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.

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THE DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

I. INTRODUCTION

At trial, the Division demonstrated that Respondent James Winkelmann was an experienced investment adviser who understood, and systematically touted, that he owed strict fiduciary duties to his advisory clients. Despite this understanding, Winkelmann repeatedly made false and misleading statements and omissions, and breached his fiduciary duties, when selling his clients "royalty unit" securities issued by his investment adviser firm, Respondent Blue Ocean Portfolios, LLC ("BOP").

Over the course of two years and four offerings, Winkelmann engaged in a scheme to depict BOP as a successful advisory firm that differentiated itself by being conflict-free and always acting in clients' best interest. Unable to organically achieve profitability or even obtain a bank loan, and facing a regulatory investigation into his business partner, Bryan Binkholder, Winkelmann chose to keep BOP afloat, and keep increasing his compensation, by selling $1.4 million worth of royalty units, primarily to BOP clients.

The royalty unit offerings were replete with violations of Winkelmann's fiduciary obligations and other requirements imposed on him as an investment adviser. For instance, the offering materials made no disclosure whatsoever of any conflict, or potential conflict, that existed between Winkelmann and the investors. This conflict was so evident to BOP's outside counsel that they included a provision in the subscription agreements that expressly precluded BOP clients from investing in the royalty units – advice that Winkelmann ignored in order to raise money for BOP and himself.

Nevertheless, the offering materials emphasized BOP's purportedly conflict-free services and represented that Winkelmann's interests were "aligned" with those of the investors. Thus, there was no disclosure that Winkelmann consistently faced the decision whether to increase payments to the investors or to increase his own compensation, or that this conflict manifested itself, to investors' detriment, when Winkelmann routinely chose to pay himself more while keeping payments to investors at or near the minimum allowable levels.

For the first three offerings, the offering memoranda additionally failed to disclose that Binkholder, BOP's co-founder and the centerpiece of its advertising campaign, was under investigation and would later be barred by Missouri securities regulators. The failure to disclose Binkholder's bar was even more glaring given that the bar was premised on Binkholder selling securities in his own businesses, without disclosing the attendant conflicts, to his clients. Winkelmann knew he was engaging in similar conduct through the royalty unit offerings. Yet, given the importance of Binkholder to BOP's growth, Winkelmann hid the bar and its findings from BOP's attorneys, clients, and investors.

Winkelmann also made false and misleading statements about BOP's advertising conversion ratio, a metric that Winkelmann routinely described as the *key driver* to BOP's business, in each of the offering memoranda and in individual correspondence to prospective investors. It is undisputed that Winkelmann selected the ratios that BOP presented to prospective investors. If Winkelmann is to be believed, he selected ratios that were calculated using a variety of evolving methodologies and look-back periods that could result in sharply different outcomes depending on the methodology, look-back period, and calculation date selected by Winkelmann. However, Winkelmann never disclosed that he purportedly changed BOP's ratio methodology from offering to offering, or that he cherry-picked the ratio from multiple options and chose the one that made BOP look best.

But Winkelmann should not be believed. Indeed, Winkelmann's explanation for the advertising ratios has morphed significantly over time. At trial, Winkelmann initially could not explain how BOP came up with ratios presented to investors. Winkelmann then recanted his investigative testimony and changed his explanation to conform to the theory espoused by his lawyers in their prehearing brief and his expert's report. Winkelmann then looked to Jennifer Juris, the BOP employee who performed the calculations, to explain how she calculated the ratios. Surprisingly, Juris confirmed that the explanation of Winkelmann's lawyers and expert were incorrect, and agreed that the methodology used by the Division's summary witness was the one that BOP, in fact, employed. After six days of trial and numerous opportunities to explain how he selected the advertising ratios he flaunted to investors, Winkelmann still has failed to introduce contemporaneous documents that support his shifting explanations for most of the ratios at issue in these proceedings. A prime example is Respondents' failure to present *any evidence whatsoever* demonstrating how BOP calculated the advertising ratio for 2011 cited in the second, third, and fourth memoranda or showing that the Division's calculation of this ratio was inaccurate.

