (RX 6). However, that intersection is one and one-half blocks from 280 S. Beverly Drive (RX 6). Nothing in the record supports an inference that the fire occurred at 280 S. Beverly Drive, or that it destroyed Amaroq's advisory books and records.

Respondents could have easily developed the record on this issue. Jones testified that Amaroq filed an insurance claim for a total loss after the fire (Tr. 238-39). However, Respondents did not subpoena the claims records of the insurance company or the emergency response records of the Beverly Hills Fire Department.[9]

The Commission first learned of the fire and the purported loss of books and records in 2007, while the Amaroq matter was under investigation by the Division (Tr. 104-05). Jones never told Fiske or Dutton about the fire or the resulting loss of books and records during 2005 or 2006 (Tr. 25-26, 30, 41, 67, 74, 83). On that basis, the Division urges me to infer that Jones's testimony about the fire and the purported loss of books and records should be treated as a recent fabrication. If the fire itself is a fabrication, it is not a recent fabrication. NRS knew about the fire several weeks after it occurred (RX 2 at NRS 259) (letter dated Jan. 31, 2002, stating: "I am very sorry to hear about your neighbor's fire and your damage."). However, there is no evidence that Amaroq told NRS or anyone else that a November 2001 fire had destroyed its advisory books and records until the matter was under investigation by the Division in 2007. As noted,

[9] Certain firms facing unwelcome Commission requests to examine their books and records find themselves disproportionately victimized by fires, floods, and other pestilences. See, e.g., Warwick Capital Mgmt., Inc., 92 SEC Docket 1410, 1419-20 (Jan. 16, 2008) (fire, flood); Harrison Sec., Inc., 83 SEC Docket 2986, 2995 (Sept. 21, 2004) (ALJ) (brokerage firm fails to present its general ledger for examination because the ledger was maintained on a laptop computer with a hard drive that purportedly had been destroyed by a computer virus or other technological difficulties), final, 84 SEC Docket 117 (Oct. 29, 2004); Larry G. Baker, CPA, 52 SEC Docket 1972, 1975 (Sept. 16, 1992) (Settlement Order) (issuer's accounting records for two years destroyed in a fire in the garage of the chief executive officer's parents); SEC v. Micro-Therapeutics, Inc., 1983 U.S. Dist. LEXIS 19496, at *13-15 nn.16-19 (S.D.N.Y. Feb. 4, 1983) (subpoenaed records purportedly destroyed in a fire in a storage facility). For that reason, the Commission typically takes a careful look at such explanations.

Jones could not recall any concerns about Amaroq's readiness for an SEC examination in early 2002. See supra p. 3.

The record is silent as to whether Amaroq maintained its books and records in hard copy or electronic format. If Amaroq used an electronic format, it would have been required to separately store a duplicate copy of its books and records. See Advisers Act Rule 204-2(g)(2)(iii) (requiring investment advisers to "separately store" a duplicate copy of required books and records for the time required for the preservation of the original records) (effective May 21, 2001).

Amaroq's Later Books and Records
Were Sold at Public Auction

In the context of the entire case, the fire is of limited relevance. Under Advisers Act Rule 204-2(a), an investment adviser must maintain and preserve its books and records for five years. When Dutton asked to see Amaroq's records in 2006, Amaroq was required to produce its advisory records for the years back to January 2001. It was not required to produce its advisory records for the years 1999 and 2000. A fire occurring in November 2001 could have destroyed, at most, eleven months of relevant books and records. Such a fire could not have destroyed Amaroq's books and records for the period from December 2001 through December 2006, absent a second intervening event.

Jones also testified that he could not present Amaroq's books and records for examination by the Commission's staff in late 2006 because some of these documents had been sold by a third-party storage company (Tr. 198-99, 210; Resp. Prop. Find. ## 20-21). According to Jones, Amaroq sent its books and records to a storage company for safekeeping, but the storage company sold the contents of the storage unit to satisfy a debt for unpaid rent.

Waddy rented two storage units from Public Storage, Inc. (Public Storage), 11120 W. Pico Blvd., Los Angeles, California 90064. She rented the first and smaller unit (10' x 7'), unit 4141, in February 2003. Public Storage sold the contents of this unit at a public auction in April 2006 for $140 to satisfy an owner's lien for unpaid rent (RX 4 at PSI 2, 25, 47, 68). Waddy also rented a second and larger unit (10' x 20'), unit 2051, in September 2003 (RX 4 at PSI 27). Public Storage sold the contents of this unit at a public auction in May 2006 to Jones for $790 to satisfy an owner's lien for unpaid rent (RX 4 at PSI 63, 65). Jones acknowledges that unit 2051 contained furniture from his Santa Monica, California, apartment, but nothing relating to Amaroq (Tr. 243).

The Division interviewed Waddy by e-mail during its investigation (RX 7). At that time, Waddy told the Division that one of the Public Storage units contained furniture and personal items from Jones's Santa Monica apartment and that the other unit contained office furniture and computer equipment from Amaroq, as well as personal items from Jones's office. She also told the Division that no Amaroq files were stored at Public Storage, and that Jones knew of the planned auction of unit 4141 in advance, but elected to take no action (RX 7 at SEC 257). Waddy did not testify at the hearing and her investigative statements were not taken under oath. Jones confirms Waddy's account as to unit 2051 (Tr. 243), but accuses Waddy of lying to the Division about the contents of unit 4141 (Tr. 244-45). I consider Waddy's e-mail

correspondence with the Division to be unreliable to the extent that it is not confirmed by Jones, and I give it no weight.

The record is inconclusive as to whether Amaroq ever stored its advisory books and records in Public Storage unit 4141. However, the record is clear that Amaroq never amended its Form ADV to notify the Commission that it was maintaining its books and records at a location other than 280 S. Beverly Drive in Beverly Hills. When Jones spoke to Dutton in August 2006 and later, he never told Dutton that Amaroq's books and records had been stored at Public Storage and had been sold at a public auction (Tr. 67, 74, 83). Inasmuch as the first Jones-Dutton telephone conversation occurred only four months after the sale of the contents of unit 4141, the episode should have been fresh in Jones's mind. Instead, Jones told Dutton in August 2006 that Amaroq's records were in transit to Texas. I conclude that Respondents have not sustained their burden of proving that Amaroq's books and records were sold at public auction, or that such a sale, even if proven, would constitute a defense to the charge of failing to submit to an examination.

Amaroq Did Not Operate as an Investment Adviser in 2004-2006; Therefore, There Were No Books and Records to Examine

Finally, Jones claimed that Amaroq had discontinued its investment advisory business in 2004 and that, as a result, there were no advisory books and records for the Commission to examine for 2004, 2005, or 2006 (Tr. 192, 194, 200, 225-26, 275). Jones testified that Amaroq never had more than one advisory client, a labor organization (Tr. 188). According to Jones, the rules of the labor organization precluded Amaroq from acting as an investment adviser to the labor organization while he worked as a consultant for a management organization between January 2004 and the Spring of 2007 (Tr. 189, 192, 228, 286).[10]

The assertion that Amaroq never had more than one advisory client is contrary to Jones's prior statements to the Commission's staff. When contacted by Fiske in June and November 2005, Jones stated that Amaroq was active as an investment adviser, managing total assets of approximately $112 million. When contacted by Dutton in August 2006, Jones claimed that Amaroq was active as an investment adviser, managing twenty-seven accounts with total assets of approximately $117 million. In addition, Jones's testimony is contrary to information posted on Amaroq's web site, which, until August 2007, continued to hold out Amaroq as an active investment adviser registered with the Commission.[11] Amaroq's Form ADV and the

[10] In a companion argument, Respondents also claim that the Division failed to prove that Amaroq used the means and instrumentalities of interstate commerce during 2004, 2005, and 2006 (Resp. Prop. Find. # 5). However, the Division need not make such a showing, in light of Section 203(d) of the Advisers Act. See Intersearch Technology, Inc., [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,139 at 85,191 n.42a (Feb. 28, 1975) (ALJ), final, 6 SEC Docket 817 (Apr. 30, 1975).

[11] DX 21 at SEC 488 (stating that Amaroq "provide[s] investment management services to employee benefit plans, university endowments, non and not for profit organizations, charitable trusts, high net worth individuals and family groups.").

amendments to Form ADV never described Amaroq's advisory business as narrowly as Jones did at the hearing (DX 4, DX 7, DX 12-DX 16). I conclude that Jones's testimony that Amaroq discontinued its advisory business in 2004, and that Amaroq never had more than one advisory client, is incredible.

B. Amaroq's Primary Liability

Willfulness is shown where an actor intends to commit an act that constitutes a violation. There is no requirement that the actor also be aware that it is violating any statutes or regulations. See Wonsover v. SEC, 205 F.3d 408, 413-15 (D.C. Cir. 2000); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965). The failure to make a required report, even though inadvertent, constitutes a willful violation. See Oppenheimer & Co., 47 S.E.C. 286, 288 (1980).

Amaroq willfully violated Section 204 of the Advisers Act when it failed to submit to a reasonable examination of its books and records by representatives of the Commission in December 2006. See SEC v. Barr Financial Group, Inc., 1999 U.S. Dist. LEXIS 11352, at *2-10 (M.D. Fla. May 5, 1999), aff'd, 220 F.3d 591 (11th Cir. 2000). It also willfully violated Section 204 of the Advisers Act by failing to furnish copies of prescribed books and records to the Commission in connection with the scheduled examination. Cf. Roman S. Gorski, 43 S.E.C. 618, 622 (1967). The Division treats this as one violation.

Amaroq willfully violated Section 204 of the Advisers Act and Advisers Act Rule 204-1(a)(1) by failing to file annual amendments to its Form ADV for its fiscal years ended December 31, 2004, 2005, and 2006. At the relevant times, Amaroq was a registered investment adviser and it was holding itself out to the public as conducting an advisory business. The Division treats this as a second violation.

Amaroq willfully violated Section 204 of the Advisers Act and Advisers Act Rule 204-1(a)(2) by failing promptly to update its business address after it had vacated the Beverly Hills office identified on its Form ADV. See Hammon Capital Mgmt. Corp., 48 S.E.C. 264, 265 (1985). The Division treats this as a third violation.

Finally, the OIP alleges that Amaroq willfully violated Section 204 of the Advisers Act and Advisers Act Rule 204-2(f) because it did not inform the Commission in writing of the address at which its books and records would be maintained before it discontinued business as an investment adviser. This aspect of the OIP is based on the assumption that Amaroq did, in fact, discontinue operations in 2004 (Div. Prop. Concl. # 7; Div. Br. at 11) ("Assuming arguendo that Amaroq did not engage in any advisory services after [2004], ..."). As discussed above, I do not credit Jones's testimony that Amaroq discontinued its advisory business in 2004, 2005, 2006, or at any time before it filed its Form ADV-W on January 22, 2008.

The Division cannot have it both ways: either Amaroq continued to function as an investment adviser during 2004, 2005, and 2006 and is liable for failing to file three annual amendments to its Form ADV; or Amaroq did not continue to function as an investment adviser during these years, and is liable for failing to notify the Commission in writing as to the location

of its books and records before it actually discontinued its advisory business.[12] However, Amaroq cannot be sanctioned for both violations over the same interval.

C. Jones's Secondary Liability

The weight of the evidence also demonstrates that Jones willfully aided and abetted and caused Amaroq's primary violations of Section 204 of the Advisers Act and Advisers Act Rule 204-1.

Aiding and Abetting Liability

To show that a respondent willfully aided and abetted a violation, the Commission requires the Division to establish three elements: (1) a primary wrongdoer has committed a securities law violation; (2) the accused aider and abetter has a general awareness that his actions were part of an overall course of conduct that was illegal or improper; and (3) the accused aider and abetter substantially assisted the conduct constituting the primary violation. See Warwick, 92 SEC Docket at 1421; Clarke T. Blizzard, 85 SEC Docket 4499, 4504 & n.18 (July 29, 2005) (EAJA Opinion); Orlando Joseph Jett, 57 S.E.C. 350, 397 & n.46 (2004); Sharon M. Graham, 53 S.E.C. 1072, 1080-81 (1998), aff'd, 222 F.3d 994, 1000 (D.C. Cir. 2000); Russo Sec., Inc., 53 S.E.C. 271, 278 & n.16 (1997); Donald T. Sheldon, 51 S.E.C. 59, 66 (1992), aff'd, 45 F.3d 1515 (11th Cir. 1995).

A reviewing court has held that a showing of "extreme recklessness" will satisfy the "substantial assistance" prong of the aiding and abetting test. See Howard v. SEC, 376 F.3d 1136, 1143 (D.C. Cir. 2004) (holding that "extreme recklessness" may support aiding and abetting liability, but concluding that "aiding and abetting liability cannot rest on the proposition that the person 'should have known' [that] he was assisting violations of the securities laws"); Graham v. SEC, 222 F.3d 994, 1004 (D.C. Cir. 2000). Extreme recklessness may be found if the alleged aider and abetter encountered red flags, or suspicious events creating reasons for doubts that should have alerted him to the improper conduct of the primary violator. Cf. Dolphin & Bradbury, Inc., 88 SEC Docket 1298, 1316 n.62 (July 13, 2006) (discussing Howard), pet. denied, 512 F.3d 634 (D.C. Cir. 2008); Robert J. Prager, 85 SEC Docket 3413, 3423 nn.24-25 (July 6, 2005) (same).

[12] The Division gives little indication that it actually believes Amaroq discontinued its advisory business (Div. Br. at 13-14) (stating that Amaroq failed to notify the Commission "when the firm purportedly discontinued its operations in 2004") (emphasis added). In essence, the Division is simply making the point that Jones talked his way into another violation when he explained that Amaroq did not file annual amendments to Form ADV for 2004-2006 because it had gone out of business.

It is permissible to plead alternative theories of liability in an OIP. Cf. Fed. R. Civ. Pro. 8(e)(2). However, the election of remedies doctrine precludes the imposition of double sanctions if the factual bases of two violations are mutually exclusive, as here. A party must elect between duplicative forms of relief when both forms of relief become ripe to choose between them.

Irrespective of the level of proof required to establish the primary violation, the Commission has made clear that the accused aider and abetter must have acted with scienter. See Warwick, 92 SEC Docket at 1421-22; Terence Michael Coxon, 56 S.E.C. 934, 949 n.32 (2003), aff'd, 137 Fed. Appx. 975 (9th Cir. June 29, 2005); Kingsley, Jennison, McNulty & Morse, Inc., 51 S.E.C. 904, 911 n.28 (1993).

Jones had far more than a general awareness that Amaroq was violating the law. Fiske and Dutton repeatedly informed him of the requirements of the law, in explicit terms. Jones responded with indifference and/or a series of broken promises, thereby demonstrating extreme recklessness. Although Jones was Amaroq's sole principal, with ultimate responsibility for Amaroq's compliance with the law, he was content to leave Amaroq's compliance to others. He made little effort to follow the necessary tasks to successful completion. To the extent that Jones responded at all to Fiske and Dutton, he did so only when confronted with the prospect of an enforcement proceeding. I conclude that Jones willfully aided and abetted Amaroq's violations of Section 204 of the Advisers Act and Advisers Act Rule 204-1.

Causing Liability

Section 203(k)(1) of the Advisers Act specifies that a respondent is "a cause" of another's violation if the respondent "knew or should have known" that his act or omission would contribute to such violation.

The Commission has determined that causing liability under Section 203(k) requires findings that: (1) a primary violation occurred; (2) an act or omission by the respondent was a cause of the violation; and (3) the respondent knew, or should have known, that his conduct would contribute to the violation. See Gateway Int'l Holdings, Inc., 88 SEC Docket 430, 444-45 (May 31, 2006); Robert M. Fuller, 56 S.E.C. 976, 984 (2003), pet. denied, 95 Fed. Appx. 361 (D.C. Cir. Apr. 23, 2004); Erik W. Chan, 55 S.E.C. 715, 724-26 (2002).

Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. Howard, 376 F.3d at 1141; KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1175 (2001), recon. denied, 55 S.E.C. 1, 4 & n.8 (2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002). In Dominick & Dominick, Inc., 50 S.E.C. 571, 578 n.11 (1991), a settled proceeding, the Commission concluded that one who aids and abets a primary violation is necessarily a cause of the violation. The Commission has subsequently followed that approach in contested cases raising the same issue. See Graham, 53 S.E.C. at 1085 n.35; Adrian C. Havill, 53 S.E.C. 1060, 1070 n.26 (1998). I will follow Dominick & Dominick here, and conclude that Jones was "a cause" of Amaroq's violations.

SANCTIONS

Cease-and-Desist Orders

Section 203(k)(1) of the Advisers Act authorizes the Commission to impose a cease-and-desist order upon any person who has violated any provision of the Advisers Act or any rule or regulation thereunder, or any other person that was a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation. In considering whether to issue a cease-and-desist order, the Commission considers the likelihood

of future violations, the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); KPMG, 54 S.E.C. at 1183-85.

I will grant the Division's request for cease-and-desist orders against both Respondents. Respondents' misconduct was serious. By refusing to produce books and records and submit to an examination even after they had agreed to do so, Respondents thwarted the Commission's ability to determine the duration and scope of Amaroq's business and ensure that clients were treated fairly. See Barr Financial Group, 1999 U.S. Dist. LEXIS 11352, at *7 (citing SEC v. J.W. Korth & Co., 991 F. Supp. 1468, 1472 n.5 (S.D. Fla. 1998)). The conduct underlying the second violation (the repeated failure to file timely annual amendments to Form ADV) was recurrent, even after Respondents were specifically informed of the importance of making the necessary filings by the Commission's staff.[13] Although books and records violations do not require a showing of scienter, it is plain that Jones acted with a high degree of scienter. Respondents ignored specific requests from the Commission's staff to file timely annual amendments to Form ADV, to make a prompt change to Form ADV to reflect Amaroq's new business address, and to appear for an examination. I do not credit the sincerity of Jones's assurances against future violations, and I find little credible evidence that Jones recognizes the wrongful nature of Respondents' conduct. I conclude that the likelihood of future violations would be quite high in the absence of cease-and-desist orders. Such an order will serve the additional remedial purpose of encouraging Jones to take his regulatory responsibilities more seriously in the future, should he seek to become involved in the securities industry.

Revoking Amaroq's Registration; Suspending or
Barring Jones from Associating with an Investment Adviser

Section 203(e)(5) of the Advisers Act authorizes the Commission to censure, place limitations on the activities, functions, or operations of, suspend for up to twelve months, or revoke the registration of an investment adviser where it is in the public interest to do so, if the investment adviser has willfully violated the Advisers Act or Advisers Act rules and regulations. The Steadman factors are applicable in making the public interest determination.

Section 203(f) of the Advisers Act authorizes the Commission to censure, place limitations on the activities of a person associated with an investment adviser at the time of the misconduct, suspend for up to twelve months, or bar such person where it is in the public interest

[13] In considering the gravity and ongoing nature of the second violation, I have considered not only Amaroq's failure to file annual amendments to its Form ADV for the years 2004, 2005, and 2006, but also its failure to file timely annual amendments to its Form ADV within ninety days after the end of its fiscal years ended December 31, 2002, and 2003. I deem the latter misconduct to have commenced on June 24, 2005. This allows for the grace period that Fiske gave to Jones to cure Amaroq's delinquencies (Tr. 23, 26). It is permissible to consider such matters in connection with sanctioning, even when they are not identified in the OIP. See Robert Bruce Lohman, 56 S.E.C. 573, 583 n.20 (2003).

to do so, if the person has willfully aided and abetted a violation of the Advisers Act or Advisers Act rules or regulations. The Steadman factors are applicable in making the public interest determination.

Paragraphs III.B and III.C of the OIP authorize the imposition of remedial sanctions in the public interest against Amaroq and Jones under Sections 203(e) and 203(f), respectively. Before the hearing, the Division sought to revoke Amaroq's registration as an investment adviser and to bar or suspend Jones from associating with an investment adviser (Prehearing Conference of Nov. 15, 2007, at 12-13). After the hearing, the Division sought to suspend Jones from associating with an investment adviser for twelve months, but it was silent as to whether it still sought to revoke Amaroq's registration as an investment adviser (Div. Br. at 17-19).

The fact that Amaroq filed a Form ADV-W on the first day of the hearing does not prevent the Commission from revoking its registration as an investment adviser. See N2K Trading Acad., Inc., 87 SEC Docket 2409, 2409 n.3 (Mar. 31, 2006) (holding that the dismissal of charges is not necessitated by the fact that a respondent files a Form ADV-W after formal proceedings have been instituted); see also Advisers Act Rule 203-2(c) (noting that withdrawal is effective upon acceptance by IARD, but that the Commission retains jurisdiction over registrants for sixty days following acceptance of Form ADV-W for the purpose of instituting a proceeding under Section 203(e) of the Advisers Act and determining whether to revoke a registration). The Commission instituted the present proceeding well before the sixty-day period had expired.

I incorporate by reference my discussion of the Steadman factors from above. I conclude that it is in the public interest to revoke Amaroq's registration as an investment adviser. I also conclude that the Division's request for a twelve-month "time out" is fully warranted as to Jones. However, I do not believe it would be in the public interest to allow Jones to resume his securities industry career automatically at the end of the twelve-month period. Rather, I believe that the public interest would be better served if the Commission and the self-regulatory organizations determined Jones's fitness to resume his participation in the industry at that juncture, after giving specific attention to the issue of whether Jones has paid the civil monetary penalty imposed in this proceeding. See Rule 193 of the Commission's Rules of Practice. There is ample precedent for requiring a respondent to apply for reinstatement after one year, as distinguished from merely completing a twelve-month suspension without the need to apply for reinstatement. See Stephen E. Muth, 86 SEC Docket 1217, 1250 (Oct. 3, 2005) (barring a vice president from associating with a broker or dealer in a supervisory capacity, with a right to reapply after one year); James A. Goetz, 53 S.E.C. 472, 478-79 (1998) (barring a respondent from associating with an NASD member firm with a right to reapply after one year); Consol. Inv. Servs., Inc., 52 S.E.C. 582, 591 (1996) (barring the president and vice president of a registered broker-dealer from associating with a broker or dealer with a right to reapply after one year); Robert F. Lynch, 46 S.E.C. 5, 11 (1975) (barring a respondent from associating with a registered investment company with a right to reapply after one year).

Civil Monetary Penalty

Section 203(i) of the Advisers Act authorizes the Commission to impose a civil monetary penalty in a proceeding instituted under Sections 203(e) and 203(f) of the Advisers Act, where it is in the public interest, if a respondent has willfully violated, or has willfully aided and abetted the violation of, any provision of the Advisers Act, or the rules and regulations thereunder. The

following factors may be considered in determining whether it is in the public interest to assess a civil penalty: whether the acts or omissions involved fraud, deceit, manipulation, or deliberate or reckless disregard of a statutory requirement; the harm caused to other persons; the extent to which any person was unjustly enriched; whether a person has been found previously to have violated the federal securities laws; the need for deterrence; and such other factors as justice may require.

Section 203(i)(2) of the Advisers Act specifies a three-tier system for determining the maximum civil penalty for each "act or omission." See Mark David Anderson, 56 S.E.C. 840, 863 (2003) (imposing a civil penalty for each of the respondent's ninety-six violations). A penalty may increase to the second tier if the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." See Advisers Act Section 203(i)(2)(B).

Violations committed by a natural person after December 9, 1996, and on or before February 2, 2001, have a maximum penalty of $5,500 in the first tier. Violations committed by a natural person after February 2, 2001, but on or before February 14, 2005, have a maximum penalty of $6,500 in the first tier. Violations committed by a natural person after February 14, 2005, also have a maximum penalty of $6,500 in the first tier. See 17 C.F.R. §§ 201.1001, .1002, .1003. The Division's assertion that $5,000 is the maximum tier-one penalty against a natural person is inaccurate (Div. Prop. Find. # 37; Div. Br. at 19-20; Div. Reply Br. at 9).

The Division's position on civil penalties in this proceeding has been somewhat inconsistent. At the first prehearing conference, the Division stated that it would seek multiple tier-one penalties against Jones, and no penalty against Amaroq (Prehearing Conference of Nov. 15, 2007, at 13-14). I then ordered the Division to notify Respondents of the specific dollar amount of the maximum civil penalty it would be seeking (Prehearing Conference of Nov. 15, 2007, at 27-28; Scheduling Order of Nov. 16, 2007). I explained that, once the Division made its position known, that would trigger Respondents' obligation to submit evidence in support of any claim of inability to pay.

By letter dated December 13, 2007, Division counsel stated that the Division "intends to seek civil monetary penalties of $15,000, pursuant to Sections 203(e), 203(f), and 203(i) of the [Advisers Act]."[14] I found the Division's reference to Section 203(e) puzzling because that statutory provision could only apply to Amaroq, and the Division had already stated that it would not be seeking a civil penalty against Amaroq. The Division's pre-hearing brief, dated January 8, 2008, discussed the liability issues in the proceeding, but remained silent on the sanctioning issues.

At the second prehearing conference, I again attempted to ascertain the Division's position on the civil penalty issue (Prehearing Conference of Jan. 9, 2008, at 18-21). Division counsel first stated that the Division would be seeking one civil penalty against both Jones and Amaroq, with joint and several liability. When Division counsel realized that this conflicted with the position he had taken at the first prehearing conference, he reaffirmed that the Division

[14] This was the cover letter transmitting the Division's list of proposed witnesses and proposed exhibits.

would not be seeking a civil penalty against Amaroq. Division counsel also stated that the Division would seek a maximum penalty of $15,000 against Jones.

Nonetheless, in its post-hearing pleadings, the Division shifted gears again. It now urges me to impose a penalty of $20,000 against Jones (Div. Prop. Find. # 37; Div. Br. at 19-20; Div. Reply Br. at 9). According to the Division, this would amount to "maximum first-tier penalties of $5,000 for each of four distinct violations by Jones."[15] I agree with the Division that Jones willfully aided and abetted three violations, namely Amaroq's failure to: (1) file annual amendments to Form ADV; (2) promptly update its Form ADV to reflect its Texas address; and (3) submit to an examination. I do not agree with the Division as to the fourth alleged violation, namely, Amaroq's failure to notify the Commission of the location of its books and records upon discontinuing operations. See supra pp. 12-13.

I decline to impose a civil penalty against Amaroq. As to Jones, I find no evidence of fraud or deceit. There is evidence that Jones recklessly disregarded several regulatory requirements. While tier-two penalties would be authorized, such penalties are unnecessary here in light of the other sanctions imposed. I find no evidence of direct monetary harm to clients, no evidence of unjust enrichment, and no evidence of prior violations. I agree with the Division that separate first-tier penalties of $5,000 are appropriate for each of Jones's three proven aiding and abetting violations. Multiple first-tier penalties at that level (collectively, $15,000) will deter others from similar misconduct in the future. Three maximum first-tier penalties ($6,500 x 3 = $19,500) are not warranted. I am not aware of any other factors that justice requires me to consider. I do not believe that a cease-and-desist order and a bar with a right to reapply in one year, without a $15,000 civil penalty, would be sufficient to ensure Jones's compliance in the future.

Jones Has Failed to Demonstrate
Inability to Pay a $15,000 Penalty

In its discretion, the Commission may consider evidence of a respondent's ability to pay. See Section 203(i)(4) of the Advisers Act. Such evidence may relate to the extent of the respondent's ability to continue in business and the collectability of the penalty, taking into

[15] Jones could reasonably rely on the Division's December 13, 2007, representation that the total penalty would not exceed $15,000. He has presented evidence of inability to pay on the assumption that his maximum financial exposure in this proceeding would be $15,000. If Jones had known that his maximum financial exposure was greater, he might have put on more or better documentary evidence, or more eloquent testimony, in support of his claim of inability to pay. I could not legitimately impose a penalty of $20,000 (even if such a penalty was consistent with the gravity and number of the proven offenses) without first reopening the record and giving Jones another opportunity to demonstrate inability to pay the higher amount. Because the Division has not shown good cause for changing its position, I decline to reopen the record for that purpose. Pursuant to my authority to regulate the course of the proceeding and the conduct of the parties and their counsel, to hold prehearing conferences to resolve issues in controversy, and to require the parties to furnish such information as I deem appropriate, I decline to entertain the Division's last-minute request for a $20,000 civil penalty. See Rules 111(d), 111(e), 222(a) of the Commission's Rules of Practice.

account any other claims of the United States or third parties upon the respondent's assets and the amount of the respondent's assets.

Two months before the hearing, I advised Jones that, if he intended to claim inability to pay a civil monetary penalty, he would have to file a sworn financial statement, as well as supporting income tax returns, before the hearing (Prehearing Conference of Nov. 15, 2007, at 27-28; Order of Nov. 16, 2007, at 1 n.1). When Jones missed the due date, I afforded him a second opportunity (Prehearing Conference of Jan. 9, 2008, at 21-23). See Rule 630(b) of the Commission's Rules of Practice; Terry T. Steen, 53 S.E.C. 6l8, 626-28 (1998) (holding that an Administrative Law Judge may require the filing of sworn financial statements).

The Division cross-examined Jones about his financial circumstances at the hearing (Tr. 278-301). The cross-examination was relatively brief, due to the absence of backup documentation (Items G, J, K of Commission Form D-A). For example, Jones made certain representations about the fair market value and current encumbrances on real estate he owns (both his personal residence and certain investment properties). However, Jones did not explain how he determined the valuations. Nor did he provide recent tax appraisals or attach evidence of mortgage loan balances. Jones provided no information about his spouse's financial circumstances, even though certain of the claimed assets and liabilities are jointly owned and owed (Tr. 300). Jones did not submit any income tax returns (Tr. 297-98). Jones co-signed a note for a friend and is now jointly-and-severally liable with the friend for a judgment of $1 million (Tr. 294-96). Jones testified that he has never made a payment on that judgment and does not intend to do so. However, he claimed the full amount as a liability on his sworn financial statement. Disallowance or reduction of this one item would significantly alter the financial statement presented into evidence. Jones also testified that he worked with an accountant on his income taxes and is about to seek refinancing for his residence (Tr. 297, 299). On that basis, I assume that extensive financial documentation should have been readily available to Jones. The fact that it was not provided undercuts the weight to be accorded to Jones's claim of inability to pay. Jones has not sustained his burden of showing he is unable to pay a $15,000 civil penalty.

RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on March 11, 2008, as corrected by my Order dated April 2, 2008.

ORDER

IT IS ORDERED THAT, pursuant to Section 203(k) of the Investment Advisers Act of 1940, Amaroq Asset Management, LLC, and Dwight Andree Sean O'Neal Jones shall cease and desist from committing or causing any violations or future violations of Section 204 of the Investment Advisers Act of 1940 and Advisers Act Rule 204-1;

IT IS FURTHER ORDERED THAT, pursuant to Section 203(e) of the Investment Advisers Act of 1940, the registration of Amaroq Asset Management, LLC, as an investment adviser is revoked;

IT IS FURTHER ORDERED THAT, pursuant to Section 203(f) of the Investment Advisers Act of 1940, Dwight Andree Sean O'Neal Jones shall be barred from association with any investment adviser, with a right to apply for association after one year pursuant to Rule 193 of the Commission's Rules of Practice; and

IT IS FURTHER ORDERED THAT, pursuant to Section 203(i) of the Investment Advisers Act of 1940, Dwight Andree Sean O'Neal Jones shall pay a civil penalty of $15,000.

Payment of the civil penalty shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by wire transfer, certified check, United States Postal money order, bank cashier's check, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying the Respondent and the proceeding designation, shall be delivered to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312. A copy of the cover letter and the instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision pursuant to Rule 111 of the Commission's Rules of Practice. If a motion to correct a manifest error of fact is filed by any party, then that party shall have twenty-one days to file a petition for review from the date of my order resolving the motion to correct a manifest error of fact.

The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact, or unless the Commission determines on its own initiative to review this Initial Decision as to any party. If any of these events occur, the Initial Decision shall not become final as to that party.

_____

James T. Kelly
Administrative Law Judge