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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: **JAMES A. WINKELMANN, SR. AND BLUE OCEAN PORTFOLIOS, LLC,** **Respondents.**	ADMINISTRATIVE PROCEEDING File No. 3-17253

RESPONDENTS' MOTION FOR SUMMARY AFFIRMANCE

Pursuant to Commission Ruled of Practice 410(b), Respondents James A. Winkelmann, Sr. and Blue Ocean Portfolios, LLC ("Blue Ocean" or the "Firm") hereby move the Commission for summary affirmance of the Initial Decision on Remand entered by the Hearing Offier (Administrative Law Judge Jason S. Patil) on October 15, 2018.

REQUEST FOR SUMMARY AFFIRMANCE

The Commission should find that no issue raised in the Initial Decision on Remand warrants review and should summarily affirm the decision. This case is unlike the majority of appeals the Commission considers. Judge Patil, who heard this case from its inception and witnessed the presentation of all testimony at trial, has twice considered the evidence presented by the Division and has twice rejected it as to the majority of appellate grounds identified in the Petition for Review (items 1, 3, and 4). Judge Patil rejected those arguments first, in the Initial Decision (issued on March 20, 2017), and then again, following the Commission's post-*Lucia* remand of the case (where he reconsidered the evidence in the record with the agreement of the Division and Respondents). There is no need for the Commission to consider these arguments for a *third* time.

Item 2 of the Petition for Review relates to the new finding that Judge Patil made following the Commission's November 2017 remand of the case, based upon new evidence submitted (pursuant to the November 2017 remand order). That new evidence, Judge Patil concluded, substantiated Respondent's reliance upon the advice of their counsel, Greensfelder Hemker & Gale, when they prepared the offering memoranda that included the statements at issue. Specifically, Judge Patil found that the redlined communications between Mr. Winkelmann and Greensfelder "negate[] the element of scienter, and requires a finding of no liability on the allegations that require scienter." Initial Decision on Remand at 80.

Judge Patil—having heard the testimony and observed the witnesses—is in the best position to make these determinations. What is more, Judge Patil has *twice* had the opportunity to consider the evidence in the record and the arguments of the parties. If the Commission were to entertain the Petition for Review, it would be required to give deference to Judge Patil's conclusions. The SEC has long recognized that its ALJs are in the "best position to make findings of fact" and "resolve any conflicts in the evidence." *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2054 (2018). Whether an individual acts with the requisite mental state so that his or her actions constituted a violation of the Advisers Act is a question of fact. *S.E.C. v. Slocum, Gordon & Co.*, 334 F. Supp. 2d 144, 181 (D.R.I. 2004) (citing *Valicenti Advisory Services, Inc. v. SEC*, 198 F.3d 62, 65 (2d Cir. 1999)). Judge Patil thoroughly and repeatedly considered the factual findings—including the Respondents' mental state—and before rendering his conclusions. Judge Patil was well-positioned to do so, and those conclusions should not be disturbed.

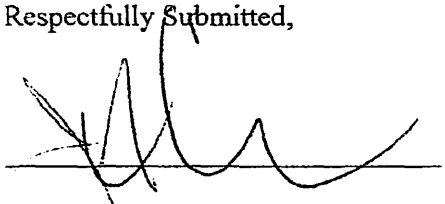
Additionally, Respondents request summary affirmance to put an end to this prosecution and the Division's fixation with proving scienter where none exists. The Initial Decision on Remand reached a middle ground between the parties' positions, with the Division prevailing on

some charges and the Respondents on others. The cost of continued litigation has long ago outweighed its utility for both the Division and the Respondents. While the Respondents do not believe the Initial Decision on Remand's findings of negligence or the sanctions imposed are correct or appropriate, they were prepared for that decision to become final.

The Commission should understand: Years of litigation expenses and reputational consequences have cost the Respondents dearly and perpetually. Blue Ocean is no longer and will never be in the investment advisory business again due to the effect of the charges against it. Mr. Winkelmann has been unable to find a job that best suits his experience and abilities in or out of the securities industry due to the pendency of this case. No longer able to afford counsel, Respondents must defend themselves *pro se*, unable to compete with the unending resources available to the United States government. Respondents attempted to avoid this appeal, proposing to the Division that the parties agree to let the decision become final. The Division refused, instead pursuing the scienter charges it has twice failed to prove. Why do they insist on beating this dead horse?

To the honorable Commission, I make this appeal directly. None of the items identified in the Petition for review reflect a "clearly erroneous" finding by Judge Patil or an abuse of his discretion. Please deny the Division's petition and, instead, I humbly request that you vote to summarily affirm Judge Patil's findings.

Respectfully Submitted,

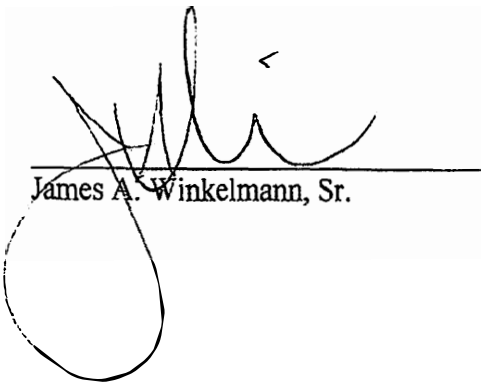


James A. Winkelmann, Sr. individually and as a bona fide officer of Blue Ocean.

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2018, I served a copy of the foregoing **RESPONDENTS' MOTION FOR SUMMARY AFFIRMANCE**, as follows:

Original and three copies to: Via facsimile transmission and overnight mail delivery	Securities and Exchange Commission 100 F Street, N.E. Washington, DC 20549-2557 Fax: (202) 772 9324
One copy to: Via e-mail	David F. Benson Benjamin J. Hanauer Division of Enforcement U.S. Securities and Exchange Commission 175 W. Jackson Blvd., St. 900 Chicago, IL 60604 Fax: (312) 353-7398 bensond@sec.gov hanauerb@sec.gov
One copy: Via e-mail and overnight mail delivery	Honorable Jason Patil Administrative Law Judge Securities and Exchange Commission 100 F Street, N.E. Washington, DC 20549-2557 ALJ@sec.gov



James A. Winkelmann, Sr.