Winkelmann's conduct demonstrates that he did more than breach his fiduciary obligations, but that he did so with scienter. For instance, Winkelmann fully understood his fiduciary obligations to disclose conflicts and act in his clients' best interests, but he ignored those obligations to make money for himself and BOP. When he misstated the advertising ratios, he always did so in a way that made BOP's performance look better. He repeatedly sent emails or letters to prospective investors where he inflated BOP's ability to raise money and success in repaying investors. He hid the Binkholder bar from his attorneys because he knew they would make him disclose the bar to investors. And he disregarded his attorneys' advice not to offer royalty units to BOP clients.

Such behavior by an investment adviser cannot be countenanced. Accordingly, the Court should follow the long line of Commission authority that imposes substantial sanctions on investment advisers who fail to disclose conflicts, breach their fiduciary obligations, or otherwise defraud their advisory clients. As in those decisions, the Court should order the disgorgement, penalties, and industry bars necessary to protect investors, hold Respondents accountable for their misconduct, and deter other investment advisers from engaging in fraud.

II. FACTS

A. Winkelmann's Background

Winkelmann has worked in the securities industry since 1981. (Nov. 15, 2016 Order on Stipulations, Findings of Fact ("FOF") ¶ 17). He has extensive experience in financial services sales, management, administration, compliance, and regulatory relations. (FOF ¶ 18). Before forming BOP, Winkelmann owned a brokerage firm from 1987 through 2008, and an investment advisory firm from 1988 until 2010. (FOF ¶ 19). Winkelmann also has served as the chairman of the Missouri Securities Association, the treasurer of a publicly traded mutual fund, and an expert consultant on securities disputes involving sales practices and disclosures. (FOF ¶¶ 20-22). He has passed a variety of FINRA licensing examinations. (FOF ¶ 23). Winkelmann claims to understand the importance of ethical selling practices and ongoing compliance in the wealth management industry. (FOF ¶ 24).

Winkelmann's longtime business partner was Don Weir. Winkelmann and Weir each owned 50% of the financial services firm that Winkelmann operated for 20 years before forming BOP. (FOF ¶ 25). In late 2008, after Winkelmann learned that Weir had misappropriated millions of dollars' worth of gold coins and bullion from Weir's advisory clients, Winkelmann closed their financial services firm. (FOF ¶¶ 26, 29). Weir subsequently pled guilty to mail fraud and was sentenced to 78 months imprisonment. (FOF ¶ 27).

Beyond his long career in the securities industry, Winkelmann engaged in other business ventures. He owned an insurance business called Longrow Insurance Agency ("Longrow") and an automatic teller machine company called Blue Ocean ATM. (FOF ¶ 30). Winkelmann also managed his son's clothing business. (Division's Statement of Facts ("SOF") ¶ 28). In 2012, after Winkelmann and his son's company were sued for trademark infringement, Winkelmann was held in contempt of court for violating an injunction previously entered against him in the lawsuit. (SOF ¶¶ 28-29).

B. Bryan Binkholder and the Formation of BOP

Following his separation from Weir, Winkelmann reached out to Binkholder after listening to Binkholder's "Financial Coach" radio show. (FOF ¶ 32). By August 2009, Winkelmann and Binkholder decided to go into business together. The two formed BOP, with each owning 50% of the company. (*Id.*). In addition to co-owning BOP, Binkholder was initially a BOP advisory representative. (FOF ¶ 33).

In the first quarter of 2010, BOP began entering into advisory agreements with clients. (FOF ¶ 38). When BOP was formed, Winkelmann's and Binkholder's legacy clients – advisory clients at the separate firms Winkelmann and Binkholder independently operated – became BOP clients. (FOF ¶ 39). In January 2010, BOP started sponsoring Binkholder's Financial Coach radio show. (FOF ¶ 40).

