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. Regarding the email attached as Exhibit A to the Motion, the Division notes that the email appears to be only part of a longer email chain. Under the common-law "rule of completeness," Respondents should be required to proffer the entire email chain so that the portion Respondents seek to introduce can be evaluated, by the Division and Commission, in the proper context to avoid "misunderstanding or distortion." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988). Regarding the affidavit attached as Exhibit B, the proposition contained therein – that Respondents' law firm provided legal advice in connection with the securities offerings at issue in this case – has long been stipulated to by the Division. And the exhibits attached to the affidavit are already in the record. For these reasons, and as detailed more fully below, the Commission should deny Respondents' Motion.

A. The Rule of Completeness Compels the Production of the Full Email Chain Containing Respondents' Proffered Exhibit A

The common-law "rule of completeness," now codified as Federal Rule of Evidence 106, provides: "[T]he opponent, against whom a part of an utterance has been put in, may in his turn

complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." *Beech Aircraft*, 488 U.S. at 171 (quoting 7 J. Wigmore, Evidence in Trials at Common Law § 2113, p. 653 (J. Chadbourn rev. 1978)).[1] The Supreme Court recognizes the "obvious" rationale behind the rule of completeness: "when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible..." *Beech Aircraft* at 172

The email constituting Exhibit A to Respondent's Motion is precisely the type of document to which the rule of completeness should apply. Based on the "Re:" notation in its subject line, the email appears to be a portion of a longer email chain. Respondents claim this email supports their reliance defense because their attorney purportedly advised they could offer securities issued by their advisory firm to their own advisory clients.[2] (Mot. at 2). But the email does not contain any such advice. Rather, it expressly notes that the attorney "had not researched...this or any other aspects of an offering by an IA to its customers of its securities." Moreover, the email appears to offer advice not on the issue of whether Respondents could offer their own securities to clients, but whether Respondents had to disclose on their Form ADV that they engaged in "principal transactions." (*See* Form ADV Part 1a, Item 8,

[1] Rule 106 provides: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." While the Division recognizes that the Federal Rules of Evidence are not binding on the Commission, the Division submits that the Commission should apply the common-law doctrine which Rule 106 codifies.

[2] One issue in the present appeal is the Division's contention that Respondents violated the antifraud provisions by *not disclosing* the attendant conflicts inherent in an investment adviser offering the adviser's own securities to its advisory clients. The Division does not assert in this case that an adviser *per se* violates the securities laws by offering its own securities to clients.

https://www.sec.gov/about/forms/formadv-part1a.pdf). Accordingly, the fuller context provided by the entirety of the email chain is required for the Division and Commission to evaluate the email's impact on Respondents' reliance defense.

The email lacks context for reasons beyond its apparent incompleteness. At the hearing in this matter there was no testimony regarding this email or its subject matter. Similarly, the affidavit attached as Exhibit B to Respondents' Motion, which authenticates other emails from Respondents' attorney, makes no reference to the email. The author of the email is deceased and cannot provide testimony about the circumstances of the email. Nor will the Division have the opportunity to cross-examine the email's purported recipient, Respondent Winkelmann, about the email. As presently submitted in Respondents' motion without any supporting foundation, there is no evidence the email is a final version, or was actually sent, received, or read by Winkelmann. Given the lack of testimonial evidence regarding the email, the justification for applying the rule of completeness and requiring the production of the full email chain is even more compelling.

B. Respondents' Proffered Affidavit Is Untimely and Seeks the Introduction of "Unduly Repetitious" Evidence

Exhibit B to Respondent's Motion is an affidavit from the General Counsel of the law firm that represented Respondents. According to Respondents, the affidavit demonstrates that the law firm provided legal advice to Respondents in connection with the securities offerings at issue in these proceedings. That proposition is not in dispute. Indeed, the Division stipulated that the law firm provided legal advice to Respondents about the securities offerings.[3] (*See*,

[3] While the Division stipulates that Respondents received certain legal advice, it very much disputes that Respondents can assert a valid reliance a defense. Specifically, the Division will establish that Respondents (1) failed to make complete disclosures to counsel, (2) did not seek advice on conduct at issue in these proceedings, (3) did not receive advice that the intended

Factual Stipulations, ¶¶ 51-55, Nov. 14, 2016). The ALJ adopted those stipulations and found them binding on the parties. (Order on Stipulations, AP Rulings Release No. 4350, Nov. 15, 2016). As for the emails attached to the affidavit, Respondents concede that those emails "have been already adduced to the record." (Mot. at 2; *see also* Order Granting Leave to Adduce Additional Evidence, Securities Act Rel. No. 10370, June 15, 2017; Initial Decision Following Remand, Initial Decision Rel. No. 1261, Oct. 15, 2018, p. 91).[4]

Rule of Practice 320(a) provides that the Commission "shall exclude all evidence that is...unduly repetitious." Exhibit B meets that standard because facts affirmed to therein have been stipulated to by the Division and are not in dispute. *See, e.g. David S. Hall, P.C.*, AP Rulings Rel. No. 4655, 2017 SEC LEXIS 680, *2 (Mar. 6, 2017) ("the audio recording is likely unduly repetitious because the parties do not dispute the substance of the conversation it documents."). Given that the emails attached to Exhibit B are already admitted, no valid reason exists for the affidavit's addition to the record.

A second ground for denying the admission of Exhibit B is that Respondents' request is untimely. Rule of Practice 452 requires Respondents to demonstrate "with particularity...that there were reasonable grounds for failure to adduce such evidence previously." Respondents' Motion offers no reason why they did not submit the affidavit, which Respondents' have apparently possessed since May 2017, when they availed themselves of the opportunity to

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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).

[4] Attached as Exhibit C to Respondents' Motion is copy of a recently filed lawsuit. While it does not appear that Respondents seek that lawsuit admitted to the record, doing so would violate Rule of Practice 320(a)'s requirement that irrelevant material be excluded from the record.

present new evidence to the law judge on remand following the Supreme Court's decision in *Lucia v. SEC.* (*See* Respondents' Submission of New Evidence, Jan. 26, 2018).[5]

C. Conclusion

To satisfy the rule of completeness, Respondents should be required to produce to the Division and Commission the full email chain containing Exhibit A before the Commission considers whether to include Exhibit A in the record. The affidavit attached as Exhibit B should not be admitted because it proffers previously stipulated facts, attaches emails already admitted into the record, and was not offered when Respondents submitted new evidence on remand. For these reasons and those discussed above, the Commission should deny Respondents' motion.

Dated: July 16, 2019

Respectfully submitted:

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[5] The failure to satisfy Rule 452's "reasonable grounds" requirement likewise provides additional justification for not admitting Exhibit A into the record. Respondents state in conclusory fashion that they "did not have a copy of Exhibit A" until it was produced in litigation with their former attorneys. (Mot. at 3). But Respondents fail to explain why they did not previously possess an email that purportedly was received by Winkelmann.

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Respondents.

CERTIFICATE OF SERVICE

Benjamin Hanauer, an attorney, certifies that on July 16, 2019, 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 on the following:

Vanessa A. Countryman, Secretary
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(via facsimile and overnight delivery)

Respondent James A. Winkelmann
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Dated: July 16, 2019

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