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' BRIEF IN SUPPORT OF CROSS-PETITION FOR REVIEW AND REPLY IN SUPPORT OF ITS PETITION FOR REVIEW

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TABLE OF CONTENTS

I. Introduction 1

II. Winkelmann's Concealment of Binkholder's Bar Violated the Antifraud Provisions 1

A. Binkholder's Important Role at BOP 2

B. Winkelmann Repeatedly Touted Binkholder to Investors 4

C. Binkholder's Bar, and the Reasons for the Bar, Were of Paramount Importance to Investors 5

D. Winkelmann Ignores *SEC v Bolla*, On-Point Authority Involving Similar Facts 7

III. Winkelmann Failed to Disclose Conflicts and Falsely Represented his "Alignment" With Investors 8

A. Advisers Act Section 206 Applies to Winkelmann's Offer of Units to Clients 8

B. Winkelmann Violated the Advisers Act by Failing to Disclose Conflicts 11

C. Winkelmann Misrepresented His Alignment with Investors 14

IV. Winkelmann Violated the Antifraud Provisions by Misrepresenting BOP's Success in Raising Funds and Repaying Investors 14

V. Winkelmann Made False Statements and Omissions Regarding BOP's Advertising Ratios 16

A. Winkelmann Failed to Disclose BOP's Changing Methodologies or His Cherry-Picking 16

B. Winkelmann Falsely Represented BOP's 2011 Annual Ratio in the Second, Third, and Fourth Memoranda 19

VI. Winkelmann's Reliance Defense Fails 22

VII. Winkelmann Does Not Dispute His Custody Rule Violations 24

VIII. The Commission Should Impose Strong Sanctions 24

TABLE OF AUTHORITIES

Cases

CFTC v. British Am. Commodity Options Corp., 788 F.2d 92 (2d Cir. 1986)....26
In re BP p.l.c. Secs. Litig., 2016 WL 3090779 (S.D. Tex. May 31, 2016)....17
Malouf v. SEC, 2019 U.S. App. LEXIS 24031 (10th Cir. Aug. 13, 2019)....23
Robare Group, Ltd. v. SEC, 922 F.3d 468 (D.C. Cir. 2019)....23
SEC v. Bolla, 401 F. Supp. 2d 43 (D.D.C. 2005)....5, 7, 8
SEC v. Calvo, 378 F.3d 1211 (11th Cir. 2004)....28
SEC v. Capital Solutions Monthly Income Fund, 28 F. Supp. 3d 887 (D. Minn. 2014)....28
SEC v. First Pac. Bancorp, 142 F.3d 1186 (9th Cir. 1998)....28
SEC v. Manor Nursing Centers, Inc. 458 F.2d 1082 (2d Cir. 1972)....28
SEC v. Savoy Indus., Inc., 665 F.2d 1310 (D.C. Cir. 1981)....24
SEC v. True N. Fin. Corp., 909 F. Supp. 2d 1073 (D. Minn. 2012)....16
SEC v. Wash. Inv. Network, 475 F.3d 392 (D.C. Cir. 2007)....7, 8
SEC v. Whittemore, 659 F.3d 1 (D.C. Cir. 2011)....28
Von Hoffmann v. Prudential Ins. Co., 202 F. Supp. 2d 252 (S.D.N.Y. 2002)....18

Commission Opinions

Bernerd Young, Exchange Act Rel. 774421, 2016 SEC LEXIS 1123 (Mar. 24, 2016)....8
Dennis J. Malouf, Advisers Act Rel. 4463, 2016 SEC LEXIS 2644 (July 27, 2016)....16
Edgar Page, Advisers Act Rel. No. 4400, 2016 SEC LEXIS 1925 (May 27, 2016)....28
Gordon Brent Pierce, Exchange Act Rel. No. 71664, 2014 SEC LEXIS 4544 (Mar. 7, 2014)....28
Gregory O. Trautman, Exchange Act. Rel. No. 61167, 2009 SEC LEXIS 4173 (Dec. 15, 2009)..26
Harding Advisory LLC, Advisers Act. Rel. 4600, 2017 SEC LEXIS 86 (Jan. 6, 2017)....10
J.S. Oliver Cap. Mgmt., L.P., Advisers Act Release 4431, 2016 SEC LEXIS 2157 (June 17, 2016)....28
Robare Group, Ltd., Advisers Act Rel. 4566, 2016 SEC LEXIS 4179 (Nov. 7, 2016)....13
Robert Radano, Advisers Act Rel. 2750, 2008 SEC LEXIS 1504, *30 (June 30, 2008)....8
Timbervest, LLC, Advisers Act Rel. 4197, 2015 SEC LEXIS 3854 (Sept. 17, 2015)....9
Wendy McNeeley, CPA, Exchange Act Rel. 68431, 2012 WL 6457291 (Dec. 13, 2012)....18

Administrative Decisions and Orders

James A. Winkelmann, Sr., Initial Decision Release No. 1261, 2018 SEC LEXIS 2836 (October 15, 2018) .... passim

Lawrence LaBine, Initial Decision Rel. 973, 2016 SEC LEXIS 795 (Mar. 2, 2016) 11

Statutes

Investment Advisers Act of 1940, Section 206(1), 15 U.S.C. § 80b-6(1) 9, 14

Investment Advisers Act of 1940, Section 206(2), 15 U.S.C. § 80b-6(2) 9, 14, 15

Investment Advisers Act of 1940, Section 206(4), 80b-6(4) 24

Investment Advisers Act of 1940, Section 206, 15 U.S.C. § 80b-6 .... 8, 9, 10, 11

Securities Act of 1933, Section 17(a), 15 U.S.C. § 77q(a) 15

Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. § 78j(b) 15

Rules

Investment Advisers Act of 1940, Rule 206(4)-2, 17 C.F.R. § 275.206(4)-2 24

Investment Advisers Act of 1940, Rule 206(4)-7, 17 C.F.R. § 275.206(4)-7 24

I. Introduction

The Division's opening brief demonstrated that the evidence in this case proves Winkelmann violated the antifraud provisions by making varied misrepresentations and omissions throughout four securities offerings directed at his advisory clients. Winkelmann's response fails to rebut that evidence, while continuing to offer lame excuses for his conduct. Winkelmann does so by repeatedly misstating or ignoring evidence, failing to address on-point case law, and blaming his former attorneys.

Winkelmann's strident response shows he still does not appreciate that, as CEO and control person of Blue Ocean Portfolios, LLC ("BOP"), he was responsible for the false statements and omissions he made to his clients and other investors. Refusing to accept any responsibility for his investors' losses, Winkelmann denies he had a duty to disclose conflicts or place his client-investors' interests before his own. Winkelmann goes so far as to claim he "met or exceeded every legal standard" and "did everything right." (Respondents' Brief ("Resp. Br.") at 1, 57).

For these reasons and those discussed below, the Commission should find that Winkelmann violated the antifraud provisions. The Commission should likewise follow its longstanding practice of imposing strong sanctions against advisers who fail to disclose conflicts and otherwise defraud their advisory clients.

II. Winkelmann's Concealment of Binkholder's Bar Violated the Antifraud Provisions

It is undisputed Winkelmann concealed from investors in the second and third offerings that his business partner and BOP's co-founder had been barred from being an investment adviser. Winkelmann also undisputedly never told investors that Binkholder was barred for engaging in analogous conduct as Winkelmann: selling securities in his businesses to advisory clients while failing to disclose the attendant conflicts. Winkelmann seeks to excuse this

concealment by downplaying Binkholder's role at BOP and portraying him as a mere "lead generator" with "limited involvement." (Resp. Br. at 36). But the evidence shows that Binkholder's position at and importance to BOP were much more substantial, and that Winkelmann consistently touted Binkholder to investors.

Given Binkholder's key position at BOP, Winkelmann's representations emphasizing Binkholder's importance, and the fact that Binkholder's bar confirmed to Winkelmann the illegality of offering clients securities without disclosing conflicts, Winkelmann was required to disclose Binkholder's bar. Winkelmann's failure to do so constitutes fraud.

A. Binkholder's Important Role at BOP

Winkelmann wants the Commission to believe Binkholder was merely a "lead generator" with minimal importance to BOP. But overwhelming evidence demonstrates Binkholder's important roles. For instance, Winkelmann ignores that Binkholder cofounded and co-owned BOP, and was an adviser representative from BOP's inception through the eve of the first offering. (Stip. ¶¶32, 33; Tr. 416:14-417:11).

Nevertheless, Winkelmann claims Binkholder had only "limited involvement" with BOP when Winkelmann began offering Units. (Resp. Br. at 36). But even after transitioning from being an owner/adviser representative, Binkholder's "separation" was more form than substance. Binkholder remained very much involved with BOP's business, and was in no way limited to a marketing role.

Despite their purported "separation," Binkholder and Winkelmann continued to share office space and employees, the two "worked closely" together, and both received equal compensation from BOP. (Tr. 416:3-7; RX-4, p. 16; DX-346, pp. 17, 32; DX-5, §1.02). Binkholder remained intimately involved in BOP's financial decision-making, and Winkelmann

continued to share with Binkholder BOP's detailed internal financial information. (DX-70).[1] Winkelmann involved Binkholder in key structural decisions such as whether to offer Units, initiate the second offering, and raise their compensation.. (DX-327 at 107:13-108:3; DX-83). Binkholder also participated in meetings where Winkelmann offered Units to investors. (DX-327 at 114:9-14). Winkelmann further confirmed that Binkholder's position at BOP included discussing "investment procedures, which index funds we would use...compensation for employees [and] various strategies of [BOP]." (DX-249 at 24:23-25:18).

Putting aside Binkholder's multifaceted role at BOP and focusing solely on his marketing function, Binkholder was still of great importance to BOP. Binkholder was critical in bringing in new clients, as his radio show generated between 70 to 100 client leads *per week*. (DX-327 at 116:6-12). In Winkelmann's words, because Binkholder's show "had a lot of listeners," BOP "got a lot of leads. A lot of leads were converted to [BOP] clients." (*Id.* at 116:15-18). Winkelmann similarly admitted Binkholder's "show was *very successful in that it generated a plethora of leads* from people wanting to know more about low-cost index funds, *conflicts of interest*, and other industry topics." (DX-346, p. 6) (emphasis added). Winkelmann even concedes that when BOP finally stopped sponsoring Binkholder's show, after learning of Binkholder's criminal investigation, it was a "*material* change to [BOP's] business." (DX-327 at 105:16-22) (emphasis added).

Binkholder's compensation further establishes his importance to Winkelmann and BOP. Winkelmann paid Binkholder the same compensation he received, and raised their pay in lockstep.

[1] Winkelmann's contemporaneous communications show Winkelmann considered Binkholder a part of BOP and involved him in BOP's financial decision-making. (DX-70 ("*Our* burn rate is higher than *we* want – the AUM is lower than *we* projected...*We* need to stop spending and start closing!) (emphasis added)).

(DX-5, § 1.02; DX-83). BOP fully reimbursed Binkholder for the production costs related to his radio show. (DX-5, § 1.01). Winkelmann even gave Binkholder a BOP corporate credit card. (DX-327 at 300:20-22). So important was Binkholder that Winkelmann had BOP take out a $2 million insurance policy on Binkholder's life, and allowed Binkholder to choose a 50% beneficiary. (DX-5, § 104(b)(ii); DX-106, § 103(b)(ii)).

B. Winkelmann Repeatedly Touted Binkholder to Investors

Consistent with Binkholder's important role, Winkelmann systematically touted to investors BOP's relationship with Binkholder. For instance, BOP's Form ADV brochure disclosed BOP's marketing agreement with Binkholder and sponsorship of his radio show. (DX-13, PDF p. 11). Similarly, the first three offering memoranda emphasize BOP's sponsorship of Binkholder's show and describe how the show drives potential clients to BOP. (RX-1, p. 8; RX-2, p. 10; RX-3, p. 8). Each memorandum also attaches BOP's Marketing Agreement with Binkholder as an exhibit.[2] (RX-1, p. 26; RX-2, p. 34; RX-3, p. 32). The first two memoranda represent BOP "will use a substantial portion of the proceeds of this offering and future cash flows to fund media buys for both [BOP] and [Binkholder's radio] Show." (RX-1, p. 8; RX-2, p. 12). Likewise, the third memorandum represents that offering proceeds will be used to "syndicate" Binkholder's show to other markets. (RX-3, pp. 4-5).

Further confirming Binkholder's importance to investors, the first three memoranda disclose that Binkholder had been providing financing to BOP, and the first memorandum additionally discloses that BOP anticipates issuing membership units to Binkholder (*i.e.*, again

[2] Winkelmann's claim that Binkholder was immaterial to BOP is belied by the fact Winkelmann disclosed the relationship in BOP's Form ADV and attached Binkholder's Marketing Agreement to the first three offering memoranda. If Binkholder's relationship with BOP was immaterial, why provide investors with the contract governing that relationship?

making Binkholder a BOP owner). (RX-1, p. 10; RX-2, pp. 14-15; RX-3, p. 12). The memoranda additionally promote the book Winkelmann and Binkholder co-authored: "The 401(k) Conspiracy." (RX-1, p. 9; RX-2, p. 13; RX-3, p. 10). Moreover, the memoranda describe Binkholder before and more prominently than the other radio host in the "Sales and Marketing" sections,[3] and the descriptions of Binkholder come before the descriptions of BOP's "Key Vendors and Relationships" and "Key People and Backgrounds." (RX-1, pp. 8-14; RX-2, pp. 10-19; RX-3, pp. 7-17).[4] Beyond the offering materials, Winkelmann and his employees promoted Binkholder's show in their email signature blocks. (DX-99, DX-129; DX-130; DX-131; RX-106, pp. 492-493, 525, 1089, 1097-98, 1099, 1189-90, 1195-96, 1197-98, 1199-1200). Not surprisingly, several investors testified they first learned of BOP through Binkholder. (Tr. 10:24-11:24, 339:12-24, 620:2-12).

C. Binkholder's Bar, and the Reasons for the Bar, Were of Paramount Importance to Investors

Winkelmann claims that "no reason" existed to disclose Binkholder's bar to investors, the majority of whom were Winkelmann's clients. (Resp. Br. at 37). In the first instance, Binkholder's bar was material because any reasonable investor would want to know that BOP's cofounder, Winkelmann's business partner, and a central figure at BOP, had engaged in serious misconduct at the expense of advisory clients. *SEC v. Bolla*, 401 F. Supp. 2d 43, 72 (D.D.C. 2005) ("Confronted with the fact that his/her investment adviser had been barred, the reasonable

[3] Again showing Binkholder's materiality, BOP's Form ADV disclosed its relationship with Binkholder but not the other radio host. (DX-13).

[4] Winkelmann argues that because the memoranda did not list Binkholder in the "Key Vendor" or "Key People" sections, he was not important to BOP. (Resp. Br. at 4). This ignores that the memoranda discuss Binkholder first, and devote as much or more space to Binkholder *alone* than they do to the *entire* Key Vendor sections. (RX-1, pp. 8-10; RX-2, pp. 10-14; RX-3, pp. 7-11). And the "Key People" sections describe BOP *employees* which, per the bar order, Binkholder was precluded from being. (RX-1, pp. 14-15; RX-2, pp. 19-20; RX-3, pp. 17-18).

investor would likely question the firm, wondering whether the other investment advisers could also be trusted to fulfill their ethical obligations").

Confirming the materiality of Binkholder's relationship with BOP, investors Grau and Swardson testified they would have wanted to know about Binkholder's regulatory issues before investing. (Tr. 23:10-24:7, 626:20-627:13). This testimony is consistent with common sense. Any reasonable person purchasing an adviser's securities would want to know that the adviser's spokesman and centerpiece of its marketing campaign was a defrocked adviser. Knowing this fact would cause a reasonable investor to question the judgment of the adviser's management. Indeed, none of the investor witnesses called by Winkelmann testified that Binkholder's bar did not matter to them.

Beyond the fact of Binkholder's bar being of paramount importance to investors, the reason for the bar was of equal or greater importance. Any reasonable investor would want to know that an adviser selling clients securities in its business without disclosing conflicts – as Winkelmann did with the Units – was illegal and could result in the adviser/issuer being barred. Because the investors relied on Winkelmann's and BOP's performance to drive their returns, investors would want to know if Winkelmann was engaging in conduct that could result in him being removed from the company, BOP being shut down, or (at the very least) drag BOP into expensive regulatory investigations.[5]

The Division's expert, Professor Laby, explained why failing to disclose Binkholder's bar violated industry standards and norms:

> Winkelmann's failure to disclose Binkholder's bar is particularly troublesome because of the reasons for the bar. Binkholder was barred because he sold securities in his own

[5] The latter of these possibilities materialized following the third offering, when Missouri regulators began investigating BOP. (DX-212)

> business to advisory clients and failed to disclose the resulting conflict of interest. The conduct giving rise to the bar, in other words, was similar to Winkelmann's conduct vis-à-vis the Royalty Unit offering. Winkelmann's and BOP's failure to disclose Binkholder's bar, given the prominence of BOP's sponsorship of Binkholder's radio show in the offering materials and Binkholder's role in soliciting new advisory clients and Royalty Unit investors, is inconsistent with their fiduciary duty of loyalty and fiduciary duty of honesty owed to clients.

(DX-363, p. 25). Winkelmann provided no testimony, expert or otherwise, to rebut Professor Laby.

D. Winkelmann Ignores *SEC v. Bolla*, On-Point Authority Involving Similar Facts

Despite its analogous fact pattern, Winkelmann, like the ALJ, simply ignores the Division's repeated citations to *SEC v. Bolla* and its affirmance in *SEC v. Wash. Inv. Network*, 475 F.3d 392 (D.C. Cir. 2007). Winkelmann fails to acknowledge that *Bolla*, just like this case, involved an advisory firm's founder who concealed from clients that his co-founder was barred shortly after the firm's formation and was then removed from ownership. 401 F. Supp. 2d at 48, 50, 56-57. Like *Bolla*, Winkelmann would discuss Binkholder with clients without informing them about Binkholder's bar. *Id.* at 56. Specifically, Winkelmann admitted that when clients asked him about Binkholder's whereabouts, rather than informing clients of the bar, he simply told them that Binkholder "is pursuing other business activities and no longer associated with [BOP]." (DX-249, at 66:9-67:8).[6] Moreover, Winkelmann affirmatively touted Binkholder and his contributions to BOP in the offering memoranda and in emails to investors, again without disclosing the bar.

As in *Bolla*, these positive statements about Binkholder, made while trying to sell Units, "triggered an affirmative obligation" to disclose Binkholder's bar and the reasons for his bar.

[6] Investor Swardson, who learned of BOP through Binkholder, found it "quite disturbing" that Winkelmann never disclosed Binkholder's bar. (Tr. 23:10-18).

Bolla at 70-71 (by not disclosing his cofounder's bar, the remaining cofounder provided clients "an inaccurate, skewed version of WIN as an investment adviser entity").[7] Affirming *Bolla,* the D.C. Circuit recognized that the adviser's fiduciary "duty included disclosing Bolla's bar" and that when "such a critical player in an investment advisory firm is barred from the business on account of misconduct, the firm has a fiduciary duty to disclose that fact to its clients." *Wash. Inv. Network*, 475 F.3d at 404-405. Likewise, in later barring the *Bolla* adviser, the Commission reiterated the materiality of the co-founder's bar. *Robert Radano*, Advisers Act Rel. 2750, 2008 SEC LEXIS 1504, *30 (June 30, 2008) ("the issue is whether those clients were notified about Bolla's bar so that they could make an informed decision about whether to continue their relationship with the Firm, notwithstanding the bar. Radano's failure to provide that notification prevented clients from making such an informed decision.").

III. Winkelmann Failed to Disclose Conflicts and Falsely Represented His "Alignment" With Investors

The Division's opening brief detailed how Winkelmann violated the antifraud provisions by not disclosing conflicts to the Unit investors who were BOP clients, and by misrepresenting his "alignment" and lack of conflicts with all Unit investors. In response, Winkelmann claims he did not owe fiduciary duties to clients and, regardless, no conflict existed.

A. Advisers Act Section 206 Applies to Winkelmann's Offer of Units to Clients

Winkelmann acknowledges investment advisers owe fiduciary duties to clients, including the duty to disclose "all material conflicts." (Resp. Br. at 30). Seeking to avoid the application of this bedrock principle of securities law, Winkelmann claims that when offering Units to clients he

[7] Even if Winkelmann had stayed silent regarding Binkholder, given Binkholder's importance to BOP and the fact that Binkholder's bar involved analogous conduct to the Unit offerings, Winkelmann was required to disclose the bar to clients as part of his fiduciary obligation to disclose all material facts. *Bernerd Young*, Exchange Act Rel. 774421, 2016 SEC LEXIS 1123, *38-39 (Mar. 24, 2016).

did so "outside of the investment advisory relationship and without any recommendation." (*Id.* at 31-32). In Winkelmann's view, if he did not affirmatively recommend Units to clients, Section 206 cannot apply to his conduct.

It is telling that Winkelmann cannot cite a single case holding that Section 206 does not apply to securities transactions between an adviser and its clients. To the contrary, Sections 206(1) and 206(2) broadly prohibit defrauding "any client or prospective client." Those provisions contain no limitation of the sort suggested by Winkelmann, such as a restriction that fraud must occur in the course of the adviser providing investment advice.[8]

On the other hand, the Commission had long recognized the "broad scope of Section 206." *Timbervest, LLC*, Advisers Act Rel. 4197, 2015 SEC LEXIS 3854, *49-51 & n.63 (Sept. 17, 2015) (citations omitted). In *Timbervest*, the Commission rejected the adviser's argument that Section 206 did not apply because the investments at issue involved real estate, as opposed to securities:

> Where an investment adviser has an advisory relationship with a client, the Act provides (among other things) that "[i]t shall be unlawful for any investment adviser . . . to employ any device, scheme, or artifice to defraud any client." This language is not limited to fraud in connection with a securities transaction. Had Congress intended such a limitation, it would have said so. Thus, once an investment advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the advisory relationship. We believe that our long-standing interpretation of the scope of the Advisers' Act is appropriate because a contrary reading, which would allow investment advisers to exploit the advisory relationship by engaging in misconduct such as that at issue in this matter, would undermine the "climate of fair dealing which is so essential to maintain public confidence in the securities industry."

Id. at *51-52 (citations omitted).

The Commission then articulated sufficient elements for Section 206 to apply: (a) respondents were investment advisers; (b) the defrauded clients had entered into advisory

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[8] The statute's reference to "potential" clients further reinforces the notion that advisers are precluded from misconduct beyond fraudulently offering investment advice.

agreements with respondents; (c) the agreements empowered respondents to render advice regarding securities; and (d) respondents had provided the clients advice about securities. *Id.* at *53. Once these prerequisites were met, subsequent fraud against the advisers' clients was actionable under Section 206. *Id.* In this case, it is undisputed that each of these elements are satisfied for the eighteen BOP clients who purchased Units.

The Commission affirmed this concept in *Harding Advisory LLC*, Advisers Act Rel. 4600, 2017 SEC LEXIS 86 (Jan. 6, 2017). In that case, respondents argued that Section 206 did not apply because their advisory clients were "essentially controlled" by the investment bank that structured and marketed the collateralized debt obligation ("CDO") investments at issue, which were managed by respondents. The Commission rejected this argument, finding that the test for Section 206 to apply was whether the adviser's conduct ran contrary to its *client's* interests. *Id.* at *39-40 ("despite the involvement of Merrill as the originator of the CDOs, Harding owed a fiduciary duty to the legally distinct SPVs [who were the adviser's clients]... Harding owed the SPVs the same duty of care that Harding owed any other advisory client, without regard to how the SPVs originated.").

Professor Laby offered unrebutted expert testimony that – even assuming Winkelmann told clients he could not recommend the Units – Winkelmann could not dispense of his fiduciary obligations because he did not expressly and unambiguously disclose he was no longer acting as their adviser. (Tr. 319:22-320:20). Similarly, Laby testified that, under the same assumption, Winkelmann acted as an adviser because he "implicitly" recommended the Units by virtue of presenting the Units, as opposed to other investment options, to clients. (Tr. 326:11-328:22).

The ALJ reached a similar conclusion, correctly recognizing that adopting Winkelmann's position, that securities transactions between an adviser and its clients fall outside the broad scope of Section 206, would frustrate the protections at the heart of the Advisers Act:

> By the very language of the Advisers Act, which prohibits certain conduct by an investment adviser with respect to "any client or prospective client," an investment adviser cannot take off his fiduciary hat in exchange for a non-fiduciary hat when it suits him...It would be inconsistent with the purposes of the Advisers Act to permit an adviser to disown his fiduciary obligations especially with respect to an investment he is intimately involved with, as Winkelmann was here. Winkelmann repeatedly went to his advisory clients, told them about the opportunity, and, in effect, attempted to persuade them to invest, typically by using funds in their advisory accounts. While Winkelmann caveated his overtures with the assertion that he was not giving advice or making a recommendation, he nonetheless had a fiduciary obligation to each client in presenting them the investment opportunity to purchase with their BOP-managed advisory account, to disclose conflicts. To find otherwise would mean that all investment advisers, simply by telling a client it is not advice or a recommendation, can now present any other investment opportunity to them, fail to disclose conflicts of interest, and empty the advisory clients' accounts into such investments.

(Initial Decision Following Remand, Initial Decision Release No. 1261 (October 15, 2018) ("R.I.D.") at 74).[9]

Consistent with the reasoning of Professor Laby and ALJs Patil and Murray, the Commission should reject Winkelmann's invitation to severely narrow the Advisers Act's scope and investor-protecting measures.

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[9] Chief ALJ Murray reached a similar conclusion in *Lawrence LaBine*, Initial Decision Rel. 973, 2016 SEC LEXIS 795 (Mar. 2, 2016) (decision became final on April 22, 2016, Advisers Act Rel. No. 4376). In response to an argument similar to the one Winkelmann now makes, Chief Judge Murray found: "It would be inconsistent with the remedial purposes of the Advisers Act to hold that LaBine could have 'switched hats' and disclaimed the fiduciary duties of an adviser without giving notice to his clients. LaBine's proposed 'transaction-by-transaction' approach has no basis in the statute, and it would be impossible under such approach for clients to ascertain what role their financial professional was playing." *LaBine* at *82.

B. Winkelmann Violated the Advisers Act by Failing to Disclose Conflicts

Winkelmann argues that, assuming the Advisers Act applies, no violation occurred because no conflicts existed. As detailed in the Division's opening brief, Winkelmann faced the recurring conflict of whether to deploy BOP funds in ways that would (a) benefit investors, such as by increasing their monthly payments or by deploying BOP's resources to increase BOP's revenues; or (b) increase his own compensation. It is undisputed that Winkelmann never disclosed this conflict or that the conflict manifested itself through Winkelmann continuously raising his compensation at investors' expense.

Winkelmann claims that no conflicts existed for two reasons. First, he argues that investors' minimum payments were based off BOP's cash receipts, before expenses (such as his salary) were taken into account. (Resp. Br. at 33). Second, he posits that BOP expressly disclosed there was no set timeframe for investors to be repaid. (*Id.*).

As the ALJ correctly noted, both excuses fail. In the first instance, a conflict existed because Winkelmann faced the recurring decision of whether to spend investor funds in ways that would increase revenues, such as advertising, or whether to spend investor money for his own personal benefit:

> as investments came in, although Winkelmann represented that those proceeds would be spent to generate revenue, Winkelmann did not disclose that as a result of that increased revenue, he could and did increase his and Binkholder's compensation. Although the fact that they received compensation from [BOP], in general, was either disclosed in some form or could be safely assumed, investors could not reasonably have known that they were being courted, in part, to hand over funds that could go directly into Winkelmann's pocket or that of his entities.

(R.I.D. at 71).

The ALJ recognized the conflict independently exists due to Winkelmann's discretion on whether to make returns to investors beyond the stated minimums, or to keep any excess funds for himself:

> there was an actual, continuing conflict between [investors'] interests and Winkelmann's, who could always elect to increase his compensation rather than returning more than the minimum to investors...Respondents point to ten separate disclosures, including the variable repayment schedules, concerning the "conditional" nature of additional payments...But, what is conspicuously absent from all those disclosures is the inherent conflict between Winkelmann's ability to take, for himself, both the initial investments, *and revenues after the investors' guaranteed minimum*. Either action by Winkelmann would decrease funds available to grow the business through advertising or pay investors a higher rate of return.

(R.I.D. at 71-72 (emphasis added)).

Winkelmann nevertheless argues that no conflict existed because he warned investors they may not receive more than the minimum payout percentages. (Resp. Br. at 4-6). While the offering memoranda contained boilerplate disclaimers that BOP may not pay more than the minimum, the memoranda were replete with charts showing significantly higher payout percentages leading to accelerated payback timeframes. (*See, e.g.*, RX-1, p. 11; RX-2, pp. 6, 17; RX-3, pp. 14, 15; RX-4, pp. 14, 15). The memoranda also contained representations such as: "Investors should expect the bulk of their return in years 3-5," which would have required consistent payout percentages much higher than the minimum. (*See, e.g.*, RX-3, p. 14; RX-4, p. 14). The memoranda likewise represented BOP sought to increase the percentages, but concealed that Winkelmann's salary increases would prevent BOP's ability to do so. (*See, e.g.*, RX-1, p. 111 ("Right to at Least 0.25% of Monthly Cash Receipts. Plan is to be higher! Investors get repaid first!"); RX-2, p. 16 ("the current plan (although not required) is to pay at least 50% of the profits, which we expect will exceed 0.25% of revenue.")).

Because Winkelmann undisputedly did not disclose conflicts, he violated a central tenet of the Advisers Act. *See, e.g., Robare Group, Ltd.*, Advisers Act Rel. 4566, 2016 SEC LEXIS 4179, *17 (Nov. 7, 2016) ("the '[f]ailure by an investment adviser to disclose potential conflicts of

interest to its clients constitutes fraud within the meaning of Sections 206(1) and (2).'") (citations omitted).

C. Winkelmann Misrepresented His Alignment with Investors

The Division's opening brief detailed how the offering memoranda falsely represent that the Units "align" "all interests" of Winkelmann and the investors. (*See, e.g.*, RX-1, pp. 5, 15; RX-2, p. 6, 15, 22; RX-3, pp. 4, 21; RX-4, pp. 4, 13, 21). The same reasons establishing the existence of a conflict likewise demonstrate that Winkelmann's claims of alignment with investors were false and misleading. There could not be "alignment" in the recurring instances where the interests of Winkelmann and the investors directly conflicted. As discussed above, Winkelmann routinely used BOP money – money that could have been used to repay or otherwise benefit investors through deployment in advertising or other revenue-generating activities – to increase his compensation, pay personal debts, or fund his other companies.

IV. Winkelmann Violated the Antifraud Provisions by Misrepresenting BOP's Success in Raising Funds and Repaying Investors

In its opening brief, the Division identified various direct communications where Winkelmann falsely represented the amount of money BOP had raised and repaid to investors:

- Winkelmann's emailing a client and falsely claiming BOP's first offering had raised $650,000 when, in reality, it had only raised $425,000 (DX-50; DX-455);
- Winkelmann's communications to clients falsely representing that BOP had raised $325,000 to $400,000 in the third offering when, at the time, BOP had only raised $250,000 (DX-199, p. 2; Tr. 711:12-712:6; DX-203; DX-455); and
- Winkelmann's August 2012 email to a client representing investors had been repaid $4,961.95 per Unit, when, in reality, they had only been repaid $2,671.98 (DX-167; DX-454; Tr. 682:3-22).[10]

[10] The ALJ did not, as Winkelmann claims, find that these communications "were not a violation." (Resp. Br. at 38). Instead, the ALJ noted the falsity of each of these statements, but did not address them in its "Conclusions of Law." (R.I.D. at 16, 19, 20).

Winkelmann does not contest that these emails contained false information. Instead, he offers the legally incorrect excuse that his emails "were not false or misleading because [he] believed them to be true and accurate." (Resp. Br. at 39). But Winkelmann's subjective belief of the emails' accuracy is irrelevant to whether they were objectively false. Moreover, the only citations Winkelmann provides relate to the October 2012 emails. (*Id.* at 39 n.183 (citing Tr. 710:7-18, 1365:9-1366:1)). Winkelmann cites no evidence to support his claims that he subjectively believed the May 2011 (DX-50) and August 2012 (DX-167) emails were accurate. However, even crediting Winkelmann's argument, Winkelmann's belief that the emails were correct would have no impact on the Division's negligence-based charges under Advisers Act Section 206(2) and Securities Act Sections 17(a)(2) and (3).

Regarding the false representation of investor repayments in DX-167, Winkelmann claims the email was not sent in connection with the offer or sale of any security. (Resp. Br. at 39). But his email's plain language touts the Units and asks if the investor wanted to review offering materials. (DX-167). Moreover, even if the email was somehow beyond the bounds of Sections 10(b) or 17(a), the email violates the Advisers Act's antifraud provisions because Winkelmann sent the false email to a client. (Tr. 546:11-18, 682:3-22).

Winkelmann further argues these direct representations to clients are not fraudulent because the offering memoranda provided curative disclosures. (Resp. Br. at 40). But Winkelmann does not cite to any disclosures in the memoranda relating to the subject matter of the emails: the amount of funds raised by BOP or returned to investors. Indeed, the memoranda contain no such disclosures, and Winkelmann's false statements were never "corrected."

Winkelmann's last attempt to excuse his fraudulent emails is to claim the non-reliance provisions of the Subscription Agreements mean the investors could not have relied on any

representation in the emails (and could only rely on the offering memoranda).[11] (Resp. Br. at 40). However, the non-reliance provisions offer no defense, because reliance is not an element to the Division's fraud claims. *See, e.g., Dennis Malouf*, Advisers Act Rel. 4463, 2016 SEC LEXIS 2644, *42 and n.70 (July 27, 2016); *SEC v. True N. Fin. Corp.*, 909 F. Supp. 2d 1073, 1097 (D. Minn. 2012) (integration clause in subscription agreement no defense in SEC action).

V. Winkelmann Made False Statements and Omissions Regarding BOP's Advertising Ratios

A. Winkelmann Failed to Disclose BOP's Changing Methodologies or His Cherry Picking

The Division's opening brief showed how, throughout the four offerings, BOP changed the methodology purportedly used to calculate the advertising ratios Winkelmann represented to investors. The Division further demonstrated that Winkelmann never disclosed: (a) the changing methodologies or (b) that he selected the ratios from multiple available options, and always chose ratios that made BOP look better.

In response, Winkelmann claims that BOP disclosed its methodology. Winkelmann points to the offering memoranda generally describing the ratios as advertising spending for a period divided by new recurring revenues generated by that advertising. (*See, e.g.*, RX-1, p. 9; RX-2, p. 5; RX-3, p. 3). But the memoranda never disclose BOP's methodology for determining what revenues were "generated" from a period of advertising, or that the methodology changed from offering to offering. The memoranda also do not disclose that the ratio fluctuates wildly depending on BOP's chosen methodology to determine the "generated" revenues.

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[11] Winkelmann's citation to the Subscription Agreements' non-reliance provisions is puzzling. Given the absence of disclosure in the offering memoranda, Winkelmann claims the only way he conveyed to clients that he was not acting as their adviser, and did not owe fiduciary duties when selling Units, was orally or in letters. If so, the non-reliance provisions of the Subscription Agreements would nullify these purportedly prophylactic (for Winkelmann) disclosures.

BOP used two distinct methodologies that led to sharply divergent ratios: (1) revenues generated *during* a period of advertising; and (b) revenues *resulting from* a period of advertising, regardless of when BOP booked the revenues. (Div. Br. at 25-28). Tellingly, Winkelmann does not even acknowledge this critical distinction.[12] Winkelmann also selected from various "look-back" periods, ranging from one month to one year, which similarly had significant impact on the resulting ratio. (Div. Br. at 25-30). Again, Winkelmann does not deny that by changing the look-back period from offering to offering, Winkelmann was able to arrive at better ratios.

Rather than address the merits of the Division's appeal, Winkelmann misstates the Division's argument. Winkelmann posits the Division's case is premised on proving the ratios presented to investors were objectively false. (Resp. Br. at 11 n.55, 29-30). Not so. Rather, the Division bases this appeal on Winkelmann failing to disclose: (a) BOP's *changing* methodologies; (b) that Winkelmann's choice of methodology led to vastly different results; and (c) Winkelmann's cherry-picking the best available ratio from a variety of options based on the different methodologies.

The Division's opening brief cited authority holding that an issuer omits material information when it fails to disclose, for key business metrics presented to investors, that it calculated the metric using changing methodologies or choosing from available methodologies yielding significantly different results. *In re BP p.l.c. Secs. Litig.*, 2016 WL 3090779, *15 (S.D. Tex. May 31, 2016); *Von Hoffmann v. Prudential Ins. Co.*, 202 F. Supp. 2d 252, 261 (S.D.N.Y.

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[12] To the extent Winkelmann cites to his expert, Palubiak, to support his advertising ratio arguments, the Division notes that Palubiak did not even know which methodology BOP employed. Indeed, Palubiak operated under the mistaken assumption that BOP calculated the ratio presented to investors based on revenues *resulting from* a period of advertising. (Tr. 1142:25-1143:19, 1151:5-12).

2002)). Winkelmann fails to even acknowledge these decisions, and offers no authority to rebut their holdings.

Instead, Winkelmann claims the advertising ratios disclosed to investors were not material. (Resp. Br. at 41). Winkelmann makes this argument despite the offering memoranda's representations that the ratio was the "key driver" for BOP's business. (Tr. 448:18-449:2; RX-1, p. 9; RX-2, p. 16; RX-3, p. 13; RX-4, p. 13). Consistent with these representations of the ratios' importance, investors Grau, Buckowitz, and Swardson testified the ratio was important to their investment decision and they would have wanted to know if the ratios were misstated. (Tr. 18:2-23, 19:6-17, 346:9-347:5, 628:20-629:15). And, even crediting Winkelmann's claims that BOP had many "correct" or "real" ratios to choose from, Winkelmann never disclosed this to investors.

Winkelmann also complains that the Division failed to precisely detail in the OIP its claims that Winkelmann concealed his changing methodologies and cherry-picking. (Resp. Br. at 28-29). However, the Division's fraud theory is consistent with the OIP's allegation that each offering memorandum "contained material misrepresentations about [BOP's] advertising [ratio]." (OIP ¶6). The OIP thus makes clear that it premises fraud charges on misrepresentations about the advertising ratios, and Winkelmann had ample opportunity to rebut the Division's fraud theories throughout this litigation. Thus, Winkelmann had sufficient notice of, and ability to defend, the charges against him. *Wendy McNeeley, CPA*, Exchange Act Rel. 68431, 2012 WL 6457291,*9 (Dec. 13, 2012) ("the standard for determining whether notice is adequate is whether 'the respondent "understood the issue" and "was afforded full opportunity" to justify [her] conduct during the course of the litigation.'") (citations omitted).[13]

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[13] Winkelmann's gripes about the OIP are the product of his own gamesmanship. Indeed, Winkelmann could not explain during investigative testimony the discrepancies between the advertising ratios presented in the offering memoranda and BOP's internal documents underlying

B. Winkelmann Falsely Represented BOP's 2011 Annual Ratio in the Second, Third, and Fourth Memoranda

The ALJ correctly observed: "Winkelmann was unable to explain how BOP arrived at the 0.79 advertising ratio for 2011 in his investigative testimony, prehearing brief, expert report, or post-hearing brief." (R.I.D. at 32).[14] Just as Winkelmann was unable to provide evidence to the ALJ supporting BOP's 2011 ratio, Winkelmann still fails to establish a basis for that figure. Indeed, Winkelmann's brief cites no record evidence showing how he selected the 2011 annual ratio for the second, third, and fourth memoranda.

All that Winkelmann offers is two charts showing BOP's *monthly* ratio over time. (Resp. Br. at 18).[15] But no witness testified these charts formed the basis of BOP's 2011's *annual* ratio, and Winkelmann cites no evidence showing that he used those charts when representing the 2011 annual ratio to investors. Tellingly, Winkelmann doesn't claim those charts reflect BOP's annual ratio, and acknowledges the charts comes from monthly reports. (*Id.* at 17-18). Perhaps this is because Winkelmann himself rejected the notion that he premised the 2011 annual ratio on a monthly figure. Rather, Winkelmann testified that he based the 2011 ratio on *year-long*

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those ratios. (Tr. 447:2-478:15, 1451:2-17). When later given the opportunity to defend himself through a Wells submission, he failed to explain how he arrived at the ratios. (DX-346). He then waited until his prehearing brief to present evidence or advance any argument on this issue.

[14] The OIP expressly alleges that Winkelmann misrepresented the 2011 annual ratio. (OIP ¶¶7-8).

[15] The first chart comes from RX-36, page 2. Note how the factor over time corresponds to the *monthly* factors documented on RX-36, page 1. (Tr. 881:5-20). Further, RX-36 does not contain any *annual* figures. Regarding the second chart on page 18 of Winkelmann's brief, Winkelmann does not cite any evidence supporting that chart, but claims the chart comes from a *monthly* advertising report. Nevertheless, the *monthly* factors contained on the second chart are consistent with the *monthly* factors contained in the first chart.

advertising and revenue data. (Tr. 662:13-21).[16] The fact that Winkelmann attempts to address a complete absence of evidence supporting the 0.78/0.79 ratio by offering an explanation he directly refuted at trial confirms that his explanations lack credibility and should be rejected.

Winkelmann again misstates the evidence and attempts to mislead the Commission by arguing that disclosures in the second offering memorandum support a 0.78 annual ratio for 2011. (Resp. Br. at 18). Notwithstanding that no witness testified to this effect at trial, Winkelmann claims the memorandum represents that, in 2011, BOP spent $328,000 on advertising which generated new annual revenues of $404,000, resulting in a ratio of 0.81. (*Id.* (citing RX-2, p. 5)).

However, Winkelmann's revenue number is $200,000 too high, because the $404,000 figure includes both *new revenues* (from clients who retained BOP in 2011) and revenues generated from existing clients who opened accounts *prior to* 2011.[17] Specifically, the second memorandum represents that BOP's annual revenues **increased** "*from* approximately $200,000 at the end of 2010 *to* $404,000 at the end of 2011." (RX-2, BO 9400) (emphasis added).

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[16] Even assuming Winkelmann relied on those charts, the 0.78 ratio would still be false and misleading. First, the chart from RX-36 (the February 2012 report and last report available at the time of the second memorandum) shows a monthly ratio at year-end 2011 of approximately 0.90, not 0.78. Moreover, the charts on page 18 of Winkelmann's brief show elevated monthly ratios earlier in 2011. Even if the 0.78 ratio was based on those charts, investors would have no way of knowing that BOP's ratios from earlier in 2011 were much worse than at year-end or that Winkelmann had cherry-picked the best possible data.

[17] The second memorandum discloses that BOP's ratio is based on "*new* recurring annual revenue," as opposed to revenue generated from existing clients. (RX-2, p. 5) (emphasis added). Further establishing that the second memorandum does not support a 0.78 annual 2011 ratio, Winkelmann's own exhibits demonstrate BOP did not generate anywhere near $404,000 in new revenues during 2011. Specifically, in 2011, BOP's AUM grew $26.2 million, from $32.9 million at year-end 2010 to $59.1 million at year-end 2011. (RX-76). To generate more than $400,000 on $26.2 million new AUM would require BOP to charge in excess of 1.5% management fees, when in reality BOP charged only 0.8%. (RX-1, p. 5). $26,200,000 x 0.008 (the approximate percentage of AUM that BOP earned as fees) = $209,600, a figure consistent with the $204,000 *new* recurring revenues for 2011 reflected in the second memorandum.

As the ALJ correctly observed in rejecting the same argument raised by Winkelmann, the second memorandum reflects that, during 2011, BOP generated *new* recurring revenues of approximately $204,000. (R.I.D. at 32 ("The memorandum also states that during 2011 BOP spent $328,000 in advertising that resulted in $204,000 in new annually occurring revenue")). Accordingly, if Winkelmann is correct that the 2011 spending and revenue figures in the second memorandum are accurate, BOP's annul ratio for 2011 would be 1.61 ($328,000 divided by $204,000) – more than double the 0.78/0.79 ratio represented to investors.

Finally, Winkelmann claims that OCIE accountant Collins' calculations for the 2011 annual ratio are incorrect. Winkelmann argues that the document Collins relied on (DX-159) was created in June 2012, after the second memorandum was issued. (Resp. Br. at 24-26). But Winkelmann testified DX-159 was one of the documents BOP used to track the advertising ratio. (Tr. 487:12-15). Moreover, the 2011 advertising spending information on DX-159 was consistent with two other BOP documents devoted to BOP's 2011 advertising data: (a) DX-86, which was a listing of BOP's 2011 monthly advertising expenditures by vendor; and (b) RX-18, which was a "2011 Advertising Analysis" spreadsheet. (Tr. 492:4-493:5, DX-86, DX-159; RX-18).

Conversely, Winkelmann cannot point to any document he claims accurately reflects BOP's 2011 *annual* data as it existed at the time of the second memorandum. Moreover, Winkelmann concedes that DX-159 contained valid data as of June 2012, and thus offers no rationale why Collins' calculations would be inaccurate to rebut the 2011 annual ratio of 0.78 represented in the third and fourth memoranda, which both post-dated DX-159.[18]

[18] Winkelmann also claims the ratio for a given period would change based on when BOP performed the calculation, as BOP would update its advertising and revenue figures in real-time. (Resp. Br. at 24-25). If this is true, BOP's calculation for the 2011 annual ratio should have changed between the second, third, and fourth memoranda.

VI. Winkelmann's Reliance Defense Fails

The Division's opening brief detailed the varied evidence showing Winkelmann's scienter and negligence. (Div. Br. at 23-24, 39-42). Winkelmann's sole response is to invoke reliance on counsel. Specifically, Winkelmann argues there can be no scienter or negligence because he engaged attorneys to review the offering memoranda and consult on the Units offerings, and because he told his lawyers that clients would be offered Units. The Division's brief showed that Winkelmann's arguments fail because, for a multitude of reasons, he does not meet the requirements for asserting a reliance defense.

Winkelmann cannot even *invoke* the defense for misrepresentations and omissions where he did not consult an attorney: his statements involving the advertising ratios and BOP's success in raising funds and repaying investors. While Winkelmann's brief does not assert that he sought advice regarding Binkholder's bar, the Division demonstrated that any such claim is refuted by Greensfelder's billing invoices, other documentary evidence, and plain common sense. (Div. Br. at 14-15).

Winkelmann offers no rebuttal to the Division's showing that Winkelmann failed to make complete disclosure to counsel. Indeed, Winkelmann does not dispute that he never apprised attorneys he would (a) keep investor payments at minimum levels while steadily increasing his own compensation or (b) use Units proceeds in ways that would not increase BOP revenues or investor returns. While Winkelmann may have told his lawyer he would offer Units to clients, Winkelmann deprived his attorneys of the facts necessary to opine on his nondisclosure of conflicts and representations that his and investors' interests were "aligned."

Winkelmann similarly fails to explain the instances where he ignored his lawyers' advice. Examples include Winkelmann (a) flouting the attorney-prepared Subscription Agreements'

prohibition on selling Units to clients, (b) rejecting attorney edits to the offering memoranda, and (c) refusing to follow attorney advice to disclose legal or disciplinary issues involving BOP personnel (*i.e.*, Binkholder). (Div. Br. at 43-44).

Winkelmann also does not address the cases cited by the Division showing that simply providing attorneys with offering documents and asking for their general review is insufficient to establish the reliance defense. (Div. Br. at 44-45).

Two recent appellate decisions further establish that Winkelmann's reliance defense fails. In *Malouf v. SEC*, the 10th Circuit affirmed the Commission's bar of an adviser who failed to disclose conflicts and misrepresented that no conflicts existed. 2019 U.S. App. LEXIS 24031 (10th Cir. Aug. 13, 2019). *Malouf* rejected the adviser's reliance defense where the adviser: (a) failed to apprise his firm's CCO of the facts giving rise to the conflict, (b) personally reviewed the Forms ADV and website which failed to disclose the conflict, and (c) ignored the advice of the firm's outside consultant. (*Id.* at *17-19, *33). Accordingly, the court rejected the adviser's efforts to "[pin] the blame" on the firm's CCO. (*Id.*).

Robare Group, Ltd. v. SEC likewise involved advisers who failed to disclose conflicts to clients. 922 F.3d 468 (D.C. Cir. 2019). The D.C. Circuit rejected a reliance defense when the advisers never "specifically sought or received advice" on the conflicts disclosures at issue. *Id.* at 478. The court similarly found the reliance defense unavailable because any advice not to disclose conflicts would have been "objectively unreasonable" because the advisers "knew of their fiduciary duty to fully and fairly disclose the potential conflicts...yet repeatedly failed to disclose the source and details of the conflicts." *Id.*

Malouf and *Robare* demonstrate that Winkelmann's reliance defense fails because he (a) never sought or received advice on various issues supporting the Division's fraud allegations, (b)

failed to fully apprise his lawyers of key facts surrounding his conflicts, (c) ignored his lawyer's advice, and (d) would have been objectively unreasonable to follow any advice to not disclose conflicts or Binkholder's bar.[19] Indeed, Winkelmann not only understood his fiduciary obligations and duty to disclose conflicts, he routinely touted those duties to clients and prospective clients. (*See*, Div. Br. at 7-9). Winkelmann also knew that not disclosing conflicts was illegal, as demonstrated by Binkholder's bar. Under these circumstances, simply retaining counsel to review an offering memorandum is insufficient to escape liability for breaching fiduciary duties and defrauding clients and other investors. *SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981) ("Compliance with federal securities laws cannot be avoided simply by retaining outside counsel to prepare required documents.").

VII. Winkelmann Does Not Dispute His Custody Rule Violations

Winkelmann concedes the Division established Custody Rule violations. (Resp. Br. at 55-57). Winkelmann also does not contest the ALJ's findings that BOP failed to follow its policies prohibiting the custody of client assets. Thus, the Commission should sustain the findings that BOP violated, and Winkelmann caused violations of, Advisers Act Section 206(4) and Rules 206(4)-2 and 206(4)-7.

VIII. The Commission Should Impose Strong Sanctions

In arguing against sanctions, Winkelmann generally avers that he didn't break the law, didn't act with scienter, and relied on his lawyers. The Division has rebutted each of those arguments above and in its opening brief.

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[19] Winkelmann insists that the Commission is bound to accept his testimony about his consultations with his lawyer, who died before trial. (Resp. Br. at 34-35). But the ALJ did not make any credibility determinations, and *Malouf* and *Robare* reject Winkelmann's contention that the Commission is bound to accept the ALJ's factual findings. *Malouf*, 2019 U.S. App. LEXIS 24031, *22 n.15; *Robare*, 922 F.3d at 478.

Beyond his conclusory arguments that the *Steadman* factors do not warrant sanctions, Winkelmann makes the unsupported claims that "there is no customer harm" and that investors continue to be repaid. (Resp. Br. at 54). Winkelmann cites no record evidence to back up these naked assertions. He also ignores the Division's proof that investors have very much been harmed: At the time of Winkelmann's October 2016 trial, BOP had only paid investors a combined $525,672.51 on their cumulative $1.4 million investment, while owing them more than $3.3 million. (Stip. ¶¶14-15). It is unclear how BOP can continue to repay investors given that, as reflected in its most recent Form ADV-W, BOP has wound down its business, ceased conducting advisory services, and has no assets.[20]

Winkelmann devotes little attention to arguing against the ALJ's disgorgement award. (Resp. Br. at 57). He merely argues he did not violate the securities laws and should not have to disgorge *any* ill-gotten gains. Refusing to accept any responsibility, Winkelmann claims he "did everything right in this case." (*Id.*)

At minimum, the Commission should order Winkelmann to disgorge the $678,757 he personally benefitted from selling Units. This figure includes the $125,000, $189,200, and $227,557 yearly sums BOP paid to compensate Winkelmann, respectively, in 2012, 2013, and 2014. (Stip. ¶64). It also includes the additional: (a) $41,000 BOP paid Winkelmann's insurance business to compensate Winkelmann for his services to BOP (DX-457; Tr. 774:6-777:15, 1486:1-17); (b) $46,000 BOP paid Winkelmann' ATM business (DX-457); and (c) $50,000 BOP paid to extinguish Winkelmann's personal settlement obligations (DX-170, §3.1(c); Tr. 800:10-23, 802:19-24, 804:20-23).

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[20] A copy of BOP's March 31, 2018 Form ADV-W is attached as Exhibit 1.

Winkelmann relied on selling Units to keep BOP's business afloat and his compensation flowing. Indeed, BOP's financial condition was dire at the time Winkelmann decided to initiate the first, second, and fourth offerings. (Stip. ¶¶ 45-46; DX-83; DX-211; DX-225).[21] Without selling Units, BOP would have had difficulty staying in business, let alone funding the significant and increasing payments made for Winkelmann's benefit.[22] Accordingly, the payments Winkelmann and his companies received from BOP are properly subject to disgorgement. *See, e.g.*, *Bernerd Young*, 2016 SEC LEXIS 1123, *92-93 (ordering disgorgement of percentage of respondent's compensation resulting from illegal conduct); *Gregory Trautman*, Exchange Act. Rel. 61167, 2009 SEC LEXIS 4173, *84-89 (Dec. 15, 2009) (same); *CFTC v. British Am. Commodity Options Corp.*, 788 F.2d 92, 93-94 (2d Cir. 1986) (ordering disgorgement of all compensation received by principal of unregistered commodity broker).

The ALJ generally agreed with the Division's disgorgement framework, subject to a few modifications, and concluded that $415,000 was appropriate disgorgement. (R.I.D. at 87-89). First, the ALJ deducted the $50,000 in BOP funds that Winkelmann used to pay his *personal* settlement obligation in a lawsuit filed against him. The ALJ concluded the settlement payment "benefitted [BOP] and its clients" because the settlement ended a lawsuit filed against both BOP

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[21] While the record does not detail BOP's finances when the third offering began, the fact that Winkelmann initiated the offering despite having serious health problems suggests the offering proceeded out of financial necessity. (Tr. 689:6-691:22).

[22] Winkelmann's dependence on selling Units to fund his compensation is best demonstrated by DX-83, a December 2011 email to Binkholder in which Winkelmann presents two options: (1) cutting the meager $2,000 per month they were receiving at the time, or (2) initiating a second offering and using the proceeds to raise their monthly compensation to $8,500. Another prime example is the disclosure in the fourth memorandum – which Winkelmann concealed from all but three investors – that BOP would not be able to make payroll without raising at least $50,000. (RX-4, p. 5; Stip. ¶ 59).

and Winkelmann. (R.I.D., pp. 45, 88). However, Winkelmann undisputedly used BOP money, funds that could have been paid to investors, to settle a personal debt that Winkelmann would otherwise have been required to pay using his own money. (Tr. 803:7-12). That amount is properly subject to disgorgement.

The ALJ also deducted $72,000 from the disgorgement figure, representing the $2,000 Winkelmann received in monthly BOP compensation prior to the start of the second offering. (R.I.D. at 88). The ALJ reasoned that because Winkelmann received $2,000 monthly before he initiated the second offering, Winkelmann should not disgorge the amount he would have received from 2012 to 2014 had he not raised his compensation ($2,000 times 36 months). (*Id.*). But the ALJ ignored that prior to the *first* offering, BOP was out of money and unable to pay Winkelmann *any* compensation. (Stip. ¶¶45-46). Thus, even the modest compensation Winkelmann received prior to significantly raising his salary was only available by virtue of fraudulently selling Units. Indeed, just as the ALJ reasoned Winkelmann should disgorge the money Winkelmann received when he raised his monthly salary *above* $2,000, Winkelmann should also have to disgorge the money he received when he earlier raised his salary *to* $2,000.

For his third adjustment, the ALJ reduced the disgorgement award by 25%, representing the relative percentage of Unit proceeds from investors who were not clients. (R.I.D. at 88). However, Winkelmann defrauded all of the investors, not just clients, by concealing Binkholder's bar, misrepresenting the "alignment" and lack of conflicts between Winkelmann's and investors' interests, and by misrepresenting BOP's advertising ratio.[23]

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[23] Winkelmann and BOP executed tolling agreements which excluded the period March 10 through May 21, 2016 from the statute of limitations. (DX-357; DX-358). The tolling agreements thus allow disgorgement of the entire proceeds of the offerings, and any compensation Winkelmann received as a result.

Alternatively, the Commission could order disgorgement based on the money BOP received for selling Units. In offering fraud cases, courts routinely order issuers to disgorge the moneys fraudulently raised from investors. *See, e.g., SEC v. Manor Nursing Centers, Inc.* 458 F.2d 1082, 1104 (2d Cir. 1972); *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1192 (9th Cir. 1998); *SEC v. Capital Solutions Monthly Income Fund*, 28 F. Supp. 3d 887, 898-99 (D. Minn. 2014), *aff'd* 818 F.3d 346 (8th Cir. 2016). Here, BOP's proceeds from the fraudulent Unit offerings (net of repayments to investors) are properly the subject of disgorgement. That amount is $874,327.49 ($1.4 million raised minus the $525,672.71 returned to investors). (Stip. ¶¶ 1, 14).

If the Commission utilizes this alternative disgorgement approach, it should hold Winkelmann jointly and severally liable for disgorgement of the offering proceeds because doing so "is appropriate in securities cases when two or more individuals or entities collaborate *or* have a close relationship in engaging in the illegal conduct." *Edgar Page*, Advisers Act Rel. No. 4400, 2016 SEC LEXIS 1925, *52 (May 27, 2016) (quoting *SEC v. Whittemore*, 659 F.3d 1, 10 (D.C. Cir. 2011)); *see also SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004); *Gordon Pierce*, Exchange Act Rel. 71664, 2014 SEC LEXIS 4544, *91 (Mar. 7, 2014) ("where joint and several liability is found, courts routinely order disgorgement of the entire amount of ill-gotten gains jointly and severally from individuals who received only part of the proceeds of the wrongdoing, or did not receive any of the proceeds at all."); *J.S. Oliver Cap. Mgmt., L.P.*, Advisers Act Release 4431, 2016 SEC LEXIS 2157, *49-50 (June 17, 2016) (ordering joint and several disgorgement). As in the above decisions, because Winkelmann was the owner and control person of BOP, joint and several liability is appropriate.

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Rule 450(d) Certification

The undersigned counsel for the Division of Enforcement hereby certifies that this brief is 8,818 words, exclusive of the tables of contents and authorities.

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