Later in 2010, Winkelmann learned that Binkholder was being investigated by Missouri securities regulators. (FOF ¶ 41). When Winkelmann learned this, he told Binkholder that until the investigation ended, Binkholder needed to rescind his membership in BOP, no longer talk to clients, and no longer "have anything to do with" BOP. (*Id*). Despite this admonishment, Winkelmann allowed Binkholder to remain intimately involved with BOP. Winkelmann and Binkholder continued to share office space and employees, and Binkholder remained an owner and adviser representative of BOP until March 2011. (SOF ¶ 23). Once Binkholder stopped being a

BOP adviser representative, his legacy clients remained as BOP clients and Winkelmann became the clients' adviser representative. (FOF ¶ 43).

In February 2011, as Winkelmann was transitioning Binkholder from being a BOP owner and employee, BOP and Binkholder entered into a "Solicitor's Agreement." (SOF ¶ 24). Per that agreement, Binkholder's "primary role" was to "introduce and assist each Solicited Client in establishing a relationship with [BOP] which will include introducing prospective clients and providing information about [BOP]." (*Id.*). The agreement noted that Binkholder was "compensated for being a paid spokesman of" BOP. (*Id.*).

On March 23, 2011, BOP and Binkholder entered into a separate "Marketing & Sponsorship" agreement. (SOF ¶ 25). That agreement obligated BOP to sponsor the production of, and reimburse Binkholder's expenses relating to, Binkholder's websites, social media sites, radio shows, television shows, and book publications. (*Id.*). The agreement required BOP to pay Binkholder monthly compensation at least equal to what it paid Winkelmann, and to purchase at least $2 million in insurance on Binkholder's life, with Binkholder able to choose a beneficiary for 50% of the policy's value. (*Id.*). In return, the agreement required Binkholder to: (a) "prominently and exclusively display and promote [BOP] services on all [his] web based, radio and television shows, productions and social media sites"; and (b) "exclusively enable [BOP] to generate leads from [Binkholder's] websites, social media sites, radio shows, television shows, speaking engagements and book publications." (SOF ¶ 26). BOP's sponsorship of Binkholder's show generated 70 to 100 leads per week for BOP. (SOF ¶ 27).

Winkelmann has at all times been BOP's CEO, manager, and Chief Compliance Officer. (FOF ¶ 34). Winkelmann had ultimate decision-making authority at BOP such that "the buck stopped" with him. (FOF ¶ 35; SOF ¶ 20). He reviewed, at least monthly, BOP's income statements, balance sheets, statements of cash flow; and "constantly" monitored BOP's revenues and expenses. (FOF ¶ 37; SOF ¶ 21). As CCO, Winkelmann was responsible for BOP's compliance program and developing and approving BOP's compliance manuals. (FOF ¶ 36).

In the first quarter of 2011, around the time Winkelmann removed Binkholder as an owner of BOP, Winkelmann conveyed his personal interest in BOP to 23 Glen Abbey Partners, a company owned by Winkelmann's family but managed by Winkelmann. (FOF ¶¶ 31, 42). Once this occurred, 23 Glen Abbey Partners owed 100% of BOP. (FOF ¶ 42)

C. Winkelmann Understood and Touted His Fiduciary Obligations

Given his long career in the industry, Winkelmann was well aware of the fiduciary obligations he owed to his clients. He admitted owing fiduciary duties of honesty, good faith, loyalty, disclosure of all material facts, and disclosure of conflicts of interest. (SOF ¶ 1). He also recognized that conflicts of interest can negatively impact investor returns. (SOF ¶ 2).

Winkelmann testified that he owed fiduciary duties not to the clients themselves, but only to their BOP-managed *accounts*. (SOF ¶ 1). But Winkelmann's narrow view is belied by BOP's internal policies and Winkelmann's contemporaneous representations to investors. Indeed, BOP's Code of Ethics and compliance policies contain no distinction between the duties owed to clients as opposed to their BOP-managed accounts. (SOF ¶ 3). To the contrary, BOP's policies repeatedly: (a) note BOP's fiduciary relationship with its clients; and (b) state that BOP must "always" place its clients' interests "first and foremost." (SOF ¶¶ 5, 6, 7, 8). Consistent with these policies, BOP provided its clients with a "Plain Language Compensation & Conflicts of Interest Disclosure" form which states: BOP "***always*** acts <u>in a fiduciary role for the client</u> and only offers options and recommendations in the clients' best interest. This would include all products (mutual funds, stocks, variable annuities, etc) plus advisory services." (SOF ¶ 12) (emphasis in original).

Winkelmann admitted he frequently reminded his clients of the fiduciary obligations he owed them. (SOF ¶ 13). For instance, in September 2011, Winkelmann gave the following quote for a press release: "we, at Blue Ocean Portfolios, *at all times* put our clients' interest first." (SOF ¶ 9) (emphasis added). Also, Winkelmann would often write his clients directly, and remind them he was required to "always" or "at all times" put their interests first. (SOF ¶¶ 14-18).

In September 2014, Winkelmann wrote on BOP's website that he is "committed to *always* acting in the best interest of clients." (SOF ¶ 10) (emphasis added). Even as of the trial, BOP's website represented: "A fiduciary duty is never fully satisfied, they must *always* seek ways to do what is best for the clients...as a fiduciary Blue Ocean Portfolios must, *at all times*, put the clients' interests first." (SOF ¶ 11) (emphasis added).[1]

D. The Genesis of the Royalty Unit Offerings

In early 2011, BOP needed money. While BOP had generated more than $120,000 in management fee revenues in 2010, its first year of operation, BOP's 2010 expenses exceeded $198,000 and it ended the year with a loss of more than $36,000. (FOF ¶ 44). BOP began 2011 with only $163.50 in its bank account and $3263.50 in total assets, while its liabilities exceeded $43,600. (FOF ¶ 45). By March 31, 2011 – the date of the first offering memorandum – BOP had only $239.16 in its bank account. (FOF ¶ 46).

Winkelmann wanted to grow BOP's revenues (its management fees based on assets under management) by expanding BOP's advertising efforts. (SOF ¶ 31). But BOP didn't have the money for an advertising campaign, and no bank would loan it money. (FOF ¶ 46; SOF ¶ 32). So Winkelmann devised the royalty unit offering, which he believed was "critical" to funding BOP's business plan and advertising campaign. (SOF ¶¶ 30, 33).

[1] That representation remains as of the filing of this brief. http://www.blueoceanportfolios.com/faq.html#what-is-a-fiduciary (last visited Nov. 22, 2016).

BOP offered each royalty unit in $25,000 increments, and granted the buyer a percentage of BOP's future cash receipts until BOP repaid the investor a fixed amount ranging from 2.25 to 3.0 times the original investment amount.[2] (FOF ¶¶ 7, 9, 11, 13). Per the offering materials, investors were entitled to a minimum percentage of BOP's monthly gross revenues, until they received the promised payback amount. (*Id.*). For instance, for the first two offerings, BOP promised each investor a minimum of 0.25% of BOP's monthly cash receipts until they received the specified amount ($75,000 per unit for the first offering, $62,500 for the second offering).[3] (FOF ¶¶ 7, 9).

However, the offering materials represented that BOP could pay more than the monthly minimum and that doing so was BOP's goal. (SOF ¶¶ 73, 80, 115, 129, 134). The memoranda also contained tables showing a range of monthly payout percentages significantly above the minimum amounts, and how those percentages impacted how quickly investors would be repaid. (SOF ¶¶ 74, 115, 116, 129, 135, 152). Those tables indicated that the higher the monthly payout percentage, the faster investors would be paid the promised returns. (*Id.*). The tables also generally indicated that if BOP paid only the minimum percentages, it would take more than ten years for investors to be paid in full. (*Id.*).

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[2] For the first offering, investors were promised a payout of three times their original investment, but for subsequent offerings, Winkelmann chose to lower the payout amount. (FOF ¶¶ 7, 9, 11, 13). For the first offering, but not subsequent ones, investors also received a warrant providing an option to purchase 1% of BOP for $100,000. (FOF ¶ 7). The fourth round royalty units were offered in $5,000 increments, but BOP imposed a minimum five unit purchase. (FOF ¶ 13).

[3] For the third offering BOP promised investors at least 0.10% of BOP's cash receipts until they received 2.25 times the amount of the investment principal. (FOF ¶ 11). For the fourth offering, BOP promised to pay at least 0.05% of BOP's cash receipts until the investors received 2.5 times the principal. (FOF ¶ 13).

Winkelmann targeted his advisory clients to be royalty unit investors. Indeed, ten of the fourteen first round investors were BOP clients, and eighteen of the 24 total investors were BOP clients. (FOF ¶¶ 5, 6). BOP would ultimately raise $1.4 million by issuing royalty units. (FOF ¶ 1). Each investor was required to complete a Subscription Agreement, written by Greensfelder attorneys, which required the investor to "represent" and "warrant" that BOP "has not provided any investment advice" to the investor. (FOF ¶ 54; SOF ¶¶ 176-177).

E. The First Offering

In February 2011, before the offering had started, Winkelmann began informing certain prospective investors about the royalty units. (SOF ¶ 59). For instance, on February 16, 2011, Winkelmann wrote a letter to Scottrade CEO Roger Riney to gauge Riney's interest in investing. (SOF ¶ 60). The letter contained the misleading representation that BOP had already set aside $400,000 in royalty units for friends and family. (SOF ¶ 61). Indeed, BOP would not be able to sell that many units until May 16, 2011. (*Id.*). Winkelmann's letter also stated that BOP generates $9,000 in annual revenues for each $1 million in AUM – a statement that conflicts with the first round offering memorandum's representation that BOP earns only $8,000 in revenues per $1 million in AUM. (SOF ¶ 62). The letter further represented that BOP was spending $2,200 in advertising to generate $9,000 in recurring revenues (a ratio of .24). (*Id.*).

Winkelmann authored the initial drafts of the offering memoranda, personally reviewed and approved the final versions that BOP circulated to investors, and had ultimate control over the memoranda's content. (FOF ¶¶ 53, 55). In April 2011, Winkelmann began circulating the first round memorandum, dated March 31, 2011, to prospective investors. (SOF ¶ 63). Among the prospective investors to whom Winkelmann provided memoranda were non-accredited investors who were not high net-worth individuals. (FOF ¶ 50).

The first offering memorandum contains no disclosure that any conflict of interest exists between Winkelmann and the investors. (SOF ¶ 65). To the contrary, the memorandum contains numerous representations indicating the absence of conflicts:

- "...the concept of Royalty Financing appears to be a compelling way for the investors, owners and employees to align their interest." (SOF ¶ 65(a)).
- BOP "attracts clients who are fed up with conflicts of interest prevalent at the broker/dealers where representatives/advisors make more money selling one security over another." (SOF ¶ 65(b)).
- BOP "creates value for its clients by eliminating conflicts of interest..." (SOF ¶ 65(c))
- "The plan is to ... be the 'go to' solution when investors are fed up with the conflicts of interest from their advisor/broker. This message is currently being broadcasted through advertising. (SOF ¶ 65(d))
- "The expansion capital in the form of Royalty Units is a way to fund growth, provide immediate cash flow stream to the Royalty Unit holders, and align all interests for returns at relatively low risk." (SOF ¶ 65(e))

In a section titled "Sales and Marketing Plan," the first memorandum describes BOP's sponsorship of Binkholder's radio show and how the show drives leads to BOP. (SOF ¶ 66). In the same section of the memorandum, BOP represents that it "will use a substantial portion of the proceeds of this offering and future cash flows to fund media buys for both [BOP] and The Financial Coach Show." (*Id.*).

Without describing BOP's methodology for calculating the advertising ratio, the first memorandum represents:

> A key business driver for [BOP] is the client acquisition cost. Currently [BOP] is spending approximately $5,500 per month on advertising that generates leads for the sales staff to follow up on. This $5,500 advertising spend is currently converting to approximately $2.5 million in new assets that are generating $25,000 in new annually recurring revenue. So, if this trend continues, each $10,000 in new recurring revenue will cost [BOP] $2,200 in advertising - a 22/100 ratio.

(SOF ¶¶ 67-68). In a later section, the memorandum represents: "The current conversion rate is $2,200 per $1mm. So currently each $2,200 spent in advertising is converting to new annual renewable revenue of $8,000." (SOF ¶ 72). Winkelmann agreed that these two sections present different advertising ratios (0.22 for the first, 0.28 for the second). (*Id.*).

The memorandum further represents: "the key business driver will be the ability of management to persistently convert advertising spending to new clients and new recurring revenues at a ratio of less than 4/10. Higher conversion ratios will cause the payback period to be drawn out lowering investor returns." (SOF ¶ 77).

The first memorandum represents that "the investor will receive *no less than* 0.25% of the cash receipts of [BOP] on a monthly basis until such time as the Royalty Unit holder receives a total of $75,000." (SOF ¶ 73) (emphasis added). The memorandum does not say that investors will only receive 0.25%. (*Id.*). The memorandum contains a chart showing anticipated payback times based on the monthly percentage of revenues paid per royalty unit (ranging from 0.25% to 1.5%) and the "New AUM Cost Per $1MM." (SOF ¶ 74). The table did not allow an investor to calculate the payback time for minimum 0.25% payments and a factor greater than 0.38. (*Id.*). According to the table, even if BOP doubled the minimum monthly payment percentage to 0.5%, with an advertising ratio of 0.38 the time to payback would be more than 7 years. (SOF ¶ 75).

Attached to the first round memorandum was a copy of a BOP PowerPoint presentation (SOF ¶ 79), which contained the following statements:

- "Growth Attributed to Advertising and Radio Show" (SOF ¶ 80(a))
- "Advertising Efficiency: Spending Approximately $25 to Land $100 in Recurring Annual Revenue." (RX-001, BO 7355) (SOF ¶ 80(b))
- "Goal – Maintain Advertising Yield Conversion $25/$100." (SOF ¶ 80(c))

- "Royalty Units Summary...Right to at Least 0.25% of Monthly Cash Receipts. Plan is to be higher! Investors get repaid first!" (SOF ¶ 80(d)).
- "Payback Time Depends on...Advertising & Lead Conversion Efficacy." (SOF ¶ 80(e))
- "Blue Ocean Portfolios: Conflict Free Wealth Management...Eliminates Conflicts." (SOF ¶ 80(f))

In April 2011, potential investor Dan Bean informed Winkelmann that the first memorandum contained an ambiguity. (SOF ¶ 81). On April 25, 2011, Winkelmann responded to Bean, acknowledging the ambiguity. (*Id.*). In Winkelmann's email, he represented that in the first quarter of 2011, BOP spent $22,000 in advertising and generated $100,000, and was investing $0.22 and getting back $1 in recurring revenue. (SOF ¶ 82). This statement was false. For the first quarter of 2011, BOP spent $18,685 on advertising and generated $42,070 in new recurring annual revenues (a ratio of .44). (SOF ¶ 83).

On May 3, 2011, Winkelmann wrote a letter to his client, Mark Funfsinn, advising Funfsinn of the royalty unit offering. (SOF ¶ 84). Winkelmann's letter represented that BOP was spending $2,500 to generate $8,000 in recurring revenue. (SOF ¶ 85). Winkelmann's letter presented a different ratio (0.31) than was represented in the first memorandum and the email Winkelmann sent to Bean a week earlier (0.22). (SOF ¶¶ 83, 85). On May 10, 2011, Funfsinn emailed Winkelmann and, like Bean had the previous month, pointed out an ambiguity in the first offering memorandum. (SOF ¶ 87).

On May 17, 2011, Winkelmann emailed his client Mike King, writing: "If you are going to do the Royalty Unit you will need to get with Sara for the IRA paperwork. So far we have raised about $650,000 we are going to close the offering at the end of May." (SOF ¶ 88). This statement was false. BOP had only raised $425,000 at the time, and the first offering would continue until July 13, 2011, when the last first round investor purchased a royalty unit. (FOF ¶¶ 4, 6; SOF ¶ 89).

When BOP closed the first round offering, it had raised $650,000 from fourteen investors, ten of whom were BOP advisory clients. (FOF ