UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 6665/August 29, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19024

In the Matter of	:	
	:	
ASCENSION ASSET MANAGEMENT, LLC, and GRENVILLE M. GOODER, JR.	:	ORDER

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on March 7, 2019, pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 and Section 9(b) of the Investment Company Act of 1940. The hearing, expected to last one week or less, is scheduled to commence on September 9, 2019, in Washington, DC. *Ascension Asset Mgmt., LLC*, Advisers Act Release No. 5230, 2019 SEC LEXIS 1055 (May 7, 2019); Admin. Proc. Rulings Release No. 6583, 2019 SEC LEXIS 1199 (A.L.J. May 21, 2019). Under consideration are the parties' motions for summary disposition, filed pursuant to 17 C.F.R. § 201.250 (Rule 250), and responsive pleadings. Respondents argue that the proceeding should be dismissed on procedural grounds. The Division of Enforcement argues that there is no genuine issue with regard to any material fact to show Respondents' liability for the violations alleged, and that any sanctions should be determined after the hearing. As discussed below, Respondents' motion will be denied, and the Division's motion will be granted in part and denied in part (in that the alleged violation of Advisers Act Rule 204-2(a)(1) is unproven).

Respondents' Motion

Respondents challenge the proceeding on a number of procedural grounds: that it violates their Seventh Amendment right to jury trial; that the presiding Administrative Law Judge is barred from adjudicating it under the Appointments Clause because of improper appointment and unconstitutional removal protections; that claims based on conduct occurring prior to March 7, 2014, are barred by the five-year statute of limitations; and that the Commission was not authorized to adopt Advisers Act Rule 206(4)-7, one of the rules that Respondents are charged with violating.

Jury Trial

As an initial matter, the undersigned lacks the authority to declare unconstitutional a statute that Congress has directed the Commission to enforce. *William J. Haberman*, Securities Exchange Act of 1934 Release No. 40673, 1998 SEC LEXIS 2466, at *10 n.14 (Nov. 12, 1998), *aff'd*, 205

F.3d 1345 (8th Cir. 2000). Further, to the extent that the OIP authorizes a cease-and-desist order and disgorgement, disgorgement and injunctive relief (comparable to cease-and-desist)[1] are equitable remedies that are not triable by a jury. Finally, it is well established that the lack of jury trials in administrative proceedings does not violate the Seventh Amendment. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977); *see also Curtis v. Loether*, 415 U.S. 189, 194-95 (1974) (noting that the Seventh Amendment is generally inapplicable in administrative proceedings where jury trials would be incompatible with the whole concept of administrative adjudication); *Taggart v. GMAC Mortg., LLC*, No. 12-cv-415, 2012 WL 5929000, at *4 (E.D. Pa. Nov. 26, 2012) (observing rule from *Curtis v. Loether*); *Vladlen "Larry" Vindman*, Securities Act of 1933 Release No. 8679, 2006 SEC LEXIS 862, at *44 n.60 (Apr. 14, 2006) (citing *Atlas Roofing Co.*, 430 U.S. at 450).

Appointments Clause

In *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Supreme Court held that the Commission's Administrative Law Judges (ALJs) are "Officers of the United States," subject to the Appointments Clause of the U.S. Constitution, and that the ALJ who had initially presided over the *Lucia* administrative proceeding[2] had not been properly appointed in compliance with the Appointments Clause. As an apparent precaution against such an outcome, on November 30, 2017, following the government's filing of its brief in *Lucia v. SEC*, the Commission had, "[t]o put to rest any claim that administrative proceedings pending before, or presided over by, Commission administrative law judges violate the Appointments Clause . . . ratifie[d] the agency's prior appointment of" then-serving administrative law judges, including the undersigned. *Pending Admin. Proc.*, Securities Act

