UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of: **ADMINISTRATIVE PROCEEDING**

File No: 3-17253

JAMES A. WINKELMANN, SR. AND

BLUE OCEAN PORTFOLIOS, LLC,

REPLY IN SUPPORT OF MOTION

FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

Pursuant to SEC Rule of Practice 452,17 C.F.R. § 201.154(b), Respondents James A. Winkelmann, Sr. and Blue Ocean Portfolios, LLC ("Blue Ocean" the "Firm") hereby files this reply in Support for their Motion to Adduce Additional Evidence.

BACKGROUND

Respondents submitted their motion for leave to adduce evidence on May 22, 2020. On June 1, 2020, the Division of Enforcement submitted its response in opposition. In its opposition, the Division argues that Cooper's emails should not be admitted because:

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

B. Cooper's Emails are Irrelevant and Immaterial.

C. Cooper's Emails are Unreliable.

D. Cooper's Emails are Protected Settlement Communications.

A. Cooper's Email reflect the truth of what was going on before the OIP was issued.

In Exhibit 1 of Respondents' Motion to Adduce Addition Evidence Mr. Cooper recites that settlement agreements were forwarded to him from the Division in February 2016. This was

months before the OIP was issued in May of 2016[1]. This raises the central question: If Respondents behavior was indeed egregious and fraudulent then why would the Division be willing to settle the matter months before the OIP was issued? In February of 2016 there was no disagreement that Respondents relied on Greensfelder's advice, in fact it was presumed that Respondents did indeed rely on Greensfelder advice when issuing the Royalty Units. Every attorney involved in the tri-lateral settlement negotiations (the Division, Respondents and Greensfelder) knew this to be true. Ultimately the Respondents had no choice but to reject the settlement offer because it required them to consent that they acted improperly when in fact their position was and is that they did not. Why would any party consent to willful misconduct when there was none? Respondents can only speculate on why ultimately the Division chose to include scienter-based fraud allegations in the OIP.

Cooper's Emails are Relevant and Material.

There is no doubt that Cooper was in communication with the Division during the settlement negotiations. Anyone reviewing Both Exhibit 1 and Exhibit 2 can only conclude that there were settlement negotiations in early 2016 and there was an error that led to an evidentiary void in the ALJ hearing causing the ALJ to wrongly conclude that there was no reliance of counsel in the Initial Decision of March 20, 2017[2].

> "All agree that Morgan was an experienced securities practitioner, and it is not conceivable that he would have blessed this scheme in the absence of any

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[1] SEC Release Number 33-10080, Order Instituting Administrative Cease-and-Desist Proceedings.
[2] SEC Release Number ID-1116. March 20, 2017 Initial Decision Page 61

documentation or correspondence to show how he arrived at the advice that Winkelmann recalls receiving. Yet there is nothing at all in writing"

In fact, the Commission granted a motion to allow this evidence referred to and attached to Cooper's Exhibit 1 into the record in July of 2017[3]. Upon of review of this evidence[4] previously and erroneously left out of the hearing record, the ALJ reversed his conclusion in his Initial Decision on Remand of October 2018 dismissing the scienter-based fraud charges against the Respondents.

> "This evidence, marked as exhibits RX 126 and RX 127, had not been before me when I rendered the initial decision[5]"

> "The two new exhibits are significant, however, in terms of Respondents' reliance-on-counsel defense. In the original initial decision, I noted an "inconceivable" lack of documentation or correspondence to substantiate the advice received from counsel. These exhibits fill that gap and cause me to reverse my conclusions about the scienter-based offenses[6]"

This exact evidence referenced (later admitted as RX 126 and RX 127) were attached in Cooper's Exhibit 1 caused the ALJ to reverse his previous findings. Why the Division continues to perpetrate their desperate claim that that there is insufficient evidence that Respondents relied

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[3] SEC Release Number 33-10370 July 15, 2017 Order Granting Leave to Adduce Additional Evidence
[4] RX 126 and RX 127
[5] SEC Release Number ID-1261 October 15, 2018 Initial Decision Page 2
[6] SEC Release Number !D-1261 October 15, 20189 Initial Decision Page 4

on their experienced outside securities counsel at the prestigious Greensfelder Law Firm is again unknown.

B. **Coopers Emails Are Reliable**.

In its argument, the Division does not dispute that it was in communication with Mr. Cooper. Why would the Division, specifically Mr. Hanauer, communicate with an "unreliable party" such as Mr. Cooper in an official communication before or after any fact?

C. Cooper Emails are NOT Protected Settlement Communications

In its argument, the Division cites FRE 408[7] and goes on to quote "We do not consider the results of failed settlement negotiations in our determination of the public interest…settlement agreements are not usually part of a record and not normally considered on review".

It is not the Respondents position that the proposed terms or results of the failed settlement negotiations should be included in the record, only that in fact there were settlement negotiations – trilateral negotiations involving the Division, the Respondents and the Greensfelder Law Firm. The Division does not dispute the fact that Mr. Cooper was representing Respondents in the failed negotiations with Greensfelder. Also, the Division, in their opposition to this motion does not dispute the fact that Ulmer & Berne represented the Respondents in the dispute with the Division in the failed settlement negotiation.

Additionally, FRE 408 only prohibits the admissibility of terms, offers, and acceptance of the settlement negotiations. Furthermore FRE 408(b) provides for exceptions allowing the court

[7] Federal Rules of Evidence 408.

to admit evidence for other purposes. The Commission should grant the Respondents' Motion because the purpose of this evidence is to point out that there were indeed settlement negotiations and that the Division knew or should have known of the error that led to the evidence void that the ALJ relied on in his March 20, 2017 Initial Decision. The same evidence that was later admitted and caused the ALJ to reverse his ruling in the October 15, 2018 Initial Decision on remand.

Additionally, the Division in their opposition argue that Cooper's emails are expressly labeled as protected settlement communications. How could this be when Mr. Cooper never entered an appearance to represent the Respondents before the Commission? Cooper had no authority to negotiate with The Division. Also, the mere practice of labeling communications as protected was never intended to give a carte blanche protection.

Conclusion

The Commission should wonder why the Division is opposed to additional evidence that the Respondents should adduce that supports a key fact in this matter and in fact attempts to suppress relevant and material evidence. Again, the Division does not dispute the fact there were indeed settlement negotiations, and the Division and the other parties never disputed at that time of these negotiations that the Respondents relied on Greensfelder for the preparation of all of their offering materials, including those offerings to their advisory clients. Additionally, it should raise suspicion that the Division knowingly took advantage of the evidence void when RX 126 and RX 127 was unintentionally left out of the administrative law judge hearing records which directly and irrevocably caused the Respondents to lose their business and professional

reputations, as well as the potential loss to the advisory client investors who invested in the offerings. The motion should be granted.

June 4, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2020, I served a copy via email of the foregoing **REPLY IN SUPPORT OF MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE**

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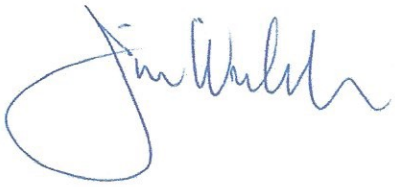

James A. Winkelmann, Sr.