UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17253

In the Matter of **JAMES A. WINKELMANN, SR., and** **BLUE OCEAN PORTFOLIOS, LLC,** **Respondents.**	**THE DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENTS' MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE**

The Division of Enforcement ("Division") hereby opposes Respondents' Motion for Leave to Adduce Additional Evidence. The additional "evidence" Respondents seek to admit are two emails from Respondents' attorney, Mr. Cooper, to counsel for the Division. Cooper is not a percipient witness and never filed an appearance, but has engaged in periodic settlement discussions with the Division throughout this litigation. Cooper sent the two emails in April 2017 – six months after the trial in this matter concluded and many years after the conduct at issue in the OIP. The emails contain the subject line "For Settlement Discussions Only," and merely reflect Cooper's *post-hoc* articulation of the reliance-on-counsel defense Respondents have long advanced in these proceedings.

Because Cooper is not a percipient witness, because his emails were sent well after the conduct at issue in this case ended, and because Cooper's emails are expressly labeled as protected settlement communications, Cooper's emails fail to meet the standards of admissibility under Rule of Practice 320 or the materiality requirement of Rule 452. Accordingly, the Commission should deny Respondents' motion in its entirely.

A. Background

This case involves Respondents' conduct as investment advisers between 2011 and 2014. The OIP alleges that Respondent James Winkelmann repeatedly made misstatements and omissions, and breached his fiduciary duties, when offering the securities of his own advisory firm, Respondent Blue Ocean Portfolios, LLC ("BOP"). Compounding the fraud, Winkelmann targeted BOP clients as investors for the BOP offerings, despite the inherent conflicts which Respondents never disclosed to their client-investors. Throughout these proceedings, Respondents' primary defense has been their claim of good faith reliance-on-counsel. Namely, Respondents argue that their consultations with the Greensfelder law firm vis-à-vis the BOP securities offerings relieves them of any liability.

While the Division does not dispute that Greensfelder attorneys provided legal advice to Respondents, the Division strongly contests that Respondents meet the requisite elements to sustain a reliance defense. Specifically, the Division has shown that Respondents: (1) failed to make complete disclosures to their Greensfelder attorneys, (2) did not seek advice on conduct at issue in these proceedings, (3) did not receive advice that the intended conduct was legal, and (4) did not rely in good faith on counsel's advice. *See, e.g., William Scholander*, Exchange Act Rel. No. 77492, 2016 SEC LEXIS 1209, *25-26 and nn. 37-38 (Mar. 31, 2016). The parties' pending appellate briefs before the Commission thoroughly discuss these issues.

B. Procedural History

The six-day trial in this case occurred in October 2016. On March 20, 2017, the law judge issued an initial decision which rejected Respondents' reliance defense and imposed significant sanctions. *See* Initial Decision No. 1116. On April 7, 2017 Respondents filed a petition for review, which the Commission granted.

While the appeal was pending before the Commission, the Commission remanded the case in the wake of *Lucia v. SEC*, 138 S. Ct. 2044 (2018). Respondents elected to retain the original law judge who, following the introduction of limited evidence related to Respondents' reliance defense, issued a revised initial decision. Initial Decision No. 1261 (October 15, 2018). That revised initial decision is the subject of the parties' present cross-appeals.

C. Cooper's Emails Reflect After-the-Fact Settlement Communications

The emails Respondent now seek to introduce were sent by another of their attorneys, Cooper, on April 3, 2017.[1] As shown by the "For Settlement Discussions Only" subject line, those emails reflect Respondents' efforts to settle this matter after the law judge issued his original initial decision. However, those negotiations did not result in a settlement, and Respondents filed their original petition for review on April 7, 2017.

As noted in the affidavit attached to Respondents' motion, attorney Cooper represents Respondents in their ongoing dispute with Greensfelder. Whereas Greensfelder contemporaneously advised Respondents regarding the BOP offerings at issue in the OIP, Cooper did not. Indeed, there is no suggestion that Cooper either: (a) is a percipient witness to Respondents' underlying conduct, or (b) had first-hand or real-time knowledge of Respondents' interactions with Greensfelder. To that end, Cooper's April 2017 emails contain Cooper's *post-hoc* criticism of the original initial decision and arguments regarding Respondents' reliance

[1] Greensfelder did not represent Respondents in these proceedings. Respondents' litigation counsel, Ulmer & Berne, withdrew their appearances after the revised initial decision was issued. While Cooper never filed an appearance, he has been engaged in periodic settlement communications with the Division, on behalf of Respondents, since the onset of this litigation.

defense. Cooper's emails also discuss apparent settlement discussions Cooper was having at the time with Greensfelder's outside counsel, Mr. Haar.[2]

D. Cooper's Emails Should Not be Admitted

Rule of Practice 320(a) provides that the Commission "*shall exclude* all evidence that is irrelevant, immaterial, unduly repetitious, or unreliable." (Emphasis added). Rule 452 likewise provides that a movant seeking to adduce additional evidence must "show with particularity that such additional evidence is *material* and that there were reasonable grounds for failure to adduce such evidence previously." (Emphasis added). As discussed below, Respondents cannot satisfy the standards for admission under either Rule 320(a) or Rule 452.

***The Cooper Emails are Irrelevant and Immaterial*:** On their face, Cooper's emails are not relevant or material to any claim or defense at issue in these proceedings. Rather, Cooper's emails contain Cooper's criticism of the original initial decision, Cooper's *post-hoc* articulation of Respondents' reliance defense, and an update on Cooper's ongoing settlement discussions with Greensfelder's counsel. Neither Cooper's 2017 advocacy nor the status of Cooper's 2017 settlement negotiations with Greensfelder have any bearing on (a) whether Respondents' conduct from 2011 to 2014 violated the securities laws, or (b) whether Respondents' interactions with Greensfelder during the same period absolve Respondents of liability.

To the contrary, Cooper's after-the-fact and subjective observations about this case, sent in his capacity as Respondents' attorney, are not "facts" or "evidence" that the Commission should consider. *See, e.g., Robert D. Potts*, Exchange Act Rel. No. 39126, 53 S.E.C. 187, 208

[2] The Division understands that Respondents ultimately filed a malpractice action, in Missouri state court, against Greensfelder as well as the different law firm that represented Respondents at trial in this matter. *See Blue Ocean Portfolios, et al. v. Ulmer & Berne LLP, et al.*, Case No. 19SL-CC00307 (St. Louis County, filed January 25, 2019).

(Sept. 24, 1997) ("[m]ere opinion on the law" is inadmissible); *Pagel, Inc.*, Exchange Act Rel. No. 22280, 48 S.E.C. 223, 229-230 (Aug. 1, 1985) (affirming exclusion of expert testimony on issue of whether respondents engaged in market manipulation, because such a determination was the province of the law judge and Commission), *aff'd, Pagel v. SEC*, 803 F.2d 942, 947 (8th Cir. 1986); *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1212-13 (D.C. Cir. 1997) ("testimony that consists of legal conclusions cannot properly assist the trier of fact" and is accordingly inadmissible).[3]

***The Cooper Emails are Unreliable*:** Cooper does not purport to be a percipient witness with first-hand knowledge of any of the facts at issue in this matter. Nor has he been proffered as an expert witness. Instead, he is an attorney who represents Respondents in their dispute with Greensfelder. Presumably, any knowledge of relevant facts Cooper obtained came from witnesses who already testified or the documents already admitted to the record. Even if the Commission finds Cooper's emails to be relevant, Respondents have advanced no evidence which would establish that Cooper's communications with the Division's counsel are supported by sufficient foundation or otherwise contain reliable articulations of any admissible evidence Cooper has reviewed. Simply put, because Cooper lacked the foundation or reliability to serve as a fact witness when this case was tried in October 2016, his April 2017 observations and arguments about the case do not constitute reliable evidence.

The Cooper Emails are Protected Settlement Communications: The subject line of Cooper's emails demonstrates that they were settlement communications sent in an effort to

[3] To the extent Respondents claim any prejudice that the "evidence" discussed in Cooper's emails was not presented at trial, Respondents later availed themselves of the opportunity to introduce new evidence to the law judge following the post-*Lucia* remand. Indeed, it appears that the emails referenced by Cooper comprised the supplemental evidence submitted by Respondents on remand and are already part of the record the Commission is reviewing.

resolve Respondents' case during the period after the original initial decision was issued but before Respondents filed their first petition for review.

While the Commission is not bound by the Federal Rules of Evidence ("FRE"), the Commission has repeatedly cited FRE 408 with approval. *See, e.g.*, *Stonegate Securities, Inc.*, Exchange Act Rel. No. 44933, 2001 SEC LEXIS 2136, *11 and n.13 (Oct. 15, 2001) ("We do not consider the results of failed settlement negotiations in our determination of the public interest…settlement negotiations are not usually part of a record and are not normally considered on review") (citing FRE 408); *Michael T. Studer*, Exchange Act. Rel. No. 50786, 2004 SEC LEXIS 2840, *2 n.4. (Nov. 30, 2004) ("the Commission does not consider the results of failed settlement negotiations in its determination of the public interest") (citing FRE 408). Moreover, in adopting its current Rules of Practice, the Commission recognized the "important public policy interest in candid settlement negotiations" that underlies FRE 408. *Amendments to the Commission's Rules of Practice*, Exchange Act Rel. No. 78319, 2016 SEC LEXIS 2568, *68 (July 13, 2016).

Here, Cooper's emails are plainly settlement communications which Cooper intended to remain outside the record of these proceedings. Consistent with Commission practice and guidance, those emails should not be admitted, regardless of the applicability of FRE 408 to these proceedings.

Respondents' Failure to Present Cooper's Emails is Not Reasonable: Finally, Rule of Practice 452 requires Respondents to demonstrate "with particularity . . . that there were reasonable grounds for failure to adduce such evidence previously." Respondents' motion claims that Respondents only recently obtained the emails they now seek to introduce. But it is undisputed that Cooper – Respondents' attorney and agent – possessed the emails since the time

Cooper sent them, more than three years ago. Rather than accusing the Division of withholding exculpatory evidence, as Respondents do in their motion (at p. 3), any responsibility for failure to advise Respondents of the emails rests with their attorney, Cooper.

E. Conclusion

The *post-hoc* emails Respondents seek to introduce are irrelevant, immaterial, and reflect observations from Respondents' attorney who is not a percipient witness. The emails also constitute settlement communications that should not be part of the record in these proceedings. For these reasons and those discussed above, the Commission should deny Respondents' motion in its entirety.

Dated: June 1, 2020

Respectfully submitted:

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Benjamin Hanauer, an attorney, certifies that on June 1, 2020, he caused a true and correct copy of the foregoing The Division of Enforcement's Response to Respondents' Motion for Leave to Adduce Additional Evidence to be served, via email, on the following:

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Dated: June 1, 2020

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