

**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' CROSS-PETITION FOR REVIEW

Pursuant to SEC Rules of Practice 410(b), and in the event that the Motion for Summary Affirmance, filed contemporaneously herewith, is denied, Respondents James A. Winkelmann, Sr. and Blue Ocean Portfolios, LLC ("Blue Ocean" or the "Firm") hereby petition the Securities and Exchange Commission (the "Commission") to review the Initial Decision on Remand entered by the Hearing Officer in this matter on October 15, 2018.

I. INTRODUCTION

Respondents submit that the Initial Decision rests upon erroneous conclusions of material fact and law, as well as decisions of law or policy that are important and should be reviewed by the Commission, including the findings that:

- (1) Mr. Winkelmann acted negligently.
- (2) The sanctions imposed were in the public interest and the severity and/or amount of those sanctions.

The above findings contained in the Initial Decision on Remand reflect erroneous conclusions and/or an exercise of discretion or decision of law or policy that warrants review. Respondents respectfully request that the Commission review the following findings and conclusions contained in the Initial Decision on Remand.

II. ERRONEOUS CONCLUSIONS OF MATERIAL FACT AND LAW

A. Respondents Did Not Act Negligently.

The evidence reflected that Respondents acted reasonably in issuing the Royalty Units. Respondents retained attorneys at Greensfelder Hemker & Gale who were experienced in securities offerings to assist in the preparation and drafting of the offering documents. Greensfelder expressly advised Respondents that no conflict of interest existed under the Royalty Unit Structure. Retaining experts like Greensfelder to provide advice on the Royalty Unit offerings shows that Respondents acted reasonably under the circumstances and, therefore, did not act negligently.

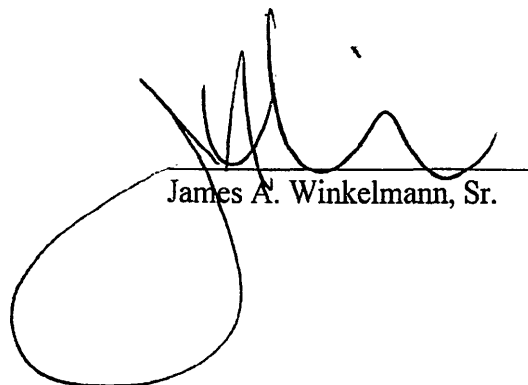
B. The Sanctions Are Unsupported.

The sanctions imposed by the ALJ run contrary to the public interest factors set forth in *Steadman* and are unsupported by the evidence presented.

III. CONCLUSION

For the reasons set forth above, if the Commission denies Respondents' contemporaneously-filed Motion for Summary Affirmance, Respondents respectfully request that the Commission review the Initial Decision on Remand on the above points. If the motion for summary affirmance is granted, Respondents respectfully withdraw this Cross Petition as moot.

Dated: November 14, 2018



James A. Winkelmann, Sr.

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2018, I served a copy of the foregoing

RESPONDENTS' CROSS PETITION FOR REVIEW, 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

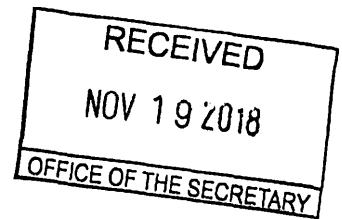
David F. Benson
Benjamin J. Hanauer
Division of Enforcement
U.S. Securities and Exchange Commission
175 W. Jackson Blvd., St. 900
Chicago, IL 60604
Fax: (312) 353-7398
bensond@sec.gov
hanauerb@sec.gov

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.



**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 Rule 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 Officer (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.

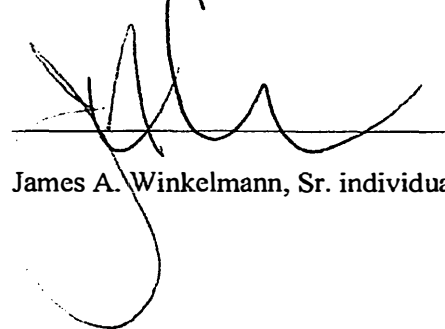
Additionally, Respondents request summary affirmance to put an end to this prosecution and the Division's fixation with proving scienter where none exists. The Initial Decision on Remand reached a middle ground between the parties' positions, with the Division prevailing on

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,

A handwritten signature in black ink, appearing to read 'James A. Winkelmann, Sr.', written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

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

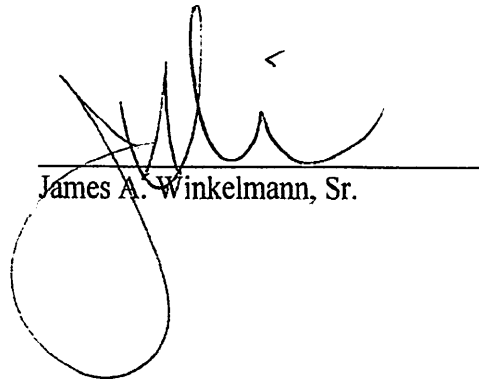
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557
Fax: (202) 772 9324

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.