[1] The House Report on the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, which authorized Commission cease-and-desist proceedings, stated that a cease-and-desist order is an administrative remedy comparable to an injunction. H. Rep. 101-616, at 23-24 (1990). *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), which held that disgorgement is a "penalty" within the meaning of 28 U.S.C. § 2462 and thus subject to the five-year statute of limitations is inapposite. Courts that have considered the issue have ruled that *Kokesh* designates disgorgement as a penalty only within the meaning of 28 U.S.C. § 2462 and not as a penalty in all contexts. *See United States v. Meyer*, No. 18-cv-60704, 2019 U.S. Dist. LEXIS 48148, at *3-7 (S.D. Fla. Mar. 21, 2019); *SEC v. Ahmed*, 343 F. Supp. 3d 16, 26-27 (D. Conn. Sept. 6, 2018); *SEC v. Camarco*, 17-cv-2027, 2018 U.S. Dist. LEXIS 212816, at *3-5 (D. Colo. Dec. 18, 2018); *SEC v. Mapp*, No. 17-cv-3285, 2018 U.S. Dist. LEXIS 125352, at *17-18 (E.D. Tex. July 25, 2018); *United States v. RaPower-3, LLC*, 294 F. Supp. 3d 1238, 1240-42 (D. Utah Mar. 7, 2018), *confirmed*, 2018 U.S. Dist. LEXIS 58090, at *2 & n.8 (D. Utah Mar. 13, 2018); *SEC v. Brooks*, No. 07-cv-61526, 2017 U.S. Dist. LEXIS 122377, at *21-24 (S.D. Fla. Aug. 3, 2017).

[2] *See Raymond J. Lucia Cos.*, Initial Decision Release No. 495, 2013 SEC LEXIS 1973 (A.L.J.); *supplemented*, Initial Decision Release No. 540, 2013 SEC LEXIS 3856 (A.L.J. Dec. 6, 2013); *opinion of the Commission*, Exchange Act Release No. 75837, 2015 SEC LEXIS 3628 (Sept. 3, 2015); 832 F.3d 277 (D.C. Cir. 2016) (denying petition for review); 868 F.3d 1021 (D.C. Cir. 2017) (on rehearing *en banc* by an equally divided court, denying petition for review); 138 S. Ct. 2044 (2018) (reversing and remanding); 736 F. App'x 2 (D.C. Cir. 2018) (setting aside Commission decision and remanding to Commission for a new hearing).

Release No. 10440, 2017 SEC LEXIS 3724, at *1. Respondents argue that this did not cure the Appointments Clause violation going forward. If they are arguing that the Commission could not ratify an act that it could have taken on its own originally, this appears self-contradictory. They also argue that by ratifying previous appointments the Commission limited itself to the then-serving administrative law judges rather than an "open pool of candidates." Mot. at 8. It is not clear why the Commission's choice to do this could violate the Appointments Clause.

Respondents also argue that the statutory restrictions on removing the Commission's ALJs are unconstitutional. The Supreme Court affirmatively declined to address this issue. *Lucia*, 138 S. Ct. at 2051 n.1. The Commission has rejected the tenure protection argument that Respondents make. *See optionsXpress, Inc.*, Securities Act Release No. 10125, 2016 SEC LEXIS 2900, at *180-89 (Aug. 18, 2016), *abrogated in part on other grounds by Lucia*, 138 S. Ct. 2044. To date, no federal court has addressed Respondents' tenure protection argument, *see Lucia*, 138 S. Ct. at 2050 n.1, let alone agreed with it.

Statute of Limitations

Insofar as Respondents argue that the proceeding should be dismissed based on the statute of limitations, this argument fails. The Commission's March 7, 2019, OIP alleged misconduct allegedly violating various Advisers Act Rules until various dates in 2015. Therefore, the proceeding was instituted within the five years specified by 28 U.S.C. § 2462. The potential applicability of possible sanctions is, of course, dependent on a determination of violative conduct within the five-year period.

Advisers Act Rule 206(4)-7

Advisers Act Section 206 is an antifraud provision. Section 206(4) provides, "The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative." Accordingly, Rule 206(4)-7, "Compliance Procedures and Practices," requires investment advisers to:

> (a) . . . Adopt and implement written policies and procedures reasonably designed to prevent violation . . . of the [Advisers] Act and the rules that the Commission has adopted under the Act; (b) . . . Review, no less frequently than annually, the adequacy of the policies and procedures . . . and the effectiveness of their implementation; and (c) . . . Designate a [Chief Compliance Officer] responsible for administering the policies and procedures.

Respondents argue that this rule expands the definition of "fraudulent" beyond the Commission's rulemaking authority because "there is nothing 'fraudulent' about not having written compliance policies or a Chief Compliance Officer, or failing to annually review written compliance policies." Resp. Mot. at 10. To the contrary, the rule does not provide that failure to follow its requirements is itself fraudulent; the required written policies and procedures, annual review, and Chief Compliance Officer are "means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative," clearly within the meaning of Advisers Act Section 206(4) (whether or not, in practice, they are effective in doing so.)

The Division's Motion

The OIP charges Respondents with violating or causing violations of several rules adopted pursuant to Advisers Act Sections 206(4) and 204 and with violating Advisers Act Section 207, specifically: (1) Rules 206(4)-7(a), (b), and (c), regarding compliance policies and procedures, as noted above; (2) Rule 206(4)-2, which requires investment advisers that maintain custody of client funds or securities to have surprise examinations by independent public accountants and to have any private fund clients distribute audited financial statements to their investors; (3) Rule 204-2(a)(1), which requires investment advisers to keep a journal showing the adviser's cash receipts and disbursements; (4) Rule 204-2(a)(2), which requires investment advisers to keep a general ledger reflecting the adviser's assets, liabilities, reserves, capital, income, and expense accounts; (5) Rules 204-2(a)(17)(i) and (ii), which require investment advisers to keep current copies of the adviser's compliance policies and procedures and records documenting the adviser's annual review; and (6) Section 207, which makes it "unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully to omit to state in any such application or report any material fact which is required to be stated therein." The alleged violation of Section 207 consisted of statements regarding Respondents' compliance with Rule 206(4)-7(a), (b), and (c) and Rule 206(4)-2. The OIP does not allege any client losses resulting from the alleged violations or any other defalcation of client assets.

The Division argues, pursuant to Rule 250(c), that there is no genuine issue with regard to any fact that is material to the alleged violations. The following facts are found as undisputed, established by "declarations, affidavits, deposition transcript, documentary evidence," or officially noticed pursuant to 17 C.F.R. § 201.323 (Rule 323), within the meaning of Rule 250(c).

Findings of Fact

The following facts are undisputed in consideration of Respondents' First Amended Answer (Answer), dated July 9, 2019:

Ascension, located in New York City, registered with the Commission as an investment adviser in June 2004. According to its March 23, 2018, Form ADV, Ascension provides asset allocation and portfolio management services to high net worth investors, trusts, foundations, and a pension plan, with regulatory assets under management of $152,456,779 as of December 31, 2017. Gooder, currently 80 years old, founded Ascension in 2004 after working in the securities industry for about 40 years, including for several SEC-registered investment advisers. He is, and at all times was, Ascension's sole owner, sole operator, and Chairman. He is a Chartered Financial Analyst. Gooder made all decisions concerning the management and control of Ascension. He prepared, reviewed, and signed Ascension's Forms ADV; he then directed an Ascension employee to file the forms with the Commission.

Since in or about September 2005, Ascension was a continuous member of a trade organization[3] that advocates for and provides compliance and educational resources to SEC-registered investment advisory firms. Gooder had an opportunity to review information published in the

[3] The Division identified the organization, referred to as Organization "A" in the OIP and Answer, as the Investment Adviser Association (IAA). *See* Div. Mot. at 3.

organization's monthly compliance bulletins. He did not attend the organization's training events on investment advisory compliance issues, visit the Commission's website to review guidance on investment advisory compliance issues, or contact Commission staff for guidance on any investment advisory compliance issues.

Until November 2015, Ascension did not adopt and implement written compliance policies and procedures or conduct annual reviews. Accordingly, Ascension did not have records of these things during that period. Since then, following the initiation of an examination by the Commission Office of Compliance Inspections and Examinations (OCIE), Ascension has been in compliance with these requirements.

From September 2005 until March 2016, Respondents designated in Ascension's Forms ADV two individuals as Ascension's Chief Compliance Officer (CCO) at different times.[4]

From in or about 2005, Ascension was an investment adviser to a private fund, which by 2007 had approximately 40 shareholders who collectively invested approximately $4.4 million. Gooder and another individual jointly managed the private fund. From about March 2010 until November 2015 Ascension did not retain an independent accountant to perform an annual audit of the private fund and did not distribute audit financials to its investors, nor did it retain an independent public accountant to conduct an annual surprise examination to verify the fund's assets.[5] The assets were in the possession of an independent qualified custodian. Since November 2015 the fund has been dissolved.[6]

In or about July 2012, Gooder was named sole trustee of an approximately $5.2 million trust account, and from then through at least December 2015, Ascension was the investment adviser to the trust and received a fee for managing it. The assets were in the possession of an independent qualified custodian. As sole trustee, Gooder had the authority to obtain possession of and to withdraw client funds or securities maintained with a custodian. Through at least December 2015, Ascension did not engage an independent public accountant to conduct an annual surprise examination to verify the trust's assets. Since at least 2016 Ascension did do so.[7]

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[4] The parties identified these individuals, referred to as Individual "A" and "B" in the OIP and Answer, as David N. Platt and Patrick L. Smith. *See* Div. Mot. at 2, 6 n.2; Resp. Opp. at 11-12.

[5] These steps were required as of March 12, 2010. *See* Custody of Funds or Securities of Clients by Investment Advisers, 75 Fed. Reg. 1456 (Jan. 11, 2010) (amending Rule 206(4)-2, effective Mar. 12, 2010).

[6] The Answer states this, and the Division does not dispute it.

[7] The Answer states this, and the Division does not dispute it. *See also* Resps. Opp. at Exs. 8-10 (correspondence with the independent public accountant); Ascension's Accountant Surprise Examination Report (showing reports filed on December 20, 2018, and October 6, 2017), *available at* https://www.adviserinfo.sec.gov/IAPD/IAPDFirmSummary.aspx?ORG_PK=132067.

Respondents concede that Ascension had what they describe as "technical" custody of the assets.[8] Respondents admit that through 2015 Ascension had "technical" custody of assets in the private fund and of at least some of the trust's assets and thus made "mistaken" statements in Forms ADV and in Form ADV brochures through February 2015 that it did not have custody of client assets.

The following facts are found as established by "declarations, affidavits, deposition transcript, documentary evidence," or official notice pursuant to 17 C.F.R. § 201.323 (Rule 323), within the meaning of Rule 250(c).

David Platt, listed in several Ascension Forms ADV filed between September 2005 and February 2015 as the adviser's CCO,[9] has known Gooder for many years and owned and operated an investment adviser from 1980 to 2017, when he retired from business. Div. Mot. at Ex. 7 (Platt Tr.) at 9, 13.[10] Platt was the joint manager, with Gooder, of the private fund. Platt Tr. at 19-21. He allowed Gooder to list his name as a convenience; Platt was not acquainted with the responsibilities of a CCO, and the two did not discuss it: "I don't know what responsibilities would have been. All I did was have my name on his ADV because we had assumed you can't be your own compliance officer." Platt Tr. at 14; *accord*, Div. Mot. at Ex. 1 (Gooder 12/2017 Tr.) at 74, 76-77.[11] Platt did not set up a compliance file, adopt or implement any written compliance policies and procedures, perform an annual review, or take any other action as Ascension's CCO. Platt Tr. at 15-16.

Patrick Smith, listed in Ascension's Form ADV filed February 10, 2011, as the adviser's CCO,[12] became acquainted with Gooder when both were associated with another investment firm. Div. Mot. at Ex. 10 (Smith Tr.) at 23-27; Gooder 12/2017 Tr. at 8.[13] In 2009, when Smith was considering leaving that firm, Gooder suggested that he start his own firm and offered him shared

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[8] This appears to refer to the definition of custody in Rule 206(4)-2(d)(2): "*Custody* means holding, directly or indirectly, client funds or securities, *or having any authority to obtain possession of them* . . . includ[ing] . . . (ii) any arrangement . . . under which you are authorized or permitted to withdraw client funds or securities maintained with a custodian upon your instruction to the custodian." (emphasis added; "*Custody*" is italicized in the original). The definition of custody was added in 2003 (then numbered as Rule 206(4)-2(c)(1)). *See* Custody of Funds or Securities of Clients by Investment Advisers, 68 Fed. Reg. 56692-93, 56701 (Oct. 1, 2003) (amending Rule 206(4)-2, effective Nov. 5, 2003).

[9] Specifically, Platt was listed as CCO in Ascension's Forms ADV filed Sept. 14, 2005, Mar. 14, 2006, Mar. 14, 2007, July 2, 2007, Jan. 30, 2008, Feb. 2, 2009, Mar. 23, 2010, Mar. 26, 2012, Feb. 19, 2013, Mar. 12, 2013, Mar. 11, 2014, and Feb. 26, 2015. *See* Div. Mot. at Exs. 6A-6L.

[10] Exhibit 7 is an excerpt of the transcript of the June 18, 2019, deposition of Platt.

[11] Exhibit 1 is excerpts of the transcript of the December 12, 2017, investigative testimony of Gooder.

[12] *See* Div. Mot. at Ex. 9.

[13] Exhibit 10 is excerpts of the transcript of the June 14, 2019, deposition of Smith.

office space rent-free until he became established. Smith Tr. at 30-41. Smith began to pay rent in 2011 but found that he could not sustain it, and both made other arrangements for office space toward the end of 2011. Smith Tr. at 41-43.

At most, Gooder mentioned only briefly to Smith that he was naming him CCO: Gooder recalls telling Smith that he was naming him CCO, without, however, discussing the duties and responsibilities involved. Gooder 12/2017 Tr. at 36-39. Smith, however, testified that Gooder never talked to him about being Ascension's CCO. Smith Tr. at 63, 78-80. Smith was not aware that he had been listed as CCO in the February 2011 Form ADV until Commission staff showed him a copy in 2017.[14] Smith Tr. at 54-56.

Prior to the OCIE examination, Respondents did not maintain any ledgers reflecting the adviser's assets, liabilities, reserves, capital, income, and expense accounts; rather, Gooder "ran Ascension Asset Management out of a checkbook." Div. Mot. at Ex. 8 (Gooder 12/2016 Tr.) at 50-51. At year-end, he listed receipts and disbursements in different categories by hand on pieces of paper to provide to his accountant for tax purposes; he retained some of the papers. *Id*. In support of the allegation that Ascension violated Advisers Act Rule 204-2(a)(1), which requires investment advisers to keep a journal showing the adviser's cash receipts and disbursements, the Division's Motion includes several exhibits that are correspondence concerning a journal reflecting Ascension's cash receipts and disbursements. Div. Mot. at Exs. 12-16.

Gooder did not read any Investment Adviser Association (IAA) bulletins or Commission guidance regarding the custody rule that were published around the time of the 2010 amendment of the rule and did not have an understanding of the requirements of the rule. Gooder 12/2017 Tr. at 99-103.

Conclusions of Law

The OIP charges that Ascension willfully violated and Gooder caused Ascension's violations of Section 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-2 thereunder; that Ascension violated and Gooder caused Ascension's violations of Section 204 of the Advisers Act and Rule 204-2 thereunder; and that Ascension and Gooder willfully violated Section 207 of the Advisers Act. As discussed below, it is concluded that these violations were proved, with one exception. The alleged violation of a subsection of Rule 204-2, Rule 204-2(a)(1), pertaining to "journals," was not proved.

A. Legal Standards

1. Causing

Gooder is charged with causing various violations by Ascension. For "causing" liability, three elements must be established: (1) a primary violation; (2) an act or omission by the respondent that was a cause of the violation; and (3) the respondent knew, or should have known, that his or her conduct would contribute to the violation. *Robert M. Fuller*, Securities Act Release No. 8273, 2003 SEC

[14] Gooder does not recall, one way or the other, whether he showed Smith a draft of the Form ADV but believes that he "probably" showed him an Ascension Form ADV with his name on it at some time. Gooder 12/2017 Tr. at 47.

LEXIS 2041, at *13-14 (Aug. 25, 2003), *pet. denied*, 95 F. App'x. 361 (D.C. Cir. 2004). Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. *See KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 SEC LEXIS 98, at *82 (Jan. 19, 2001), *pet. denied*, 289 F. 3d 109 (D.C. Cir. 2002). Negligence is a "failure to exercise reasonable care or competence." *Byron G. Borgardt*, Securities Act Release No. 8274, 2003 SEC LEXIS 2048, at *38 & n.35 (Aug. 25, 2003) (citation omitted).

2. Willfulness

Ascension is charged with willfully violating Section 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-2 thereunder and Section 204 of the Advisers Act and Rule 204-2 thereunder, and Respondents are charged with willfully violating Section 207 of the Advisers Act. A finding of willfulness does not require an intent to violate, but merely an intent to do the act which constitutes a violation. *See Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.C. Cir. 2000); *Steadman v. SEC*, 603 F.2d 1126, 1135 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 180 (2d Cir. 1976); *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965); *see also Robare Grp., Ltd. v. SEC*, 922 F.3d 468, 479 (D.C. Cir. 2019) (assuming, without deciding, that the *Wonsover* standard applies to Section 207).

3. Materiality

Advisers Act Section 207 proscribes material misstatements and omissions "in any registration application or report filed with the Commission" under Advisers Act Section 203 or 204." The standard of materiality, applicable to Advisers Act Section 206 as well, is whether or not a reasonable investor or prospective investor would have considered the information important in deciding whether or not to invest. *See SEC v. Steadman*, 967 F.2d 636, 643 (D.C. Cir. 1992); *see also Basic Inc. v. Levinson*, 485 U.S. 224, 231-32, 240 (1988); *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

4. Scienter

Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *SEC v. Steadman*, 967 F.2d at 641. Recklessness can satisfy the scienter requirement. *See SEC v. Steadman*, 967 F.2d at 641-42; *David Disner*, Exchange Act Release No. 38234, 1997 SEC LEXIS 258, at *15 & n.20 (Feb. 4, 1997). Reckless conduct is "conduct which is 'highly unreasonable' and which represents 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978) (quoting *Sanders v. John Nuveen & Co.*, 554 F.2d 790, 793 (7th Cir. 1977)).

Scienter is not required to establish a violation of Section 206(4) of the Advisers Act; a showing of negligence is adequate. *See Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195; *SEC v. Steadman*, 967 F.2d at 647; *Steadman v. SEC*, 603 F.2d at 1132-34 (5th Cir. 1979).

Ascension is accountable for the actions of its responsible officer, Gooder. *See C.E. Carlson, Inc. v. SEC*, 859 F.2d 1429, 1435 (10th Cir. 1988) (citing *A.J. White & Co. v. SEC*, 556 F.2d 619, 624 (1st Cir. 1977)). A company's scienter is imputed from that of the individuals controlling it. *See SEC*

v. Blinder, Robinson & Co., 542 F. Supp. 468, 476 n.3 (D. Colo. 1982) (citing *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1096-97 nn.16-18 (2d Cir. 1972)).

Gooder, as owner and sole principal of Ascension, was an associated person of an investment adviser. *See* Advisers Act Sections 202(a)(17), 203(f). Investment advisers and their associated persons are fiduciaries and "must be governed by the highest standards of conduct. They have an affirmative duty of utmost good faith, and full and fair disclosure of all material facts." *Fundamental Portfolio Advisors, Inc.*, Securities Act Release No. 8251, 2003 SEC LEXIS 1654, at *54 & nn.52, 53 (July 15, 2003) (internal quotation marks omitted), *pet. dismissed sub nom. Brofman v. SEC*, 167 F. App'x 836 (2d Cir. 2006); *see Capital Gains*, 375 U.S. at 191-92, 194, 201; *see also Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979).

B. <u>Advisers Act Section 206(4) and Rules 206(4)-7 and 206(4)-2</u>

Advisers Act Section 206(4) is an antifraud provision that makes it unlawful for any investment adviser, by jurisdictional means "to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative" and directs the Commission to "by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative." The undisputed facts show that Ascension violated, and Gooder caused the violation of: (1) Rule 206(4)-7 by failing to have written compliance policies and procedures, annual reviews of the written policies and procedures, and a CCO (in that individuals identified as CCOs were not acting in that capacity);[15] and (2) Rule 206(4)-2 by failing to retain an independent accountant to perform an annual audit of the private fund and distribute audited financial statements to investors and to conduct surprise examinations of the private fund's and trust's assets. As the sole owner and operator of Ascension, Gooder caused the violations and his state of mind is imputed to Ascension. Gooder should have known of these requirements but did not. Rule 206(4)-7 was added in 2003, effective February 5, 2004,[16] and the definition of "custody" in Rule 206(4)-2 was added in 2003.[17] Gooder did not attend IAA training events on investment advisory compliance issues, visit the Commission's website to review guidance on investment advisory compliance issues, or

[15] Platt was aware that he had been designated as CCO on the Forms ADV. Whether or not Smith was aware that he had been designated as CCO, neither was "responsible for administering the [Rule 206(4)-7(a) written] policies and procedures" within the meaning of Rule 206(4)-7(c). Nor did either have any compliance responsibilities. It is noted that, standing alone, designating Smith in a 2011 Form ADV is outside the five-year statute of limitations period. However, this occurrence is relevant to Respondents' motive, intent, or knowledge. Acts outside the statute of limitations may be considered to establish a respondent's motive, intent, or knowledge in committing violations that are within the statute of limitations. *Eric J. Brown*, Exchange Act Release No. 66469, 2012 SEC LEXIS 636, at *45 & n.41 (Feb. 27, 2012), *aff'd sub nom. Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013); *Sharon M. Graham*, Exchange Act Release No. 40727, 1998 SEC LEXIS 2598, at *41 n.47 (Nov. 30, 1998), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000).

[16] *See* Compliance Programs of Investment Companies and Investment Advisers, 68 Fed. Reg. 74714, 74715-16, 7430 (Dec. 24, 2003) (adding Rule 206(4)-7, effective Feb. 5, 2004).

[17] *See supra* n.8.

contact Commission staff for guidance on investment advisory compliance issues. The established facts show that he did not read any IAA bulletins or Commission guidance around the time of the 2010 amendment of Rule 206(4)-2(a)(2) and did not have an understanding of the rule's requirements. As a fiduciary who had decades of industry experience and who owned and controlled Ascension, Gooder's failure to remain informed about compliance requirements was highly unreasonable – reckless conduct amounting to scienter.

Because Ascension violated, and Gooder caused the violations of, rules prescribing "means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative" authorized pursuant to Advisers Act Section 206(4), Ascension violated, and Gooder caused the violation of, that section, which makes it unlawful "to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative."

C. Advisers Act Section 204 and Rule 204-2

Advisers Act Section 204 is a record-keeping and reporting provision that requires investment advisers to "make and keep for prescribed periods such records . . . and make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors." Even if Gooder's "checkbook" were considered a "journal . . . including cash receipts and disbursements" within the meaning of Rule 204-2(a)(1),[18] the undisputed facts show that Ascension violated, and Gooder caused the violation of Rule 204(a)(2) by failing to keep ledgers and of Rules 204(a)(17)(i) and (ii) by failing to have copies of Ascension's (non-existent) written compliance policies and procedures and records documenting its annual review. As the sole owner and operator of Ascension, Gooder caused the violations. He should have known of these requirements. Because Ascension violated, and Gooder caused, the violations, of rules authorized pursuant to that section "as necessary or appropriate in the public interest or for the protection of investors," Ascension violated, and Gooder caused the violation of, that section.

D. Advisers Act Section 207

Advisers Act Section 207 proscribes material misstatements and omissions "in any registration application or report filed with the Commission under [Advisers Act] section 203 or 204." Respondents answered "No" in Ascension's Forms ADV, Part 1A, Item 9, to questions asking whether Ascension had "Custody" of client assets. Respondents concede that this answer was "mistaken." However, Gooder's lack of knowledge concerning this arose from reckless conduct amounting to scienter. A reasonable investor would consider this misstatement important since it was the culmination of a cursory process of bookkeeping and accounting that, in addition, omitted the role of an independent accountant. Likewise, listing Platt and Smith as CCOs in Ascension's Forms ADV were material misstatements. Neither was a CCO within the meaning of Rule 206(4)-7(c) or had any compliance responsibilities. Listing them was at least reckless. A reasonable investor would consider this misstatement important because it showed a cavalier attitude toward the importance of compliance. Accordingly, Ascension and Gooder violated Advisers Act Section 207.

IT IS SO ORDERED.

[18] The Division may seek to prove violation of Rule 204-2(a)(1) at the hearing.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge