UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19024

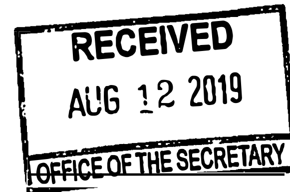
In the Matter of

ASCENSION ASSET MANAGEMENT, LLC

and

GRENVILLE M. GOODER, JR.,

Respondents.



DIVISION OF ENFORCEMENT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION AGAINST RESPONDENTS ASCENSION ASSET MANAGEMENT, LLC AND GRENVILLE M. GOODER, JR.

August 12, 2019

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I. INTRODUCTION

The Division of Enforcement ("Division") of the Securities and Exchange Commission ("Commission" or "SEC") respectfully submits this reply in support of its motion for summary disposition against Respondents Ascension Asset Management, LLC ("Ascension") and Grenville M. Gooder, Jr. ("Gooder" and, collectively, "Respondents") in this matter. For the reasons described below, in their memorandum in opposition to the Division's motion for summary disposition ("Resp. Br."), Respondents fail to raise a genuine issue of material fact as to any of the Division's claims, and the Division respectfully requests that its summary disposition motion ("Div. Mot.") be granted in its entirety.

II. LEGAL ARGUMENT

A. Summary Disposition Should Be Granted As To Ascension's Compliance And Custody Violations And Gooder's Related Causing Liability For These Violations Because Respondents Did Not Offer Any Evidence In Opposition.

The Division moved for summary disposition against Ascension for its compliance and custody violations. (Div. Mot. at 4-11 & 14-17). The Division further moved for summary disposition against Gooder for causing these violations by Ascension. (*Id.* at 24-26 & 3-4). Respondents did not present any evidence in opposition to these parts of the Division's motion. (Resp. Br. at 1-14).

Because Respondents did not offer any evidence, let alone evidence raising a genuine issue of material fact, the Division is entitled to summary disposition on these claims. *See* 17 C.F.R. § 201.250(c); *China-Biotics, Inc.*, S.E.C. Release No. 70800, 2013 WL 5883342, at *16 (Commission Opinion) (Nov. 4, 2013) ("Once the moving party has carried its burden of establishing that it is entitled to summary disposition on the factual record, the opposing party may not rely on bare allegations or denials but instead must present specific facts showing a genuine

issue of material fact for a hearing."). Summary disposition should be granted against Respondents for these violations (*i.e.*, Order Instituting Administrative and Cease-and-Desist Proceedings dated March 7, 2019 ("OIP") ¶¶ 6-28 & 49-50).

B. Respondents' Sanctions Argument Is Irrelevant And Untimely Because The Division Expressly Moved For Summary Disposition As To Liability Only.

Respondents' argument that sanctions in this matter would not be in the public interest (Resp. Br. at 6-8) conflates the liability phase of this enforcement proceeding with the sanctions phase. The Division only moved for summary disposition as to liability and requested a hearing in the future to determine sanctions. (Div. Mot. at 27). Respondents' sanctions argument is both irrelevant and premature. The Division is prepared to present evidence concerning the appropriate sanctions against Ascension and Gooder at the appropriate stage of this proceeding.[1]

C. Respondents Have Failed To Demonstrate A Genuine Issue Of Material Fact As To Respondents' Violations Of Section 207.

1. Misrepresentations Regarding Ascension's Chief Compliance Officer

a. Falsely Naming Patrick Smith As Ascension's Chief Compliance Officer

The Division moved for summary disposition against Ascension and Gooder for violating Section 207 of the Investment Advisers Act of 1940 ("Advisers Act") [15 U.S.C. § 80b-7] by falsely naming Patrick Smith ("Smith") as Ascension's Chief Compliance Officer ("CCO") in the firm's Form ADV which Respondents filed on or about February 10, 2011. (Div. Mot. at 8-9, 22-24; *see also* OIP ¶¶ 35-36, 38, 40-41, 52). Respondents did not present any evidence in opposition to this part of the Division's motion. (Resp. Br. at 11-12).

[1] While the discussion is premature, the Division disagrees with Respondents' assertion that sanctions are not in the public interest in this case. (Resp. Br. at 6-9). The facts underlying this action, as summarized in the Division's opening brief (Div. Mot. at 2-13), warrant appropriate sanctions.

Instead, Respondents repeat the statute of limitations argument that they made in their summary disposition motion. (*Id.*). As explained at pages 1-7 of in the Division's August 5, 2019 response to Respondents' motion for summary disposition ("Div. Resp. Br."), Respondents' argument fails because 28 U.S.C. § 2462 does not apply to prophylactic remedies such as cease-and-desist orders and industry and associational bars. *See Larry C. Grossman*, S.E.C. Release No. 4543, 2016 WL 5571616, at *13-15 (Commission Opinion) (Sept. 30, 2016) (concluding that an industry bar, an associational bar, and a cease-and-desist order were not penalties subject to Section 2462) (subsequent procedural history stated in Div. Resp. Br. at 4); *Timbervest, LLC*, S.E.C. Release No. 4197, 2015 WL 5472520, at *15, *17 (Commission Opinion) (Sept. 17, 2015) (holding that Section 2462 did not prevent the Commission from (1) barring respondents from associating with an investment adviser or (2) issuing a cease-and-desist order) (subsequent procedural history stated in Div. Resp. Br. at 4).

Because they failed to offer any evidence raising a genuine issue of material fact, summary disposition should be granted against Respondents regarding their liability for violating Section 207 on this basis (*i.e.*, OIP ¶¶ 35-36, 38, 40-41, 52). *See* 17 C.F.R. § 201.250(c); *China-Biotics, Inc.*, 2013 WL 5883342, at *16.

b. Falsely Naming David Platt As Ascension's Chief Compliance Officer

The Division also moved for summary disposition against Respondents for violating Advisers Act Section 207 [15 U.S.C. § 80b-7] by falsely naming David Platt ("Platt") as Ascension's CCO in the Forms ADV that the firm filed between September 2005 and February 2015 (except the February 10, 2011 Form ADV that depicted Smith as CCO instead). (Div. Mot. at 5-8, 22-24). In response, Respondents claim that: (1) Gooder subjectively believed that Platt was Ascension's CCO; and (2) "[a]lthough Mr. Platt may not have been responsible for

administering written policies and procedures as contemplated by Rules 206(4)-7(a) and (c), he was nonetheless Ascension's CCO and it was therefore not a material misstatement for Ascension and Mr. Gooder to name him as Ascension's CCO on Form ADV." (Resp. Br. at 12).

Turning to Respondents' first argument (Gooder's willfulness), their position is untenable. Even if, for the sake of argument, one were to assume that Gooder subjectively believed Platt was Ascension's CCO (as Respondents assert), they have failed to raise a genuine issue of material fact as to Gooder's recklessness[2] in depicting Platt this way. "Chief Compliance Officer" in Form ADV is a specialized term with a precise meaning. In the context of the Advisers Act, the term "Chief Compliance Officer" means a "[d]esignate[d] . . . individual (who is a supervised person) responsible for administering the policies and procedures that you adopt under paragraph (a) of this rule." Advisers Act Rule 206(4)-7(c) [17 C.F.R. § 275.206(4)-7(c)].

Thus, summary disposition is appropriate if the undisputed evidence establishes that Gooder recklessly disregarded Platt's absence of responsibility for administering written compliance policies and procedures on behalf of Ascension when portraying Platt as CCO. On this front, undisputed evidence of Gooder's recklessness abounds:

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[2] Recklessness satisfies the willfulness element of Section 207. *See Robare Group, Ltd. v. SEC*, 922 F.3d 468, 479-80 (D.C. Cir. 2019) ("'Extreme recklessness' may constitute 'a lesser form of intent.'") (quoting *SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) and citing *Marrie v. SEC*, 374 F.3d 1196, 1203-06 (D.C. Cir. 2004)). Recklessness is "commonly defined as 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the [respondent] or so obvious that the [respondent] must have been aware of it.'" *Toby G. Scammel*, S.E.C. Release No. 3961, 2014 WL 5493265, at *6 n.41 (Commission Opinion) (Oct. 29, 2014) (internal citations omitted; brackets in original), *vacated in part on other grounds*, *Toby G. Scammel*, S.E.C. Release No. 5272, 2019 WL 2775920, at *1 (Commission Order) (July 2, 2019).

- First, Gooder volunteered in testimony that he named Platt as CCO and vice president in Ascension's Forms ADV for "window dressing." (Declaration of Nicholas A. Pilgrim, executed on July 22, 2019 ("Pilgrim Decl."), Ex. 8 (Gooder Tr. (12/12/16) at 29:13-15)) (emphasis added)). Gooder's testimony reflects that he did not believe Platt was Ascension's CCO;
- Second, Gooder knew and acknowledged that he never asked Platt to adopt, implement, administer, or review any written policies and procedures on behalf of Ascension despite Gooder naming Platt as CCO in Forms ADV. (Pilgrim Decl., Ex. 1 (Gooder Tr. 12/12/17) at 74:16-76:20);
- Third, Gooder admittedly never communicated to Platt what he was supposed to be doing as Ascension's CCO or communicated with Platt about regulatory compliance issues. (*Id.* at 74:8-11, 76:13-15);
- Fourth, Gooder had falsely named a different individual, Smith, as Ascension's CCO – without Smith's knowledge or agreement – in the Form ADV that the firm filed on or about February 10, 2011. (OIP ¶ 18; Answer ¶ 18; Pilgrim Decl., Ex. 9 (Form ADV filed 2/10/11) at SEC-SEC-E-0003366-68; Ex. 10 (Smith Dep. (6/14/19) at 78:11-19, 63:8-14, 78:20-79:2, 79:14-21, 54:23-55:14, 80:18-22, 83:3-17). Gooder's willingness brazenly to misrepresent Smith as Ascension's CCO in 2011 is relevant to Gooder's mental state in portraying Platt as CCO in Ascension's subsequent Forms ADV; and
- Lastly, Platt testified that Gooder never: (1) told Platt what Gooder believed to be the responsibilities of a CCO; (2) told Platt any tasks or jobs he wanted Platt to perform as Ascension's CCO; (3) asked Platt to adopt or implement any written compliance

> policies and procedures for Ascension; or (4) discussed compliance issues with Platt. (Pilgrim Decl., Ex. 7 (Platt Dep. (6/18/19) at 14:16-21, 15:15-19; 17:15-18). Indeed, Platt's understanding – which necessarily had to come from his interactions with Gooder – was that he was Ascension's CCO in "name only." (*Id.* at 17:12-14) (emphasis added).

On these facts, Gooder acted at least recklessly in repeatedly portraying Platt as Ascension's CCO in his firm's certified Commission filings. *See S.W. Hatfield, CPA*, S.E.C. Release No. 3602, 2014 WL 6850921, at *3-9 (Commission Opinion) (Dec. 5, 2014) (reversing denial of the Division's summary disposition motion and finding accounting firm and its sole proprietor liable for scienter-based charges and instructing, "[w]hen the defendant is aware of the facts that make the statement misleading, 'he cannot ignore the facts and plead ignorance of the risk.' Notwithstanding any efforts Respondents may have made to renew the Firm's license, Respondents knew that those efforts were not successful during the Relevant Period. Thus, Respondents must have been cognizant of the obvious risk of deceiving investors by falsely identifying themselves as CPAs.") (internal quotation marks, citations, and footnotes omitted).

Respondents' second argument – that the statements concerning Platt in Ascension's Forms ADV were accurate given Platt's assent to be named CCO (Resp. Br. at 12) – fails for the same reason. The named CCO in Form ADV means a CCO pursuant to Rule 206(4)-7(c) of the Advisers Act [17 C.F.R. ¶ 275.206(4)-7(c)] as one designated to administer an investment adviser's written compliance policies and procedures adopted pursuant to Rule 206(4)-7(a) [17 C.F.R. ¶ 275.206(4)-7(a)]. It is undisputed that Platt was never responsible for administering written compliance policies and procedures for Ascension, however. (Pilgrim Decl., Ex. 7 (Platt Dep. (6/18/19) at 14:2-15:19; Ex. 1 (Gooder Tr. (12/12/17) at 74:16-76:20). Consequently,

Respondents' second argument concerning Ascension's misrepresentation of Platt as the firm's CCO should similarly be rejected.

Because they have not identified any genuine issue of material fact, summary disposition should be granted against Respondents regarding their liability for violating Section 207 on this basis too (*i.e.*, OIP ¶¶ 35-36, 37, 39, 41, 52).

2. Respondents' Misrepresentations Regarding The Custody Rule

The Division also moved for summary disposition against Respondents for violating Advisers Act Section 207 [15 U.S.C. § 80b-7] by falsely stating in Forms ADV and Part 2A brochures that Ascension did not have custody over client assets between September 2005 and February 2015.[3] (Div. Mot. at 10-11, 20-21). Respondents concede that their representations about custody in the respective Forms ADV were false. (Resp. Br. at 13) (conceding Respondents made misstatements about custody); (*id.* at 14) (conceding Respondents "misstat[ed] information about custody" in Ascension's Forms ADV); *see also* Resp. Br. Ex. 6 at SEC-SEC-E-0008852 (conceding Ascension's Form ADV custody disclosure "was inaccurate"); (OIP ¶¶ 45-46; Answer ¶¶ 45-46).[4]

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[3] The Division notes for completeness that, on March 14, 2007, Ascension filed a second Form ADV approximately 14 minutes after filing its first Form ADV. (*Compare* Pilgrim Decl., Ex. 6C (Form ADV filed 3/14/07 at 10:00:26 AM) at SEC-SEC-E-0003544 *with* Supplemental Declaration of Luke A.E. Pazicky ("Pazicky Decl."), dated August 12, 2019, Ex. 19 (Form ADV filed 3/14/07 at 10:14:22 AM) at SEC-SEC-E-0003512). The second Form ADV also contained the same misrepresentations at issue regarding Ascension's CCO and custody. (Pazicky Decl., Ex. 19 at SEC-SEC-E-0003523, 0003532, & 0003539).

[4] For this reason, while summary disposition is appropriate on the entire Section 207 charge, we respectfully request that the Court, at a minimum, grant summary disposition to the Division regarding OIP paragraphs 42-46 to narrow the triable issues at the hearing. (*See* OIP ¶¶ 42-46; Answer ¶¶ 42-46). While denied by Respondents in their answer, summary disposition should also be granted as to the materiality element (*i.e.*, OIP ¶ 48) because the Division addressed

In claiming a triable issue of fact, Respondents focus solely on Gooder's mental state in making these misrepresentations, claiming there is a genuine question whether he acted willfully.[5] (Resp. Br. at 13-14). Recklessness satisfies the willfulness requirement of Section 207, *see Robare*, 922 F.3d at 479-80, and Respondents cite no evidence that could even arguably create a genuine issue of material fact as to Gooder's recklessness. Gooder has decades of experience investing in securities on behalf of clients. (OIP ¶ 6; Answer ¶ 6). But, despite receiving compliance bulletins and alerts from the IAA about the Custody Rule[6] (Pilgrim Decl., Ex. 1 (Gooder Tr. 12/12/17) at 88:14-89:20, 87:6-13, 96:22-97:5, 100:16-101:13, 102:15-18), Gooder admitted that he never took <u>any</u> steps to educate himself on the requirements of the rule. (*Id.* at 99:19-23). Gooder did not even remember ever reading the Custody Rule (*id.* at 102:25-103:4), despite that he was the sole manager and owner of an investment advisory firm with more than $150 million in client assets as of December 31, 2017. (OIP ¶ 4; Answer ¶ 4).

Given these facts, regardless of what Gooder claims to have believed subjectively, Respondents have failed to raise a genuine issue of material fact as to his recklessness (at a

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materiality in its motion, and Respondents did not present any countervailing evidence that raises a genuine issue of material fact. (Div. Mot. at 23-24; Resp. Br. at 13-14). *See* 17 C.F.R. § 201.250(c); *China-Biotics, Inc.*, 2013 WL 5883342, at *16.

[5] Respondents cite *Valincenti Advisory Services, Inc. v. SEC* for the proposition that whether they acted with the requisite mental state is a question of fact. *See* 198 F.3d 62, 65 (2d Cir. 1999) (*per curiam*) (affirming a Commission opinion and order holding an investment advisor and its president and sole owner liable for Advisers Act violations) (Resp. Br. at 10). Nothing in *Valencenti* limits or even addresses this Court's well-settled authority to grant summary disposition on scienter-based charges where no genuine issue of material fact exists. *See S.W. Hatfield, CPA*, 2014 WL 6850921, at *3-9; *Exec. Registrar & Transfer, Inc.*, S.E.C. Release No. 366, 2008 WL 5262371, at *29-31 (Initial Decision) (Dec. 18, 2008), *notice of finality, Exec. Registrar & Transfer, Inc.*, S.E.C. Release No. 59338, 2009 WL 366977 (Feb. 2, 2009).

[6] *I.e.*, Advisers Act Section 206(4) and Rule 206(4)-2 thereunder [15 U.S.C. § 80b-6(4) and 17 C.F.R. § 275.206(4)-2].

minimum) in misrepresenting that Ascension did not have custody. *See Grossman*, 2016 WL 5571616, at *8 (affirming liability of a registered investment adviser's managing partner for causing and aiding and abetting his firm's custody violation and stressing, "Grossman claimed that he was unaware of the custody rules, but advisers are obligated to know the custody rules; Grossman's claimed lack of awareness was at least reckless.") (internal footnotes omitted) (emphasis added)); *Abraham Sons & Capital, Inc.*, S.E.C. Release No. 1956, 2001 WL 865448, at *8 (Commission Opinion) (July 31, 2001) (affirming liability of investment adviser's president for causing and willfully aiding and abetting his firm's custody violation and remarking, "[e]ven if we accept that the failure to comply with Rule 206(4)-2 was not deliberate, we still find that it was reckless. Securities professionals are required to be knowledgeable about, and to comply with, the regulatory requirements to which they are subject. Failure to meet this requirement constitutes an 'extreme departure from the standards of ordinary care ...' and establishes recklessness.") (internal citations and footnotes omitted) (emphasis added)).[7]

As Respondents have failed to carry their burden of raising a genuine issue of material fact, summary disposition should be granted against them regarding their liability for violating Section 207 on this further basis (*i.e.*, OIP ¶¶ 42-48, 52).

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[7] *See also Joseph J. Fox*, S.E.C. Release No. 10328, 2017 WL 1103693, at *4 (Commission Opinion) (Mar. 24, 2017) ("[The Respondent] contends that our holding in *Abraham & Sons* [S.E.C. Release No. 1956, 2001 WL 865448 (Commission Opinion) (July 31, 2001)] does not apply because his work as a securities professional, and his securities licenses, did not require that he be knowledgeable about the registration provisions. Our holding was not as narrow as [the Respondent] claims. It applied to 'securities professionals' generally. The principle underlying our holding is that participants in the industry have an obligation to be knowledgeable about regulatory requirements because the failure to do so has the potential to cause serious harm to investors and the marketplace as a whole.") (internal citations and footnotes omitted), *vacated on other grounds and initial decision on remand, Joseph J. Fox*, S.E.C. Release No. 1382, 2019 WL 3531257 (Initial Decision) (July 30, 2019).

D. Respondents Fail To Raise A Genuine Issue Of Material Fact With Regard To The Books And Records Violations And Gooder's Related Causing Liability.

The Division moved for summary disposition against Ascension for violating Advisers Act Section 204 [15 U.S.C. § 80b-4] and Rules 204-2(a)(1) and 204-2(a)(2) thereunder [17 C.F.R. §§ 275.204-2(a)(1) & (a)(2)] (collectively, the "Books and Records Rule") by failing to make and keep a true, accurate, and current: (1) journal reflecting Ascension's cash receipts and disbursements; and (2) general ledger reflecting Ascension's assets, liabilities, reserves, capital, income, and expense accounts. (Div. Mot. at 11-13, 17-19). The Division further sought summary disposition against Gooder for causing these violations by Ascension. (Div. Mot. 3-4, 24-26).

Respondents offer nothing to contradict the Division's evidence that – for more than a decade – they failed to make and keep the books and records required by Advisers Act Rules 204-2(a)(1) and 204-2(a)(2). (Resp. Br. at 9-10). Respondents do not contest that Ascension failed to produce a general ledger or journal during either the OCIE examination or the Division's investigation. (*Id.*) Respondents did not and cannot submit a general ledger or a journal that existed before November 2015 because these records simply do not exist.

Not only do Respondents fail to raise a genuine issue of material fact, but they actually admitted Ascension's Books and Records violation in the Wells Submission they attach as Exhibit 6 to their brief. There, Respondents acknowledged that Ascension did <u>not</u> make and keep a general ledger and journal, among other required records, until <u>after</u> OCIE's examination of Ascension in November 2015:

> Ascension instituted a formal set of books and records, including journals, trial balances, ledgers, and the like, as part of its remediation in response to the OCIE examination, and retained an experienced bookkeeper to assist in instituting and maintaining its required books and records. Ascension is now in compliance with the Advisers Act books and records requirements.

(Marinzel Decl., Ex. 6 (Ascension Wells Submission dated 3/13/2018 at SEC-SEC-E-0008852)).

Rather than produce the records the Rule requires, Respondents argue that other business records should suffice. Specifically, Gooder testified that, prior to OCIE's examination of Ascension in late 2015, he "ran Ascension Asset Management out of a checkbook." (Pilgrim Decl., Ex. 8 (Gooder Tr. (12/12/16) at 50:4-12). While a checkbook is a required record pursuant to Advisers Act Rule 204-2(a)(4) [17 C.F.R. § 275.204-2(a)(4)], it is not a substitute for the general ledger and journal required by other provisions of Rule 204-2(a). Any other reading would render the requirements of 204-2(a)(1) and (2) superfluous.

Lastly, Respondents have not offered evidence to attempt to raise a genuine issue of material fact concerning Gooder's liability for causing Ascension's books and records violations. (*See* Div. Mot. at 3-4, 24-26; Resp. Br. at 9-11). By Gooder's own admission, before OCIE's examination in November 2015, he never sought any education on the types of books and records that Ascension was required to make and maintain. (Pilgrim Decl., Ex. 1 (Gooder Tr. (12/12/17) at 105:16-19)). Because Respondents did not offer any evidence raising a genuine issue of material fact on this issue, summary disposition should be granted as to Gooder's causing liability for his firm's records violations. *See* 17 C.F.R. § 201.250(c); *China-Biotics, Inc.*, 2013 WL 5883342, at *16.

In sum, Respondents have raised no genuine issue of material fact, and summary disposition should be granted against Ascension for its books and records violations (*i.e.*, OIP ¶¶ 29-31, 51) and against Gooder for causing these violations (*i.e.*, OIP ¶¶ 34, 51).

III. CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Court grant its motion for summary disposition on the issue of liability and determine at the September 9, 2019 hearing what sanctions are warranted against Respondents.

DATED: August 12, 2019

Respectfully submitted,

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CERTIFICATION PURSUANT TO RULE 250(f)(1)

I, the undersigned counsel on behalf of the Division, certify that this reply together with any supporting memorandum of points and authorities (exclusive of any declarations, affidavits, deposition transcripts or other attachments), does not exceed 7,000 words. This certification relies upon based the word count of the word-processing program to prepare this document.

Counsel for the Division of Enforcement

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 Reply in Support of Its Motion for Summary Disposition Against Respondents Ascension Asset Management, LLC and Grenville M. Gooder, Jr.** was served on August 12, 2019 upon the following parties as follows:

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