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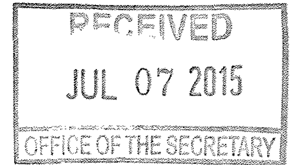

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15842

In the Matter of TOTAL WEALTH MANAGEMENT, INC., JACOB KEITH COOPER, NATHAN MCNAMEE, AND DOUGLAS DAVID SHOEMAKER, Respondents.	**THE DIVISION OF ENFORCEMENT'S POST-HEARING REPLY BRIEF**

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I. INTRODUCTION

At the hearing, the Division of Enforcement ("Division") introduced compelling evidence that Jacob Cooper ("Cooper") and Total Wealth Management, Inc. ("TWM") breached their fiduciary duty to clients and violated the antifraud provisions of the federal securities laws. Cooper failed to disclose the actual conflicts of interest created by so-called referral fee agreements that Cooper and/or TWM had with funds that Cooper invested TWM's clients in. He also misrepresented to clients that he and TWM were performing high quality due diligence of these funds prior to recommending them for investment, when in fact they were not. In his response, Cooper ignores the evidence, makes assertions of fact that are not supported by the record, and argues that there is no difference between disclosing that he "may have" agreements for referral fees, and disclosing that he "has" agreements to be paid referral fees, even though those fees represented a substantial part of his income. Cooper's construction of the record does not withstand any degree of scrutiny.

The factual premise on which all of Cooper's arguments depend – that "may have" means the same thing as "has" – was uniformly rejected by every witness at trial. (Tr. (Smith) 131-32; Tr. (Howard) 188; Tr. (Behnke) 308; Tr. (Bryant) 426); Tr. (Groves) 497, 526-27.) Cooper points to the disclosure in TWM's Form ADV and the Altus PPM, but Cooper never even provided these documents to all of TWM's clients, a fact that multiple witnesses confirmed on the stand. Even when provided to clients, Groves – an independent compliance consultant that Cooper fired – testified that TWM's "may have" language was insufficient because revenue sharing agreements were not a hypothetical possibility, but were in fact in place at the time. Nor was Cooper's personal enrichment from fee-sharing contingent or a mere possibility – that fact was also certain. The Division's expert, Behnke, found the disclosure misleading for these same reasons. Most significantly, TWM's clients testified without equivocation that a disclosure that TWM "may have" referral agreements was misleading and that the existence of revenue sharing agreements with the funds they invested in would have mattered a great deal to them.

Consequently, when Cooper allocated 90% of client assets to funds that *were* paying him large sums of money in the form of revenue sharing, he had an actual, and undisclosed, conflict-of-interest with his clients. There is no factual basis for this Court to accept Cooper's argument that his conditional "may have" disclosure of a potential conflict of interest was sufficient, in the face of facts that an actual and direct conflict of interest existed.

In response to the evidence that Cooper misrepresented the due diligence he was performing, Cooper claims that "[t]he entire process met or exceeded the highest standards of conduct in the investment management industry at the time." (Resp. 30.) Cooper fails to provide competent evidence to support that assertion, and in fact, the record at trial established that respondents failed to perform even minimal due diligence, much less the high level of due diligence that they promised to clients. Cooper's careless diligence efforts resulted in client losses of at least $20 million, and his claims of rigorous due diligence and expertise in the area of alternative investments were a fraud, in violation of the federal securities laws.

Cooper also claims as his defense that he relied on the advice of compliance and legal professionals (Resp. 15-21), which absolves him of any scienter for his actions. But that claim is not supported by any probative evidence other than Cooper's uncorroborated assertions. Cooper did not introduce into evidence any opinion letter, e-mail, or other writing memorializing the advice purportedly rendered. Cooper also did not introduce testimony from a single one of the many lawyers and compliance professionals referenced by Cooper at trial. Without any corroborating evidence, Cooper's mere assertion is insufficient to prove any reliance on professionals to negate his scienter.

Finally, Cooper's brief wholly fails to respond to the Division's claims that he willfully aided and abetted TWM's custody rule violation, caused TWM's violations of Section 10(b) and Rule 10b-5(b), willfully aided, abetted and caused Total Wealth's violations of Section 206(4) of the Advisers Act and Rule 206(4) thereunder, and violated Section 207 of the Advisers Act. (*See* Init. Br. 59-64.) The Hearing Officer should therefore find in the Division's favor on these causes of action, as Cooper has not advanced any defense to liability.

II. ARGUMENT

A. Cooper's Unsupported Factual Claims Should Be Disregarded

Cooper's response is stuffed with factual assertions, but in more instances than not, Cooper's so-called "facts" are unsupported by any citation to the evidentiary record. Under the Commission's rules, Cooper's arguments are forfeited in the absence of an appropriate citation to competent evidence. *See* Rule of Practice 360(b), 17 C.F.R. § 201.360(b) (providing for issuance of initial decision on basis of hearing record); Rule of Practice 340(b), 17 C.F.R. § 201.340(b) (requiring "citations to specific portions of the record"); *see also United States v. Moore*, 651 F.3d 30, 97 (D.C. Cir. 2011) (finding arguments forfeited where litigant "presented unsupported narratives lacking citation to the record and relevant authority"); *In the Matter of John Gardner Black, et al.*, Exchange Act Rel. No. 70318, 2013 WL 4737370, *3 n. 18 (Sept. 4, 2013) (Comm. op.) (rejecting factual theory that was "entirely unsupported by citations" or "supported only with vague references" to the record).

Accordingly, Cooper's rote claim of "undisputed" facts, unaccompanied by citations to evidence offered and admitted at hearing, should be disregarded by the Hearing Officer.

B. TWM Failed To Disclose Revenue Sharing

1. Disclosing that TWM "may have" revenue sharing arrangements was false and misleading

Cooper argues that so-called "slight" changes in the charged Form ADVs to prior, "almost identical," disclosure language are "not the stuff of fraud." (Resp. at 4, 14.) Cooper's arguments are not supported by the record, which established that Cooper's modifications were substantive changes that, under the facts and circumstances, were misleading.

a. Background of events

Initially, Cooper muddles the record on what Form ADV language was and wasn't filed with the SEC, the specific Form ADVs that the Division's OIP in fact charged, and the exact language which gives rise to Cooper's fraud, all in an effort to obscure TWM's deficient conflict-of-interest disclosures. (Resp. 12-14 (irrelevantly arguing earlier uncharged disclosures

drafted by Groves were sufficient).) Cooper's effort to create ambiguity where none exists should not be permitted.

The record established that TWM's former compliance consultant, Groves, consulted with TWM from January 2009 until December 2009, when Cooper fired him. (Tr. (Groves) 501.) TWM, however, did not become an SEC-registered investment adviser until November 2009. (*Id.* 517-18.) Before his termination at the end of 2009, Groves drafted the disclosure language found in several 2009 versions of TWM's California Form ADVs. (*Id.* at 487-496; Exhibits 128, 131.) But there was no requirement that these state ADVs be filed with any regulatory authority, and Groves testified that he had no assurance that the Form ADV language he had drafted was actually provided to TWM clients. (Tr. (Groves) 502.) The substantial changes from Groves' Form ADV language from 2009, and the TWM Form ADV disclosures from 2011 to 2013 – those actually charged by the Division in its OIP – are set forth below.

b. Groves' recommended disclosure language vs. TWM's misleading Form ADVs

Once told about TWM's revenue sharing agreements in 2009, Groves advised TWM to make the following disclosure:

> <u>The Adviser *routinely purchases* a certain type of security</u>, usually a limited partnership interest with a hedge fund or other type of unregistered investment vehicle, on behalf of a client of the Advisor. <u>The Advisor *has entered into solicitation agreements* with the firms offering the investment product</u> and as a result of placing a client in those investment products, the Adviser may receive a percentage of the investment advisory fees charged by the firm offering the security.

(Exhibit 131 (Oct. 2009 Schedule F) (emphasis and underlining added); *see also* Exhibit 128 (Sept. 2009 Schedule F).)

In contrast, the Form ADV Part 2A brochures that were filed with the SEC in 2011 to 2013, and charged in the Division's OIP, all state that:

> <u>The Firm *may have* arrangements with certain Independent Managers whereby TWM or one of its associated persons receives a percentage of the fees charged by such Independent Managers</u>. If TWM refers a client to an Independent Manager where the [<u>sic</u>] TWM receives compensation based on a percentage of

> the fees charged by such Independent Manager, TWM shall be compensated for its services by receipt of a fee to be paid directly by the Independent Manager to TWM in accordance with the requirements of Rule 206(4)-3 of the Investment Advisers Act of 1940, as amended, and any corresponding state securities laws, rules, regulations, or requirements.

(Exhibit 120 (Form ADV Part 2A, filed March 2011) (emphasis and underlining added); *see also* Exhibit 218 (filed August 23, 2011); Exhibit 220 (filed April 2, 2012); Exhibit 222 (filed February 26, 2013); Exhibit 224 (filed April 5, 2013); Exhibit 225 (filed May 22, 2013).) Groves testified that this "may have arrangements" disclosure was not his operative language, and that he played no part in drafting it. (Tr. (Groves) 496-97.)

The Altus PPM, which Cooper also relies upon, employs the same "may" formulation as TWM's 2011 to 2013 Form ADV Part 2A brochures:

> Some Private Funds *may pay* the General Partner or its affiliates a referral fee or a portion of the management fee paid by the Private Fund to its general partner or investment adviser, including a portion of any incentive allocation.

(Exhibit 135 at 00066 (SEC-OGBOMO-00002122) (emphasis added).)

c. Cooper failed adequately to disclose his revenue sharing arrangements in TWM's Form ADVs and the Altus PPM

In his defense, Cooper argues that Groves' recommended disclosure was only "modified very slightly over time." (Resp. at 12.) This argument is contrary to the evidence, which established that Groves suggested specific language to disclose an actual conflict of interest, but that after Cooper terminated his services, Cooper chose to revert to language that Groves advised was inadequate as a disclosure under the facts and circumstances. The evidence at the hearing established that disclosing that TWM "*may have* [revenue sharing] arrangements," is, contrary to Cooper's argument, very different from a disclosure that TWM "*routinely* purchases" securities from funds with which it "*has* entered into solicitation agreements."

It is undisputed that TWM's basic business plan was to place clients in funds that paid Cooper extra compensation in the form of revenue sharing fees. (DOE Ex. 271 at 10.) Despite this basic plan, Cooper told clients that "TWM has no agenda other than what our clients bring to

the table as their agenda." (Tr. (Smith) 92-93 ("It never occurred to me that [Cooper] would have a conflict of interest. He was representing me."); Exhibit 344 at 3.)

Cooper knew that the overwhelming majority of client assets were being funneled into funds with which TWM or Cooper had revenue sharing arrangements. (Exhibit 68 at 5 (ACOF schedule of investments); Exhibit 271 at 10; Init. Br. at 12.) He knew that of the $34.4 million in client money entrusted to his management through the Altus Capital Opportunity Fund, 90% of those assets – or $31.7 million – had been invested by TWM in funds that paid revenue sharing. (*Id.*) And he knew that in just four years, these revenue sharing arrangements had enriched him and TWM tremendously, to the tune of nearly $2 million in extra compensation. (Exhibit 272A.)

The witness testimony on this question was uniform. Groves, one of the very compliance professionals on whom Cooper pins his reliance defense, made this very clear at trial. As he testified, the gap between "may have" and "has" mattered significantly to him:

> Q. Would you consider this language to adequately disclose Total Wealth revenue sharing agreements?
>
> A. No, on two counts, one is, it uses the word "may" as opposed to "is" when there was, in fact, already existing agreements. There's no explicit statement as to there being a conflict of interest and/or how that conflict of interest is mitigat[ed].

(Tr. (Groves) 497, 526-27.) Further, Groves' earlier formulation – that TWM "routinely purchases" revenue sharing investments – sufficiently conveyed the important reality that funds with revenue sharing were "extensively" used in TWM client portfolios; in contrast, the conditional language of TWM's subsequent Form ADVs conveyed no meaningful information about the degree and frequency at which TWM client assets were being used to generate revenue sharing income for Cooper and TWM. (*Id.* at 493, 497-98.)

Behnke, the Division's expert, echoed Groves' view:

> Q. So it's your opinion, if I'm understanding correctly, that that does not disclose that a referral fee may be paid?
>
> A. It discloses that a referral fee may be paid, however, in this case when this AD – when this document was created, referral fees

were, in fact, already being paid and therefore "may" is misleading.

(Tr. (Behnke) 308; Exhibit 271 at 10.) Behnke explained that "since TWM was being paid to direct its clients to certain Private Funds, and then paid again to keep the clients' money invested in those Private Funds, this business practice should have been specifically and fully disclosed, because it was not a potential conflict of interest, but an *actual* conflict of interest." (Exhibit 271 at 10 (emphasis added).)

Cooper's clients also considered the "may" language employed by TWM's post-2010 Form ADVs to be misleading. For example, Christopher Bryant testified there was no "gray area" on this issue:

Q. Mr. Bryant, in your view, disclosure of the possibility of a revenue sharing agreement, is that full and fair disclosure if those arrangements, in fact, exist?

A. No.

Q. Why not?

A. I mean, you're either going to do it or you're not; correct? I mean, you either have them or you don't. So there's really no gray area there.

(Tr. (Bryant) 426.) Had clients known the truth – that revenue sharing arrangements were not a mere possibility, but had in fact been negotiated for the vast majority of the money Cooper invested on his clients' behalf – they would have considered Cooper's investment advice biased and not in their best interest, and "would never have invested a dollar with Mr. Cooper." (Tr. (Bryant) 426; *see also* Tr. (Smith) 131-32; Tr. (Howard) 188.)[1]

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[1] Cooper complains that "had witnesses for the Defense been permitted to be called, the court would have heard first hand that many clients knew about revenue sharing[.]" (Resp. Br. 14.) Cooper had the ability to subpoena and call rebuttal witnesses at trial. His decision not to was of his own volition.

Other evidence presented at hearing confirms that TWM's use of conditional language was misleading under the circumstances. For example, TWM's standard advisory agreement provided:

> *Other Fees*. Client may also incur certain fees and charges that are imposed by third-parties, not TWM. These fees and charges are separate and distinct from the fees and charges stated above and may include, but not be limited to: management and/or performance fees charged by managers of certain private investment vehicles ...*TWM* is not responsible for and *does not receive* any of these fees or charges.

(Exhibit 325 at 2 (emphasis and underlining added).)[2] This evidence contradicts Cooper's argument that he made a complete and full disclosure because it explicitly states that Cooper and TWM are not engaging in any revenue sharing arrangements.

Cooper's Wells submission also concedes that the disclosures that TWM "may have" revenue sharing agreements were inadequate:

> [W]here disclosures state that there is an event that may or might occur, those disclosures are only misleading where at the time the disclosures were written, the disclosing entity knew that the likelihood of the occurrence was certain or that the event had already occurred.

(Resp. Ex. 308 at 2.) When TWM filed its Form ADVs in 2011, 2012 and 2013, it *already had* revenue sharing arrangements with Tony Hartman, PPCN, PPCN II, LJL Funding, Rainmaker, Moneta Capital, Don Davis, Novus d/b/a Dynamic Sales, JOMAC, Aegis Retail, Aegis Atlantic, and Metro Coffee. (Init. Br. at 13-21.) The existence of each and every one of those executed agreements was certain. According to Cooper's own Wells submission, TWM's Form ADVs were therefore misleading.

Thus, the record evidence supports a finding that widespread fee sharing was a fundamental feature of TWM's business model, and that Cooper and TWM failed to disclose

[2] When confronted with this evidence at the hearing, Cooper claimed "there's a way of saying" this statement "wasn't true." (Tr. (Cooper) 731.)

TWM's indiscriminate use of client assets to extract revenue sharing fees from an array of interrelated investment funds, many of which eventually failed at a substantial cost to TWM clients, all in violation of the antifraud provisions of the Securities Act, the Exchange Act and the Advisers Act.

2. Cooper's claim that "may" was appropriate because it was theoretically possible for a TWM client to not invest in any revenue sharing fund is specious

Cooper argues that "if revenue sharing was **not certain to be a part** of an investor's mix of private funds, the language that the Division insists upon (that revenue sharing "is" present) would be untruthful and misleading language." (Resp. Br. 9 (emphasis in original).) Cooper thus reasons that even if it was 99.9% certain that upon receiving client assets, Cooper would place their money into at least one revenue sharing investment, that .1% possibility of a different outcome insulates him from liability. (*Id.* 9-11.) The Hearing Officer should reject Cooper's contorted logic.

First, Cooper is only rebutting a straw man argument of his own design. When fairly read, it is clear that the language at issue does not speak to whether a TWM client will have their money eventually invested by Cooper in a revenue sharing fund. (*See* Resp. 9.) Instead, the "may have" language speaks to a different question, one with an answer that was empirically certain: whether revenue sharing arrangements with underlying funds were in fact in place. When filed with the SEC and/or provided to clients, it was 100% certain that the following Form ADV statement was false:

> The Firm *may have* arrangements with certain Independent Managers whereby TWM or one of its associated persons receives a percentage of the fees charged by such Independent Managers.

(*E.g.*, Exhibit 120 at 00005 (Form ADV Part 2A, filed March 2011).) That is because TWM *did* "have arrangements with certain Independent Managers" at the time the statement was made. (Init. Br. 13-21 (describing 13 revenue sharing and consulting arrangements with underlying funds and their affiliates in place prior to March 2011 Form ADV).)

Second, when discussing the likelihood that a client would invest in at least one revenue sharing fund, Cooper still manages to obfuscate the record. His claim that there are TWM clients who never invested in any revenue sharing fund noticeably lacks any citation to the evidence. (Resp. Br. 10 ("Both occurrences happened.").) In fact, the available evidence is to the contrary. Cooper claims in his brief that "only about one-third of the investments offered by Total Wealth had revenue sharing arrangements," again, without record support. (Resp. Br. 9.) But the evidence admitted at trial demonstrates that in 2010 – the only year in which ACOF issued audited financials – 90% of client assets were invested in funds that paid Cooper and TWM revenue sharing. And in 2014, when a federal district court placed TWM into receivership, the receiver found that more than $34 million of the remaining $38.7 million left in the Altus funds were investments in investment vehicles from which Cooper and TWM had received revenue sharing. (Exhibit 310 at Ex. 1.)

Third, Cooper places much stock in the fact that he purportedly gave clients Form ADVs before any investment allocation was finalized, and so the conditional tenor of TWM's conflict-of-interest disclosure on revenue sharing was fully appropriate. (Resp. Br. 9 (no citation to record).) However, Cooper's fiduciary duty under *Capital Gains* does not set "potential" conflicts-of-interest apart from "actual" conflicts-of-interest:

> The Investment Advisers Act of 1940 thus reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship, as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline as investment adviser – consciously or unconsciously – to render advice which was not disinterested.

SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 200-01 (1963) (an investment adviser must "fully and fairly reveal[ ] his personal interest in [his] recommendations to his clients."). "Potential conflicts of interest are 'material' facts with respect to clients and the Commission." *Vernazza v. SEC*, 327 F.3d 851, 859 (9th Cir. 2003) (emphasis added). Thus, the applicable precedent establishes as false Cooper's argument that the conflict of interest was hypothetical – and need not be disclosed – until the exact moment he invested client assets in

funds where he had referral agreement. Because the agreements were in place and it was his plan to invest the money, the conflict of interest was actual and real even before the investment was made.

3. TWM did not give its Form ADV and the Altus PPM to all of its clients

Even if the Form ADV and Altus PPM disclosures had been sufficient – and they were not, for the reasons given above – TWM clients were still defrauded because TWM failed to provide those materials to all of its clients. As late as 2009, TWM's chief compliance officer had no idea that the Form ADV was even supposed to be sent to clients. (Tr. (Groves) 478-79, 502-03.) TWM also neglected to maintain a log of exactly who it had given its Form ADV to. (*Id.* at 478-79.) Predictably, multiple investors testified that before 2014 (when the Division brought this action), they were never given a copy of TWM's Form ADV, or Altus's PPM. (Tr. (Howard) 169, 194; Tr. (Bryant) 423.) Nor does Cooper's self-interested account of oral conversations he supposedly had with clients preclude liability. All three investor witnesses testified, without hesitation, that they were never told about Cooper's revenue sharing arrangements, orally or otherwise. (Tr. (Smith) 130-31; Tr. (Howard) 187-88; Tr. (Bryant) 424-25.)

C. Cooper Acted With Scienter When Failing To Disclose Revenue Sharing

1. Cooper acted with scienter

In its initial brief, the Division proved that Cooper knew, or was reckless in not knowing, that he and Total Wealth misrepresented material facts about TWM's pervasive revenue sharing arrangements with the "alternative investment" funds that it put client money into. (Init. Br. 53-54.) Because Cooper made all decisions for TWM, personally negotiated and signed the revenue sharing agreements at issue, approved the revenue sharing funds for investment by clients, and made all related investment decisions for ACOF and the Portfolio Series Funds, Cooper acted with scienter. (*Id.*) His scienter is only underscored by the efforts he took to conceal his financial dealings with Aegis and Life's Good when those investments failed in 2010 and 2014.

In each case, Cooper sought to reassure worried clients with false promises of optimism

and sympathy. For example, once an SEC investigation revealed that Life's Good was a Ponzi scheme, Cooper told clients the following in a July 2010 letter:

> We were told by SEC attorneys that the nature of the misinformation disseminated by LG was exceptionally sophisticated and could reasonably be expect[ed] to mislead any reasonable person.
>
> * * *
>
> We are very disappointed by this news, as we know you are. I personally had money invested in LG, as I believe in leading by example. Please know that we are dedicated to you and have engaged the most proficient legal counsel available. We are also committed to keeping the flow of information on the issue – accordingly, we intend to provide additional information to you to the extent possible and prudent.

(Exhibit 346.) In that letter, Cooper asked defrauded clients to take heart and know that their best interests remained front and center. He told them that "additional information" was forthcoming. (*Id.*) What he didn't tell them, however, was that upon hearing about Life's Good for the first time in February 2010, Cooper had received a windfall of $69,900 in fees over the next five months, all paid in connection with the $2.4 million in client assets he hurried to invest in that Ponzi scheme. Nor did he ever disclose to clients that he was later sued by the receiver appointed over Life's Good for unjust enrichment and fraudulent transfer. (Tr. (Smith) 120-21.)

Similarly, when the Aegis funds began to fail in 2014, Cooper told concerned clients that he had removed Aegis's existing management and was personally working to right the ship:

> In the past weeks and months, we shared with many of you the growing major concerns we have on many levels of the Aegis operations ... It became our opinion that a change at the top was needed to bring about a restructuring of the Aegis organization for the benefit of all investors involved.
>
> * * *
>
> Perhaps, however, the most notable change is that Altus now is in a position to assist with Aegis' business activities going forward, and will make every effort to mitigate losses to the greatest extent possible.

(Exhibit 328 at 1-2.) But at no time did Cooper tell clients that along the road to their financial failure, he and TWM had reaped a six-figure financial windfall in the form of revenue sharing from the Aegis funds. (*See* Exhibit 310 at 13 (finding that Aegis fee-sharing payments to TWM were "unusual, given that the Receiver's records reflect that the Aegis entities had substantial

losses and were essentially insolvent during all relevant periods, meaning the fees paid [to TWM and Cooper] could otherwise have mitigated investors' losses."). In fact, Cooper's letter said precisely the opposite:

> While a conflict of interest indeed can exist with Altus being closely involved in the management of the various entities, it is important to note that neither Altus, TWM, nor any of their officers or employees, have any economic interest in the Aegis entities or are receiving any form of compensation. We believe this is a strong mitigating factor against any conflict. The actions taken by Altus are meant to preserve and add value to its and TWM's investors to the greatest extent possible.

(*Id.* at 2.) That was a blatant lie. (*See* Tr. (Howard) 187-88.)

Cooper's concealment of his fraud further proves he acted with scienter. *United States v. Boone*, 951 F.2d 1526, 1537 (9th Cir. 1991) ("lulling" statements constitute evidence of defendant's active and knowing participation in fraudulent scheme); *SEC v. Holschuh*, 694 F.2d 130, 143-144 (7th Cir. 1982) (a scheme to defraud may well include later efforts to avoid detection of the fraud). It also puts the lie to Cooper's claim that "the Division presented no evidence that he had any reason to suspect that [TWM's conflict-of-interest disclosures] may have been deficient." (Resp. Br. 18.)

2. Cooper did not prove good faith reliance on professionals

Cooper claims that he acted without scienter because he said at trial that he relied upon counsel and compliance experts to draft the disclosure language at issue. (Resp. at 15-21.) Cooper failed to introduce evidence to support this contention, which therefore lacks any probative value.

Initially, Cooper misunderstands the Division's evidentiary burden. Although he argues that the Division did not call his attorney as a witness, Cooper has the burden of proof on this issue, not the Division. *See, e.g.*, *SEC v. Bankatlantic Bancorp, Inc.*, No. 12-60083-Civ., 2013 WL 5588139, at *20 (S.D. Fla. Oct. 10, 2013) ("[t]he burden of establishing an affirmative defense lies with the defendant".) Indeed, unless Cooper waived privilege to establish his good faith reliance on professionals, which he refused to do here, it would be futile for the Division to

waste time calling Cooper's counsel to testify, only to have him or her refuse to answer on the basis of privilege. Cooper further mistakes the elements necessary to establish good faith reliance on professional advice. Cooper's principal point – he insists he never "interfered or coerced" any compliance professional (Resp. 15) – does not even prove good faith reliance. Instead, Cooper must show that he:

> (1) made a complete disclosure to counsel; (2) requested counsel's advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied in good faith on that advice.

SEC v. Goldfield Deep Mines Co. of Nevada, 758 F.2d 459, 467 (9th Cir. 1985). When a defendant does not treat counsel as an independent, unbiased legal adviser, his reliance claim necessarily fails. *United States v. Manning*, 509 F.2d 1230, 1234 (9th Cir. 1974). Should a defendant meet his burden, reliance still does not constitute an automatic defense and is but one factor for consideration. *Goldfield Deep Mines*, 758 F.2d at 467; *United States v. Bush*, 626 F.3d 527, 540 (9th Cir. 2010) ("advice of counsel is not regarded as a separate and distinct defense".)

Cooper entirely failed to meet his burden of proof that he relied in good faith on counsel or other leunprofessionals.

a. Cooper's "say-so" cannot prove the defense

Cooper's *ipse dixit*, without a shred of corroborating evidence, does not prove the defense. Missing from the record is any opinion letter, e-mail, writing, or other document corroborating the "advice" that Cooper vaguely alluded to during his testimony at trial. Cooper did not call any attorney or compliance consultant on whom he claimed to rely. At trial, the Hearing Officer explicitly asked for evidence that he relied on counsel or other professionals:

> JUDGE MURRAY: But you have not introduced any evidence or any witness that's an attorney or compliance consultant that says, I advised him to do this and he followed my advice, have you?

(Tr. (Cooper) 1102-03.) Defense counsel was forced to answer in the negative. (*Id.*) Thus, other than his self-serving statements, Cooper failed to introduce a shred of evidence that he provided the necessary disclosure to professionals, obtained their advice, and followed it.

In his brief, Cooper offers a purported factual recitation of the advice he sought from Jacko and Lively, but there is little evidence in the record to support the story he wishes the Hearing Officer to believe. Indeed, Cooper's brief delivers a lengthy narrative on Jacko's involvement in TWM's Form ADV, but that section lacks even a single citation to the evidence. (Resp. at 16-17.) It is well-established that attorney argument in the form of a brief is no substitute for proof. *See, e.g., Enzo Biochem, Inc. v. Gen-Probe, Inc.* 424 F.3d 1276, 1284 (Fed. Cir. 2005); *see also Urban v. United States*, 119 Fed. Cl. 57, 61 (Fed. Cl. 2014).

Crucially, "[i]t isn't possible to make out an advice-of-counsel defense without producing the actual advice from an actual lawyer." *SEC v. McNamee*, 481 F.3d 451, 456 (7th Cir. 2007); *see also In the Matter of J.S. Oliver Capital Management, L.P., et al.*, Initial Decision Rel. No. 649, 2014 WL 3834038, *41 (Aug. 5, 2014) (rejecting reliance-on-counsel defense – "there is no credible evidence, and certainly no written material, showing that Howard Rice or any other counsel approved the soft dollar payments at issue.".) Decision after decision dictates that a defendant's self-serving account of nebulous advice, not reflected anywhere in the documentary record, cannot prove reliance-on-professionals. Courts were unpersuaded, and rejected the defense, where the defendant: "did not produce any letter from a securities lawyer giving advice that reflected knowledge of all material facts," *McNamee*, 481 F.3d at 456, did not provide any "written material" at all which would have reflected the advice, *J.S. Oliver Capital*, 2014 WL 3834038, *41, did not "offer the live testimony of any securities lawyer," *id.*, provided only "vague allusions to legal advice," *In the Matter of Dan Rapoport*, Release No. 63744, 2011 WL 194504, *5 n.27 (Jan. 20, 2011) (Comm. op.), did not prove "with any specificity" whatever advice he may have received, *In the Matter of the Application of Eugene T. Ichinose, Jr.*, SEC Release No. 393, 1980 WL 22146, *2 (Dec. 16, 1980) (Comm. op.), and merely advanced a claim of reliance lacking in "sufficient content and sufficient supporting evidence." *In the Matter of the Application of Howard Brett Berger*, SEC Release No. 58950, 2008 WL 4899010, *10 (Nov. 14, 2008) (Comm. op.).

Even when a defendant has an opinion letter in hand, courts have still rejected the good faith claim when the proffered opinions fail to fit, hand in glove, with the specific conduct charged. *Dolphin and Bradbury, Inc. v. SEC*, 512 F.3d 634, 642 (D.C. Cir. 2008); *In the Matter of John A. Carley, et al.*, SEC Rel. No. 8888, 2008 WL 268598, *11-12 (Jan. 31, 2008) (Comm. op.) (finding no reliance on advice of counsel – "Although the record contains several opinion letters … no letter addresses the legality" of the charged conduct). Thus, it is not enough for Cooper to simply say, "My lawyer looked at this." (*See, e.g.* Tr. (Cooper) 770 ("It was all verbally over the phone.")).

Cooper's claim of good faith reliance accordingly fails for lack of proof. *See also SEC v. Small Business Capital Corp.*, No. 5:12-CV-3237 EJD, 2013 WL 4455850, at *13 (N.D. Cal. Aug. 16, 2013) (granting SEC summary judgment in the face of reliance claim – "Feathers neither points to nor provides any evidence to establish any of these elements. He only offers an unsupported assertion that he 'acted with his professionals in good faith[.'] As such, the Court rejects this argument."); *SEC v. Indigenous Global Development Corp.*, No. C-06-5600 JCS, 2008 WL 8853722, *14 (N.D. Cal. Jun. 30, 2008) ("Leonard has offered no specific or admissible evidence …. Therefore, this defense fails.".)

b. Cooper did not rely on advice – rather, he rejected it

Cooper's claim that he followed the advice of TWM's compliance consultants, without exception, is also belied by the record. (*See, e.g.*, Resp. at 18.) Groves testified that he recommended Form ADV disclosures that appropriately communicated both the fact and frequency of TWM's revenue sharing arrangements. Groves' language employed, crucially, the words, "*routinely* purchases a certain type of security" with revenue sharing, and TWM "*has* entered into solicitation agreements." TWM fired Groves in December 2009. Then, starting in 2011, TWM's Form ADV disclosure on conflicts-of-interest went "backwards". (Tr. (Groves) 498 ("Q. What I don't understand, have they gone backwards? …. A. Yeah, in my opinion, Your

Honor, they have gone backwards, yes.".) This record does not establish reliance. Instead, it shows that Cooper rejected Groves' advice.

Cooper's testimony is replete with varied and irrelevant claims of reliance – so many, in fact, that he left the impression he was without any agency in his business affairs. He incorporated TWM because his accountant told him to. (Tr. (Cooper) 691.) He set up Altus Capital Opportunity Fund at an attorney's direction. (*Id.* at 698.) He and TWM's other principals only created side entities – Pinnacle Wealth Group, Financial Counsel, and Capita Advisors – because Cooper's accountant said it would help with "tax planning and something of that nature." (*Id.* at 736.) It was his accountant who told him to use revenue sharing fees from TWM client investments to pay his personal expenses, which Cooper then did. (*Id.* at 858.) He allowed TWM to violate the custody rule because his auditor said it would be okay. (*Id.* at 967-68.) He was not in the "habit" of fair valuing client investments – which needed to be assigned value to calculate TWM's management fee – because unidentified lawyers told him it was fine to value them at cost. (*Id.* at 976.) Since a lawyer never said he had to, he did not tell clients that the Ponzi scheme he invested them in had separately paid him a large sum of money for his "consulting" services. (*Id.* at 1028-28, 1031.) Finally, he went to the effort of using a law firm when he decided to "borrow" client money to fund his settlement of this enforcement action. (*Id.* at 1067.) In Cooper's telling, he never did a thing without the advice of trained professionals.[3]

Yet on a matter central to TWM's business – the glaring conflict of interest inherent in TWM's allocation of 90% of client assets to "alternative investments" that paid Cooper considerable revenue sharing fees – Cooper disregarded Groves' clear admonition that the conflict must be disclosed in TWM's Form ADV, and that using merely conditional language would be wholly inconsistent with TWM's fiduciary duty. (*See also* Tr. (Groves) 506-07

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[3] Consistent with Cooper's purported reliance in connection with TWM's Form ADVs, these further claims of reliance were of course uncorroborated by any other evidence or testimony.

(Cooper was not receptive to Groves' recommendations).) Cooper has no reliance claim because he did not take the advice of Groves, he instead rejected it.

c. **Cooper should not be allowed to use the attorney-client privilege as a shield and a sword**

Finally, Cooper cannot advance a good faith reliance claim when, at hearing, he refused to answer questions from the Division about legal advice on the grounds of privilege. "A defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes.'" *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.), *cert. denied*, 502 U.S. 813, 112 S. Ct. 63, 116 L. Ed. 2d 39 (1991). On the stand, Cooper refused to waive the privilege when questioned about one aspect of the supposed advice he had received. (Tr. (Cooper) 1028.) The Commission has rejected claims of reliance on the advice of counsel where a litigant refused to reveal the specifics of the advice received. *See Rapoport*, 2011 WL 194504, *5 n.27 ("Rapoport was free to decline to reveal his 'specific communications' with Kraut, but he cannot simultaneously refuse to reveal them and benefit from their alleged or implied contents."); *Berger*, 2008 WL 4899010, *11 n.65 (same). Cooper's reliance claim must also fail for this final reason.

D. **Cooper Misrepresented TWM's Due Diligence Efforts**

The Division's initial brief meticulously documents the evidence of the non-existent or, at best, shoddy due diligence that TWM performed on the Life's Good, PPCN, Rainmaker, Moneta, Aegis Retail, Aegis Atlantic, and Metro Coffee investment funds. (Init. Br. 37-44.) In so doing, the Division proved that TWM's claims of "rigorous" due diligence were false, and that those misrepresentations were material to investors. (*Id.* 34.) Cooper's response brief nonetheless defends, without success, the sufficiency of his due diligence. Each of Cooper's arguments is refuted below.

1. **Cooper disregarded obvious red flags when he allocated client money to revenue sharing funds**

Cooper's brief poses a rhetorical question: "Where is the evidence that Mr. Cooper

'intentionally refused to investigate in disregard of a risk known to him?'" (Resp. Br. 22.) Cooper's rhetoric ignores the fact that he, and TWM, had a fiduciary duty to their clients because they were registered investment advisers, they held themselves out as "experts" in the "alternative investment" field (*e.g.*, DOE Exs. 122, 123), and they represented to clients and potential clients that they performed "in-depth qualitative and quantitative due diligence." (Ex. 122-00014.) The Division was not required to answer Cooper's question in order to prove that Cooper and TWM misrepresented their due diligence efforts to clients and potential clients. Nonetheless, the evidence in the record establishes more than enough deficiencies in TWM's due diligence to satisfy Cooper's irrelevant, rhetorical question:

- Cooper continued to invest clients in the Aegis funds – including a fund he marketed as an investment in "Peet's Coffee" – even after learning, in 2011, that Peet's Coffee and Tea had terminated much of its business relationship with Aegis, and Aegis was involved in litigation with Peet's Coffee. (*See* Tr. (Bryant) 411-413; Exhibit 271 at 25, Appendix P (Behnke opining that "[a]t that point, I should think any prudent investment adviser would re-evaluate the business before committing any additional investor money.".)

- Cooper invested clients in PPCN II even though he knew that the PPCN offering had been unable to meet its loan obligations and needed to be bailed out with a substantial related-party loan from PPCN II, and that this loan was then legally extinguished when PPCN simply merged into PPCN II. (Init. Br. 40-42.)

- Cooper invested clients in Life's Good after one phone call, and continued to direct client money to that fund following his later discovery that its auditor had resigned, Life's Good could not find a suitable replacement because it was "tax season," and as a result, the investment fund had no audited financials for 2009 for Cooper to at least consider when conducting quantitative due diligence on the fund. (Init. Br. 38-40.)

- Cooper invested clients in Rainmaker – a purported fund of funds – after researching the performance track record of its constituent fund managers. He knew even then, however, that Don Davis had the discretion to move fund managers in or out of Rainmaker for

any reason at all, thus rendering his claimed research into manager performance beside the point. (Tr. (Cooper) 804 ("Q. So with regard to looking at publicly-available documents from Autumn Gold, you had no [assurance] that those particular managers would be in the fund because it was Mr. Davis' [discretion] as to which managers would be in the fund. Is that correct? A. Yeah, it – yes, it was his discretion.").)

These examples have a unifying thread: in each instance, the fund which Cooper supposedly scrutinized prior to recommending it to clients agreed to pay him and TWM revenue sharing fees. "Hindsight" has nothing to do with it. (*See* Resp. Br. 21.) Contrary to TWM's claims of "rigorous" due diligence, these efforts "barely scratch the surface of good diligence practices and show[ ] a breach of duty to TWM and Cooper's clients." (Exhibit 271 at 21.)

2. TWM's "robust" diligence procedures and "compliance checklist"

Cooper also argues that "over time," TWM's due diligence process "evolved" and became "more robust." (Resp. Br. 19.) As part of these purported process improvements, TWM "implemented due diligence checklists"; checklists which Cooper strongly implies as having been always completed prior to offering a fund for investment to TWM clients. (*Id.* 23-24.) That implication is not supported by the record. In the testimony cited by Cooper to support his assertion that "the diligence items on the checklists were completed," Cooper only discusses the checklist completed as to a single investment fund. (Tr. (Cooper) 1161; Resp. Br. at 24.) Behnke, however, reviewed the complete due diligence files produced by TWM during the Division's investigation. (Exhibit 271 at 14.) Those files did not contain completed checklists for the alternative investment funds that Cooper recommended to TWM clients. (*Id.*) Nor did they include any indicia of the diligence work that Cooper claimed to have performed. Behnke found no documentation showing quantitative analysis of the relevant funds, and no documentation that even tended to show the qualitative analysis that Cooper claims TWM engaged in. (*Id.* at 14-15 (finding picture of dead rat and tourist photos of New York in TWM diligence file).)

3. TWM's "quantitative" due diligence

As he did at trial, Cooper's brief regurgitates a litany of statistical analyses – standard deviations, Sharpe ratios, and Sortino ratios – that he supposedly performed when conducting quantitative due diligence of potential funds for investment. (*See* Resp. Br. 27, 28, 31.) In the same vein, Cooper's marketing materials to clients presented "backtested" performance models. (Tr. (Cooper) 1092-1095.) Cooper's repeated claims of rigorous quantitative analysis make absolutely no sense, as Behnke's expert testimony explains:

> [B]ecause these were new Private Fund offerings, and in many cases the manager did not appear to have prior performance history or data, the testimony makes no sense and such a quantitative analysis would not provide any meaningful data for a due diligence analysis.
>
> * * *
>
> In my opinion, purporting to use quantitative due diligence, and specifically as testified to by Mr. Cooper, as a means of assessing the risk of a Private Fund with no available historical data is deceptive to clients and a breach of fiduciary duty.

(Exhibit 271 at 16-18; *see also* Tr. (Cooper) 1093.)

4. TWM's "qualitative" due diligence"

On the topic of qualitative due diligence, Cooper urges that TWM's qualitative inquiry "focused on the fund itself and its manager," and that he applied the "proper measure of skepticism so as to make the process reasonable." (Resp. Br. 21, 25, 31.) The record shows that simply was not the case.

Cooper says TWM made on-site visits to fund managers' offices, which "spanned from Hawaii to San Francisco to New York City." (Resp. Br. 19.) He accordingly claims that these visits were "not the behavior of reckless or even negligent people, who are spending money to improve their company." (*Id.*) But the Division's Exhibit 365, an itinerary for one of TWM's on-site diligence visit to Aegis, shows the fallacy of this claim. During that "diligence" trip, Aegis took TWM to a taping of the David Letterman show, drinks and dinner at the Harvard Club, a lunch on Wall Street, and drinks and appetizers at the restaurant that Aegis bought and operated (until it failed) with capital raised, in large part, through investments from TWM

clients. (Exhibit 365; Tr. (Cooper) 1200.) Consistent with this, Cooper admitted that often times, simply meeting with a fund manager went a long way in his qualitative due diligence. (Tr. (Cooper) 800 ("It was meet with this investment. For example, Rainmaker, it was neat to talk to the person who was running it.".)

Even more illustrative of Cooper's qualitative due diligence is his experience with the Life's Good fund. In that case, Cooper did not perform an "on-site diligence visit" to Life's Good prior to investing client money. Instead, he participated in a single phone call with Life's Good's management, and the very next day, began allocating client funds into what proved, in short order, to be a Ponzi scheme. (Init. Br. 38-39.) Cooper took at face value Life's Good representation that "Morningstar had spent two months in its offices conducting due diligence," and determined that Morningstar's five-star rating for Life's Good was reason enough to invest. (Resp. Br. 30.) Incomprehensibly, Cooper argues that this "entire process met or exceeded the highest standards of conduct in the investment management industry at the time." (*Id.*)

However, "Morningstar does not perform due diligence on the hedge funds it reports on." (Exhibit 271 at 21.) Rather, it only analyzes performance data on the basis of self-reported information from the funds themselves since Morningstar does not attempt to verify data provided to it by those funds. (*Id.* at 21-22.) In addition, had Cooper simply run a "background check" (Resp. 20) on the principal of Life's Good, Robert Stinson, Jr., he would have learned of Stinson's criminal background, a fact that one his clients was able to easily ascertain on her own. (Tr. (Smith) 113-15 ("I was able to do the Google search and find out that this man had been convicted of these kinds of crimes before. So I didn't understand why my money was put there in the first place.".)[4]

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[4] Cooper submits that "[f]inally, it is worth noting that Total Wealth <u>did not</u> have a revenue sharing arrangement with the general partners of LG. Tr. 1039. This undermines the Division's whole theory of the case." (Resp. Br. 30.) That statement is disingenous, at best. Cooper agreed to a "Memorandum of Understanding" with an entity controlled by members of the Life's Good

Credulous acceptance of representations made by fund promoters and diligence visits that more closely resemble a weekend getaway do not constitute rigorous qualitative due diligence. (*See*, *e.g.*, Tr. (Cooper) 799.)

5. TWM purportedly "rejected" many funds that offered it revenue sharing

Cooper offers as exculpatory evidence the fact that he did not, in certain cases, recommend funds for investment even though they had offered him revenue sharing. (Resp. Br. 20-21, 31.) That evidence is irrelevant. *See United States v. Scarpa*, 897 F.2d 63, 70 (2d Cir. 1990) ("A defendant may not seek to establish his innocence, however, through proof of the absence of criminal acts on specific occasions."); *United States v. Heidecke*, 900 F.2d 1155, 1162 (7th Cir. 1990) ("Proof that a defendant acted lawfully on other occasions is not necessarily proof that he acted lawfully on the occasion alleged in the indictment.".) Notably, the fund cited by Cooper as an investment vehicle that he turned down in good faith (Resp. 1162-63), was later sued by the SEC for securities fraud. *See* SEC Litigation Release No. 22622, 105 S.E.C. Docket 2890, 2013 WL 635054 (Feb. 20, 2013) ("SEC Charges Fund Manager in Scheme Involving Risky Mortgage-Related Investment.").

6. Cooper's misrepresentations of "rigorous" due diligence caused enormous client losses

Cooper attracted clients to TWM with the idea that he had expertise in "alternative investments." (Tr. (Howard) 154-55, 171-72; Tr. (Bryant) 376-77, 384.) But Cooper's claimed expertise in that area, as well as the kind of due diligence that he conducted once entrusted with client money, was false. In truth, Cooper's due diligence can be summed up as follows. He met a man named Don Davis, had a "meeting of the minds," and discovered he and Davis "believed

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management team; he was paid "management fees" pursuant to this arrangement in the few months prior Life's Good's implosion; and in that time, Cooper's fees – for purported consulting work that generated no written work product – coincidentally totaled, on an annual basis, about 6% of the $2.4 million of client funds he invested in Life's Good. (Init. Br. 20-21.)

in a lot of the same things." (Tr. (Cooper) 794.) Cooper then decided to invest in Davis-led funds like Aegis Retail, Aegis Atlantic, Metro Coffee, Rainmaker, and Moneta. (*See*, *e.g.*, Tr. (Cooper) 799, 825-27, 1045-46, 1055-56.) Cooper met another man named Tony Hartman, whom he came to think highly of (*see* Tr. (Cooper) 1119), and then decided to invest in PPCN and PPCN II, two high-risk investment vehicles whose business model was to serve as a "lender of last resort." (Tr. (Cooper) 923-24.) Not incidentally, both Hartman and Davis agreed to a series of lucrative revenue sharing and consulting arrangements (under which Cooper generated no written work product) that personally enriched Cooper and TWM. (Init. Br. 13-21; Tr. (Cooper) 816-17, 1043-45, 1078.)

In conclusion, Cooper and TWM lost no less than $20 million in client assets that Cooper allocated to failed alternative investment funds, and all told, clients may have lost as much as $44 million. (Ex. 310 at 4; Init. Br. 72.) Cooper violated the antifraud provisions of the Securities Act, the Exchange Act, and the Advisers Act when he misrepresented TWM's due diligence efforts.

E. Cooper Aided and Abetted TWM's Securities Law Violations

To defend against indirect liability for aiding and abetting TWM's primary violations, Cooper reiterates the same arguments refuted above. He argues that there are no primary violations, and that he was not a "substantial factor in causing" TWM's violations in light of his reliance on the advice of professionals, and the adequacy of his due diligence. (Resp. 33-34.) But for the reasons provided at Section IIC(2) and D, *supra*, Cooper's arguments are unavailing.[5]

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[5] Cooper's brief does not respond to the Division's claims that: (i) he willfully aided and abetted TWM's custody rule violation; (ii) he caused TWM's violations of Section 10(b) and Rule 10b-5(b); (iii) he willfully aided, abetted and caused Total Wealth's violations of Section 206(4) of the Advisers Act and Rule 206(4) thereunder; and (iv) he violated Section 207 of the Advisers Act. (*See* Init. Br. 59-64.) Any opposition he may have to those causes of action is therefore forfeited.

F. Cooper's Violations Justify a Cease-And-Desist Order Against Him

Cooper next claims that injunctive relief is not warranted because "[t]he Division made no attempt to show a substantial likelihood that Mr. Cooper would directly or indirectly violate the securities laws in the future." (Resp. 35.) The governing case law establishes, however, that "[a]bsent evidence to the contrary, a finding of violation raises a sufficient risk of future violation." *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 54 SEC 1135, 2001 WL 47245, at *24 (Jan. 19, 2001) ("To put it another way, evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist."), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002.) Cooper violated the law over an extended period of time, acted with a high degree of scienter, and as recently as last year, attempted to conceal his revenue sharing with the Aegis entities when lying in a client letter about the extent of his pecuniary involvement in Aegis' failed businesses. This record clearly warrants a cease-and-desist order.

G. Cooper's Misconduct Justifies a Permanent Industry Bar

In response to the Division's request that the Hearing Officer impose a permanent industry bar, Cooper argues that his fraud was not "outside the heartland of conventional frauds, either because of its magnitude or its impact on investors." (Resp. 36.) It is unclear if, in making this argument, Cooper is admitting that he engaged in fraudulent conduct, but that his conceded fraud was merely run-of-the-mill. In any event, Cooper again claims that he relied in good faith on professionals. The Hearing Officer should reject that assertion because Cooper has not proven reliance, and indeed, the record demonstrates that Cooper in fact rejected the advice of TWM's independent compliance consultant. Cooper's fraud had an eight-figure impact on his clients, many of whom lost their entire life savings because they placed their trust in Cooper. (*See, e.g.*, Tr. (Smith) 135; Tr. (Howard) 193.) Permanent bars are routinely ordered in cases involving undisclosed conflicts-of-interest, and in Cooper's case, the same result is warranted. *See, e.g.*, *In the Matter of Larry C. Grossman, et al.*, Release No. 727, Release No. ID - 727,

2014 WL 7330327 (Dec 23, 2014); *J.S. Oliver Capital Management*, 2014 WL 3834038; *In the Matter of Glenn M. Barikmo*, Release No. 436, 101 S.E.C. Docket 818, Release No. ID - 436, 2011 WL 4889086 (Oct 13, 2011).

H. The Hearing Officer Should Order A Third-Tier Statutory Penalty

On the issue of the appropriate civil penalty, Cooper argues that he is "destitute" and implies, through his citation to case law, that his conduct had "relatively small consequences" for which he "received neither profits ... nor any other discernable benefit." (Resp. 38-39.) On both points, nothing could be further from the truth. Investor losses were immense. On the flip side, Cooper reaped nearly $2 million in additional compensation from revenue sharing arrangements that he never disclosed to investors.

At the hearing, Cooper did testify that he was in dire financial straits. (Tr. (Cooper) 1072-73.) However, he also conceded that he nonetheless owns a home with [redacted] An internet search reveals that Cooper's residence, and the term, "destitute," make a poor match.[6] There is further evidence that last year, at the very end of TWM's existence, Cooper still continued to transfer substantial sums of money out of TWM's bank account and into his own. (Tr. (Cooper) 1203-04; Exhibit 350.) Cooper's bare and uncorroborated claim of poverty, without any financial records to support his situation, should be rejected. Substantial third-tier penalties against him are supported by the evidence in the record, including the substantial amounts that were paid to Cooper, directly and indirectly, in referral fees by the funds in which he invested his clients' money.

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[6] *See* http://www.zillow.com/homedetails/370-E-Silver-Hawk-Ct-Washington-UT-84780/89417732_zpid/

III. <u>CONCLUSION</u>

For all of these reasons, the Division respectfully requests that the Hearing Officer find that Cooper violated the stated provisions of the federal securities laws, and impose the requested sanctions.

Dated: July 6, 2015

Respectfully submitted,

DIVISION OF ENFORCEMENT

/s/ Gary Y. Leung

David J. Van Havermaat
John B. Bulgozdy
Gary Y. Leung
Carol Lally
Counsel for the Division of Enforcement
Securities and Exchange Commission
444 S. Flower Street, Ste. 900
Los Angeles, CA 90071
(323) 965-3213 (*Leung*)
(213) 443-1904(*facsimile*)

In the Matter of Total Wealth Management, Inc., et al.
Administrative Proceeding File No. 3-15842
Service List

Pursuant to Commission Rule of Practice 151 (17 C.F.R. § 201.151), I certify that the attached:

THE DIVISION OF ENFORCEMENT'S POST-HEARING REPLY BRIEF

was filed with the Office of the Secretary of the Commission and served by email and UPS Overnight Mail on July 6, 2015, upon the following parties as follows:

Brent J. Fields, Secretary Securities and Exchange Commission 100 F. Street, N.E., Mail Stop 1090 Washington, DC 20549-1090	(By UPS) (Original and three copies)
Honorable Brenda P. Murray Chief Administrative Law Judge Securities and Exchange Commission 100 F Street, N.E., Mail Stop 2557 Washington, DC 20549-2557 Email: alj@sec.gov	(By Email and UPS)
Vincent J. Brown, Esq. 8685 Rio San Diego Drive, Suite 4130 San Diego,CA 92108-6553 Email: vince@vjblaw.com ***Attorney for Respondent Jacob Keith Cooper***	(By Email and UPS)
David R. Zaro, Esq. Joshua A. Del Castillo, Esq. Kenyon Harbison, Esq. Allen Matkins Leck Gamble Mallory & Natsis LLP 515 S. Figueroa Street, Ninth Floor Los Angeles, CA 90071 Email: dzaro@allenmatkins.com jdelcastillo@allenmatkins.com kharbison@allenmatkins.com ***Attorneys for Receiver Kristen A. Janulewicz***	(By Email)

Mr. Nathan McNamee (By UPS)
6 The Spinney
Weycombe Road
Haslemere
GU27 1SP
United Kingdom

Mr. David Douglas Shoemaker (By UPS)
8425 Jane Street
San Diego, CA 92129

Dated: July 6, 2015

/s/ Gary Y. Leung
Gary Y. Leung