UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19024

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In the Matter of

ASCENSION ASSET MANAGEMENT, LLC

and

GRENVILLE M. GOODER, JR.,

Respondents.

DIVISION OF ENFORCEMENT'S PREHEARING BRIEF

September 5, 2019

Division of Enforcement
Securities and Exchange Commission
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I. INTRODUCTION

Pursuant to Rule of Practice 222 and the Commission's May 7, 2019 Order, the Division of Enforcement (the "Division") respectfully submits this Prehearing Brief. On August 29, 2019, this Court entered summary disposition against Respondents, Grenville M. Gooder, Jr. ("Gooder") and Ascension Asset Management, LLC ("Ascension"), on all of the Division's claims except one books-and-records charge.[1] The Court's decision conclusively establishes that for at least a decade, Gooder operated Ascension in flagrant disregard of multiple SEC statutes and regulatory requirements that are designed to protect investors. *Id.* at 4-10. In addition to determining that Gooder acted recklessly in causing Ascension's pattern of compliance and other regulatory failures, the Court found that Gooder acted *at least* recklessly when, from 2005 through 2015, he misrepresented material facts in 13 distinct Forms ADV, which he signed under penalty of perjury, and directed to be filed with the SEC. *Id.* at 9-10.

The Commission takes violations of the antifraud and compliance provisions of the securities laws seriously.[2] Because "[t]he securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence, it is essential that the highest ethical standards prevail in every facet of the securities

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[1] *See Ascension Asset Mgmt, LLC*, Advisers Act Release No. 6665, 2019 SEC LEXIS (Initial Decision) (Aug. 29, 2019) ("Summary Disposition Decision"), *at* https://www.sec.gov/alj/aljorders/2019/ap-6665.pdf.

[2] *See, e.g., In the Matter of Peter Siris*, S.E.C. Release No. 3736, 2013 WL 6528874, at *6 (Dec. 12, 2013) ("We have repeatedly held that conduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions under the securities laws.") (internal citation and quotation marks omitted), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014); *Anthony Fields, CPA,* S.E.C. Release No. 4028, 2015 WL 728005, at *17 (Commission Opinion) (Feb. 20, 2015).

industry."[3] Here, the scope, duration, and egregiousness of their violations warrant entering a cease-and-desist order against Respondents, ordering Ascension to retain an independent compliance monitor, and imposing a civil penalty and a censure upon Respondents. The Division further seeks all other relief that the Court deems appropriate in light of the serious and recurring nature of Respondents' violations.

II. PROCEDURAL HISTORY

A. Summary Of The Allegations In The OIP

On March 7, 2019, the Commission instituted this case pursuant to the Order Instituting Proceedings ("OIP").[4] The OIP charged Respondents with failing to: adopt and implement certain policies and procedures that apply to investment advisers; comply with the rule governing custody of client assets; and maintain certain books and records. The OIP further alleged that Respondents made material misrepresentations in numerous SEC forms over a period of years. The OIP alleged that this conduct violated Advisers Act Sections 204, 206(4), and 207 and Rules 206(4)-7, 206(4)-2, and 204-2 thereunder.

B. The Court's Summary Disposition Ruling

On August 29, 2019, the Court granted summary disposition against Respondents on all of the claims in the OIP, except for the books and records charge pursuant to Rule 204-2(a)(1). *See* Summary Disposition Decision at 9-10. The Court held that Ascension violated Advisers Act

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[3] *Donald L. Koch*, S.E.C. Release No. 3836, 2014 WL 1998524, at *20 (Commission Opinion) (May 16, 2014) (internal citations, footnotes, and quotation marks omitted), *pet. granted in part on other grounds*, *Koch v. SEC*, 793 F.3d 147 (D.C. Cir. 2015).

[4] The Commission instituted the case pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. §§ 80b-3(e), (f), & (k), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act"), 15 U.S.C. § 80a-9(b).

Section 206(4) and Rules 206(4)-7 and 206(4)-2 thereunder. *Id.* at 9. The Court further held that Ascension violated Advisers Act Section 204 and Rule 204-2(a)(2) thereunder. *Id.* at 10. And, the Court held that Gooder caused Ascension's compliance, custody, and records violations. *Id.* In its decision, the Court underscored that, "[a]s 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*." *Id.* at 9 (emphasis added).

The Court additionally granted summary disposition against Respondents for violating Advisers Act Section 207 by making scienter-based material misstatements in Ascension's Forms ADV. *Id.* at 10. The Court found that Respondents violated Section 207 by materially misstating that Ascension did not have custody of client assets, remarking that "Respondents concede that this answer was 'mistaken.' However, Gooder's lack of knowledge concerning this *arose from reckless conduct amounting to scienter*." *Id.* (emphasis added). In determining that Respondents also violated Section 207 by materially misstating that Platt and Smith were Ascension's CCO at different times, the Court commented that "[n]either was a CCO within the meaning of Rule 206(4)-7(c) or had any compliance responsibilities. Listing them *was at least reckless*." *Id.* (emphasis added).

C. The Division Does Not Intend To Offer Evidence Concerning The Journal-Based Books-And-Records Charge

As noted above, the Court did not grant summary disposition on the Rule 204-2(a)(1) charge relating to Respondents' failure to maintain a journal reflecting, among other things, cash receipts and disbursements. In light of the Court's August 29, 2019 summary disposition ruling in favor of the Division on all but this one charge, the Division does not intent to present additional

evidence of Respondents' alleged Rule 204-2(a)(1) violation. Rather, as discussed below, the Division will proceed to the remedies phase of the matter.

D. Purpose Of The September 9, 2019 Hearing

The purpose of the September 9, 2019 hearing is for the Court to determine the appropriate remedies, if any, to order against Respondents pursuant to Section III of the OIP, which, in relevant part, reads as follows:

> B. What, if any, remedial action is appropriate in the public interest against Ascension pursuant to Section 203(e) of the Advisers Act including, but not limited to, civil penalties pursuant to Section 203 of the Advisers Act;
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> C. What, if any, remedial action is appropriate in the public interest against Gooder pursuant to Section 203(f) of the Advisers Act including, but not limited to, civil penalties pursuant to Section 203 of the Advisers Act;
>
> D. What, if any, remedial action is appropriate in the public interest against Gooder pursuant to Section 9(b) of the Investment Company Act including, but not limited to, civil penalties pursuant to Section 9 of the Investment Company Act; and
>
> E. Whether, pursuant to Section 203(k) of the Advisers Act, Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 204, 206(4), and 207 of the Advisers Act and Rules 204-2, 206(4)-2, and 206(4)-7 thereunder; and whether Respondents should be ordered to pay a civil penalty pursuant to Section 203(i) of the Advisers Act and Section 9(d) of the Investment Company Act.

OIP Section III, ¶¶ B-E.

E. Respondents Are Bound By This Court's Summary Disposition Findings At The Hearing

As a preliminary matter, the Division maintains that the Court's findings of fact and conclusions of law contained in its Order granting summary disposition against Respondents are the law of the case for purposes of the September 9, 2019. The hearing should be directed solely at

determining the appropriate remedies to address the Court's liability findings. Pursuant to the law-of-the-case doctrine, "'when a court has ruled on an issue,that decision should generally be adhered to by that court in subsequent stages of the same case.'" *SEC v. Bronson*, 246 F. Supp. 3d 956 (S.D.N.Y. 2017) (quoting *U.S. v. Uccio*, 940 F.2d 753, 757 (2d Cir. 1991)).[5] The doctrine "counsels a court against revisiting its prior rulings in subsequent stages of the same case absent cogent and compelling reasons such as an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Bronson*, 246 F. Supp. 3d at 970 (internal quotation marks and citations omitted).[6] The law-of-the-case doctrine encompasses both matters expressly decided and those decided necessarily by implication.[7]

More specifically, given the Court's findings regarding Gooder's scienter, the Court should preclude any attempt by Respondents to re-open the record as to Gooder's mental state when he committed the established violations as there was—and is—no dispute of any material fact regarding Respondents' scienter when engaging in the violations upon which the Court has ruled in favor of the Division.

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[5] *See also SEC v. Bilzerian*, 815 F. Supp. 2d 324, 327 (D.D.C. 2011); 18B Charles Alan Wright, et al., *Federal Practice and Procedure* § 4478 (2d ed.) ("Law-of-the-case principles . . . are a matter of practice that rests on good sense and the desire to protect both court and parties against the burdens of repeated reargument by indefatigable diehards.").

[6] The Commission has applied the law-of-the-case doctrine in the past. *See, e.g.*, *Application of John Joseph Plunkett*, S.E.C. Release No. 73124, 2014 WL 4593195, at *7 n.32 (Commission Opinion) (Sept. 16, 2014); *Application of KO Securities, Inc.*, S.E.C. Release No. 52106, 2005 WL 1713434, at *3 n.18 (Commission Opinion) (July 22, 2005); *Application of Nicholas T. Avello*, S.E.C. Release No. 51633, 2005 WL 1006827, at *2 & n.6 (Commission Opinion) (Apr. 29, 2005).

[7] *See Federal Practice and Procedure* § 4478 n.29 and accompanying citations.

III. THE COURT SHOULD ISSUE A CEASE-AND-DESIST ORDER, REQUIRE ASCENSION TO RETAIN AN INDEPENDENT COMPLIANCE MONITOR, AND IMPOSE CENSURES AND PENALTIES UPON RESPONDENTS

A. Respondents Should Be Ordered To Cease And Desist From Committing Or Causing Violations of the Advisers Act As Found By The Court In Its Order Granting Summary Disposition In Favor Of The Division

The Court should order Respondents to cease and desist from committing or causing violations as found by the Court in its Order granting summary disposition in favor of the Division pursuant to Section 203(k)(1) of the Advisers Act. *See* Section 203(k)(1);15 U.S.C. § 80b-3(k)(1). Where, as here, the Court has found that Respondents have violated—for more than a decade—multiple compliance and anti-fraud provisions of the Advisers Act, the Commission may enter an order requiring them to cease and desist from committing or causing such violations and any future violations of the same provisions, rules, or regulations. *Id.*

To obtain a cease-and-desist order, the Division must show that there is some likelihood of future violations, but "a single past violation ordinarily suffices to establish a risk of future violations." *optionsXpress, Inc.*, S.E.C. Release No. 10125, 2016 WL 4413227, at *34 (Commission Opinion) (Aug. 18, 2016) (citation omitted), *order corrected on other grounds*, S.E.C. Rel. No. 10206, 2016 WL 4761083 (Sept. 13, 2016). All of Respondents' established misconduct is relevant in deciding whether to issue a cease-and-desist order. *See Larry C. Grossman*, S.E.C. Release No. 4543, 2016 WL 5571616, at *15 (Commission Opinion) (Sept. 30,

2016)[8]; *Timbervest, LLC*, S.E.C. Release No. 4197, 2015 WL 5472520, at *15, *17 (Commission Opinion) (Sept. 17, 2015).[9]

In determining whether a cease-and-desist order is appropriate, the Commission considers:

> [1] whether there is a reasonable likelihood of violations in the future, [2] the seriousness of the violation, [3] the isolated or recurrent nature of the violation, [4] the respondent's state of mind in committing violations, [5] the respondent's recognition of the wrongful nature of his or her conduct, and [6] how recent the violations are.

Id. (bracketing added). The Commission additionally considers "the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions."

S.W. Hatfield, CPA, S.E.C. Release No. 3602, 2014 WL 6850921, at *10 (Commission Opinion) (Dec. 5, 2014) (internal quotations and citations omitted). No one factor is dispositive. *See optionsXpress, Inc.*, 2016 WL 4413227, at *35.

Considering these factors, a cease-and-desist order is appropriate here. Starting with the first factor, a reasonable likelihood of future violations exists. The Division understands that

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[8] *Vacated in part on other grounds*, S.E.C. Release No. 4871, 2018 WL 1532792 (Commission Order) (March 29, 2018), *vacated in part on other grounds*, S.E.C. Release No. 5281, 2019 WL 2870969 (Commission Order) (July 3,2019). *See also Birkelback v. SEC*, 751 F.3d 472, 482 (7th Cir. 2014) (upholding sanctions ruling that considered conduct outside of the five-year limitations period: "even assuming the five-year period applies, there was no error in the SEC considering events outside that period in crafting its sanction."); *In the Matter of Bernerd E. Young* S.E.C. Release No. 4358 at 21 (March 24, 2016) ("Even where a sanction is deemed punitive . . . we may consider evidence outside the limitations period showing that the respondent's misconduct during the limitations period reflected ongoing courses of fraudulent conduct.").

[9] *Subsequent settled order and recitation of procedural history, Timbervest, LLC*, S.E.C. Release No. 5093, 2018 WL 6722760, at *1-3 (Dec. 21, 2018).

Gooder intends to continue serving Ascension's clients into the foreseeable future and has financially benefitted from such service for a number of years. In light of his continued service to Ascension's clients, and the long history of his non-compliance with required rules and regulations for investment advisers, there is a reasonable likelihood of future violations. Further, as his firm's sole owner and sole manager, Gooder holds ultimate control over Ascension's compliance program, creating an even greater likelihood of future violations. Thus, a cease-and-desist order is warranted.

Moving to the second factor (the seriousness of the violation), Respondents' violations were severe. Gooder at least recklessly made materially untrue statements in Ascension's certified Commission filings, upon which investors rely, for approximately a decade. Gooder also caused a hat trick of compliance violations by his firm under all three subsections of Rule 206(4)-7 over an extended period of years. He similarly caused Ascension's failure to maintain a general ledger, a basic accounting record for any business, let alone an SEC-registered investment adviser. And not only did Gooder cause Ascension to violate the Custody Rule, but he exacerbated these violations by falsely stating that Ascension did *not* have custody over client assets repeatedly in his firm's Forms ADV.

Turning to the third factor (the isolated or recurrent nature of the violation), Respondents' compliance, custody, books-and-records, and Section 207 violations were not isolated but recurred over an extended period of time, in some cases approximately a decade. Indeed, Gooder signed 13 materially false Forms ADV that Ascension filed with the Commission between September 2005 and February 2015. With regard to the fourth factor (the respondent's mental state), Gooder's recklessness (at a minimum) should be deemed conclusively established at the sanctions hearing due to the Court's summary disposition ruling and operation of the law-

of-the-case doctrine. *See, e.g., SEC v. Bronson*, 246 F. Supp. 3d at 970-71. Furthermore, as the Court stated, Gooder's false statements with regard to custody of his client assets—a fact essential to his duties as an investment adviser—was reckless. Summary Disposition Decision at 10. Similarly, his false statements with regard to Ascension's purported compliance officers were reckless—especially considering that one of them denied ever having served as Ascension's CCO.

And, as for the fifth and sixth factors (the respondent's recognition of the wrongful nature of his or her conduct and how recent the violations are), Respondents have not demonstrated to date that they recognize the wrongful nature of their conduct. Respondents' use of the term "technical" in their Answer and First Amended Answer to describe their custody violations raises fundamental questions about their recognition of the wrongful nature of their violations and demonstrates a cavalier attitude towards the importance of the Advisers Act rules and regulations. *See* Answer ¶¶ 3, 43-47; First Amended Answer ¶¶ 3, 43-47. And, as for the sixth factor, Respondents' violations are relatively recent, occurring as recently as November 2015. *See Hatfield*, 2014 WL 6850921, at *11 (December 5, 2014 Commission opinion stating "[t]he violations are recent, having occurred from 2010 to 2011.").

Moreover, in considering the degree of harm to investors or the marketplace resulting from the violation, the public interest analysis focuses on the welfare of investors generally. *See id.* Investors and the marketplace are harmed when a registered investment adviser ignores its compliance, custody, and books-and-records requirements and materially misrepresents its CCO and its custody status in certified Commission filings. These items are material to investors and serve to protect them from fraud and deceit. Lastly, a cease-and-desist order will serve the remedial purposes of encouraging Respondents to understand and obey their obligations under the federal securities laws. *Id.* at 11.

Consequently, the Division respectfully requests that the Court order Respondents to cease and desist from committing or causing violations and future violations of Advisers Act Section 206(4) and Rules 206(4)-7 and 206(4)-2 thereunder; Section 204 and Rule 204-2 thereunder; and Section 207.

B. The Court Should Order that Ascension Retain An Independent Compliance Monitor As An Activity Limitation

In light of the long-standing compliance failures at Ascension, the Division respectfully requests that the Court order Respondents to retain an independent compliance monitor, acceptable to the Division, to review and effect future compliance with the Advisers Act. Pursuant to Advisers Act Section 203(k)(1), in addition to a cease and desist order, the Court may issue any order it deems appropriate to "require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify." Additionally, Advisers Act Section 203(e), authorizes the Commission to place limitations on the activities, functions, or operations of an investment adviser if the sanction is in the public interest and the adviser:

- "willfully made or caused to be made in any application for registration or report required to be filed with the Commission under the [Advisers Act] . . , any statement which was at the time and in light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein," *see* 15 U.S.C. § 80b-3(e)(1); or
- willfully violated any provision of the Advisers Act, *see* 15 U.S.C. § 80b-3(e)(5).

All of Respondents' established misconduct is relevant in deciding whether to order Ascension to retain an independent monitor pursuant to Sections 203(k)(1) and 203(e).[10]

An order requiring Respondents to retain an independent compliance monitor is appropriate pursuant to Section 203(k)(1) for the same reasons a cease-and-desist order is appropriate. As discussed above, based upon the Court's findings of fact and conclusions of law with regard to Respondents' conduct: (1) there is a reasonable likelihood of violations in the future; (2) the established violations were serious; (3) the established violations were recurrent, (4) the respondents acted recklessly and willfully; (5) the respondents have failed to recognize the wrongful nature of their conduct; and (6) the violations occurred recently. *See Ernst & Young LLP*, S.E.C. Release No. 249, 2004 WL 824099, at *57-59 (Initial Decision) (Apr. 16, 2004) (ordering an independent compliance consultant as a remedy), *made final*, S.E.C. Release No. 8413, 2004 WL 885243 (Commission Order) (Apr. 26, 2004).

Additionally, Section 203(e) authorizes requiring Ascension to retain an independent monitor where, as here, Respondents willfully made false statements in 13 Forms ADV, Respondents willfully violated Section 207 of the Advisers Act, and such relief is in the public interest. *See* Section 203(e)(1) and (5), 15 U.S.C. §§ 80b-3(e)(1) and (5).

In the context of Section 207, and, by extension, Advisers Act Section 203(e)(1), proving willfulness requires establishing that the respondent acted intentionally or recklessly. *See Robare Group, Ltd. v. SEC*, 922 F.3d 468, 479-80 (D.C. Cir. 2019). The Court has already found that

[10] *See Birkelback v. SEC*, 751 F.3d at 482 (upholding sanctions ruling that considered conduct outside of the five-year limitations period: "even assuming the five-year period applies, there was no error in the SEC considering events outside that period in crafting its sanction."); *In the Matter of Bernerd E. Young*, 2016 WL 1168564 at *21 ("Even where a sanction is deemed punitive . . . we may consider evidence outside the limitations period showing that the respondent's misconduct during the limitations period reflected ongoing courses of fraudulent conduct.").

Respondents violated Section 207 by making materially false statements with scienter in Forms ADV. *See* Summary Disposition Decision at 10. Gooder's scienter should be deemed established at the remedies hearing due to the Court's summary disposition decision and the operation of the law-of-the-case doctrine. *See SEC v. Bronson*, 246 F. Supp. 3d at 970-71. Where, as here, the Court has found that Respondents violated Section 207, the Division has established that the requirements of Section 203(e)(1) and (5) have been satisfied as Respondents acted, at least, recklessly, with regard to their statements in 13 Forms ADV. As such, this Court should order a compliance monitor as a limitation on Respondents' activities.

The Division has also established that ordering Ascension to retain an independent monitor pursuant to Section 203(e) would be in the public interest. In assessing the public interest, the Commission considers the *Steadman* factors:

> the egregiousness of [the respondent's] actions (including his aiding and abetting of [his entity]'s fraudulent conduct), the isolated or recurrent nature of the infraction, the degree of scienter involved, his recognition of the wrongful nature of his conduct, the sincerity of his assurances against future violations, and the likelihood that his occupation will present opportunities for future violations.

In the Matter of Edgar R. Page, S.E.C. Release No. 4400, 2016 WL 3030845, at *5 (Commission Opinion) (May 27, 2016) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)). No one factor is dispositive. *Id.*

The *Steadman* factors establish that Ascension should be ordered to retain an independent compliance monitor. Although no one factor is controlling, with regard to the third factor, the degree of scienter, the Commission has "repeatedly held that conduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions under the securities laws." *Peter Siris*, 2013 WL 6528874, at *6 (internal citation and quotation marks omitted).

Here, Respondents made scienter-based, materially false statements in Ascension's Form's ADVs for nearly a decade, from September 2005 to February 2015. Respondents acted with scienter in portraying Platt and Smith as Ascension's CCO. *See* Summary Disposition Dec. at 10. Gooder had an opportunity to pause and deliberate on how he was disclosing the identity of Ascension's CCO every time he signed and certified a new Form ADV. The certification requirement for Form ADV should have placed him on notice of the need to review the filings carefully to ensure they were accurate and complete. Yet he named Platt or Smith as Ascension's CCO in these filings, at least recklessly disregarding that neither individual was truly his firm's CCO. Respondents also recklessly stated that Ascension did not have custody over client assets in Ascension's Forms ADV. Compounding the seriousness of Respondents' scienter were Gooder's four decades of experience as a securities professional.

Turning to the other factors, with regard to the first—the egregiousness of the Respondents' actions—these violations were severe because they involved Respondents at least recklessly misrepresenting material facts over approximately a decade in certified filings. Respondents' other violations reflected a long-standing, blatant disregard for the compliance, custody, and books-and-records requirements of a registered investment adviser. These requirements exist to protect investors. At the hearing, Respondents will undoubtedly seek to shift attention to their remedial actions, but the Commission has "repeatedly declined to credit a respondent whose misconduct stopped only after it was detected by regulators." *Donald L. Koch*, 2014 WL 1998524, at *20.

Moving to the second factor—whether the infraction was isolated or recurrent – Ascension's violations were not isolated but persisted for years, in some cases over approximately a decade. Turning to the fourth and fifth factors (recognition of the wrongful

nature of the respondent's conduct and the respondent's sincerity of assurances against future violations), Ascension and Gooder have not yet recognized the wrongful nature of their conduct in this proceeding or sincerely assured the Court against any future violations. Lastly, regarding the sixth factor (the respondent's occupation providing an opportunity for future violations), the Division understands that Gooder intends to continue serving Ascension's clients into the foreseeable future; therefore, Gooder's occupation would present opportunities for future violations by Ascension.

As a result, the *Steadman* factors support ordering Ascension to retain an independent compliance monitor as an activity limitation pursuant to Section 203(e) as well as Section 203(k)(1).

C. The Court Should Censure Respondents

The Court should censure Gooder and Ascension pursuant to Advisers Act Section 203(f) and Section 203(e), respectively, which authorize the Commission to censure an investment adviser or an associated person thereof if the sanction is in the public interest and the adviser or associated person either: (1) willfully made or caused to be made in any application for registration or report required to be filed with the Commission under the Advisers Act any statement which was at the time and in light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein, 15 U.S.C. §§ 80b-3(f), (e)(1); or (2) willfully violated any provision of the Advisers Act, 15 U.S.C. §§ 80b-3(f), (e)(5). A censure may be considered a penalty subject to the five-year statute of limitations pursuant to 28 U.S.C. § 2462. *See Johnson v. SEC*, 87 F.3d 484, 486-90 (D.C. Cir. 1996). Based solely on the basis of

Respondents' established misconduct on and after March 7, 2014, the Court should order a censure against Respondents.

However, as noted, the Court may consider evidence outside the limitations period in fashioning an appropriate remedy. *See Birkelback*, 751 F.3d at 482 (upholding sanctions ruling that considered conduct outside of the five-year limitations period: "even assuming the five-year period applies, there was no error in the SEC considering events outside that period in crafting its sanction."); *In the Matter of Bernerd E. Young* S.E.C. Release No. 4358 at 21 ("Even where a sanction is deemed punitive . . . we may consider evidence outside the limitations period showing that the respondent's misconduct during the limitations period reflected ongoing courses of fraudulent conduct.").

The Court is authorized to censure Gooder and Ascension based on the following two statutory grounds: first, because of Section 207's willfulness requirement, Respondents' violations of Section 207 based on Ascension's Forms ADV dated March 11, 2014 and February 26, 2015 constituted willful violations of a provision of the Advisers Act, Section 203(e)(5), 15 U.S.C. §§ 80b-3(f), (e)(5); and second, because Section 207's elements overlap with those of Section 203(e)(1). *See* 15 U.S.C. § 80b-3(e)(1). Respondents willfully misrepresented Platt as Ascension's CCO in the firm's Forms ADV dated March 11, 2014 and February 26, 2015. They also willfully misrepresented that Ascension did not have custody in these filings. This misconduct constituted a continuation of similar behavior that Respondents had engaged in for years prior, a pattern the Court may consider. *See Birkelback*, 751 F.3d at 482.

Additionally, the Division has established that a censure is in the public interest. In assessing the public interest, the Commission considers the same *Steadman* factors discussed above in Part III.B, *supra*. *See Edgar R. Page*, 2016 WL 3030845, at *5. Even applying these

factors only to Respondents' violations since March 7, 2014, the record still amply establishes that they:

1. acted egregiously in at least recklessly misrepresenting material facts in two Forms ADV (within the statute of limitations period);
2. made not just an isolated Commission filing that was materially untrue, but two such filings (within the statute of limitations period);
3. acted with scienter (at least recklessness), *see* Summary Disposition Dec. at 10;
4. have not demonstrated recognition as to the wrongful nature of their actions to-date in this proceeding;
5. have not sincerely assured the Court that they will not make future violations; and
6. have an occupation—in particular, Gooder's sole management of Ascension—that will present opportunities for future violations.

Consequently, Respondents should be censured.

D. Respondents Should Be Ordered To Pay A Civil Penalty

The Division respectfully requests that the Court impose a second-tier penalty upon Respondents. Pursuant to the Advisers Act's three-tier system, the second tier is reserved for conduct involving fraud, deceit, manipulation, or the deliberate or reckless regard of a regulatory requirement. *See* Section 203(i)(2)(B); 15 U.S.C. § 80b-3(i)(2)(B).[11] In light of the Court's order on summary disposition, second-tier penalties are appropriate.

[11] The Court has considerable discretion in deciding whether to assess civil penalties, and, if so, to determine the appropriate amount. *J.S. Oliver Capital Mgmt*, S.E.C. Release No. 4431, 2016 WL 3361166, at *14 (Commission Opinion) (June 17, 2016).

As an initial matter, the Division has proven violations within the five-year limitations period that involved fraud and deceit as well as at least the reckless disregard of regulatory requirements.[12] Thus, as a starting point, penalties should appropriately be awarded at the second tier.

Turning to penalty amount, for conduct during the date range March 6, 2013 to November 2, 2015, the maximum second-tier penalty per violation for a natural person is $80,000 and for any other person is $400,000 (the maximum first-tier penalty for a natural person was $7,500 and $80,000 for any other person). *See* 17 C.F.R. s 201.1001. In accordance with the Court's instructions at the scheduling conference, to enable Respondents to determine whether to introduce evidence of alleged inability to pay, the Division communicated to Respondents' counsel on July 29, 2019 that, based on the development of the record to date, and not including any further factual developments before the conclusion of the hearing, the maximum dollar amount of the civil penalty the Division envisioned seeking was $50,000 against Respondents. *See* Scheduling Conf. Tr. (5/21/19) at 4:18-5:6.

In a cease-and-desist proceeding instituted pursuant to Advisers Act Section 203(k)(1), a civil penalty may be imposed if the Commission finds that: (i) the respondent is violating or has violated any provision of the Advisers Act or its rules and regulations thereunder or is or was a cause of such violation; and (ii) the penalty is in the public interest. Section 203(k)(1)(B), 15 U.S.C. §§ 80b-3(i)(1)(B) & (i)(3). Six factors are considered when determining whether an award of penalties will serve the public interest: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, (2) the resulting

[12] A civil penalty is subject to the five-year statute-of-limitations in 28 U.S.C. § 2462. *See Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

harm to other persons, (3) any unjust enrichment and prior restitution, (4) the respondent's prior regulatory record, (5) the need to deter the respondent and other persons, and (6) such other matters as justice may require. *See* Section 203(k)(1); 15 U.S.C. § 80b-3(i)(3).

Respondents' misconduct, considered in light of these factors, weighs heavily in favor of a second-tier penalty. For example, just considering misconduct within the statutory period, Respondents' portrayal of Platt as Ascension's CCO in the firm's Forms ADV dated March 11, 2014 and February 26, 2015 unquestionably involved fraud and deceit. Respondents' false statements that Ascension did not have custody over client assets in these Forms ADV also involved fraud and deceit. Ascension's other violations since March 7, 2014 involved at least the reckless disregard of a regulatory requirement.

Regarding unjust enrichment and prior restitution, Respondents benefitted financially by avoiding costs that they would have had to pay to compensate a CCO. The compensation that Respondents are currently paying their current CCO represents the type of costs that they avoided by not having a real CCO from March 2014 until at least November 2015. Moreover, the need to deter Respondents and to provide general deterrence in this case are strong, both to prevent future violations by Respondents and to send a message to the industry that registered investment advisers cannot ignore their regulatory requirements while hoping to never be subject to an examination by OCIE.

Consequently, second-tier penalties should be awarded against Respondents.

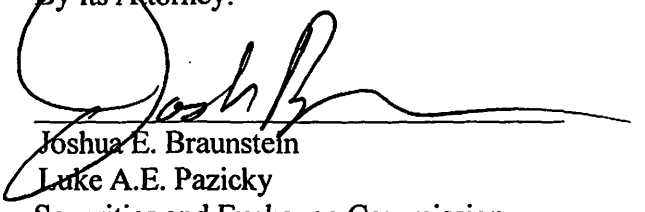
CONCLUSION

Based on the foregoing, the Division respectfully requests that the Court impose the remedies requested in this brief. The Division reserves the right to seek all other authorized remedies based upon the evidence adduced at Monday's hearing.

DATED: September 5, 2019

Respectfully submitted,

DIVISION OF ENFORCEMENT
By its Attorney:



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CERTIFICATE OF SERVICE

In the Matter of Ascension Asset Management, LLC and Grenville M. Gooder, Jr.
Administrative Proceeding File. No. 3-19024

Service List

Pursuant to Commission Rule of Practice 151 (17 C.F.R. § 201.151), I certify that the foregoing **Division of Enforcement's Pre-Hearing Brief** was served on September 5, 2019 upon the following parties as follows:

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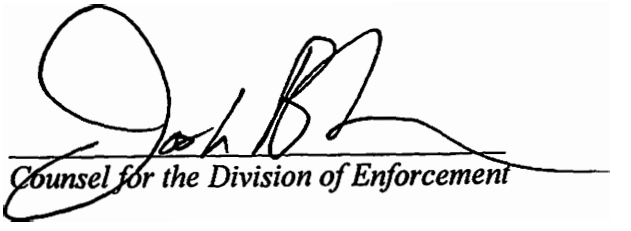

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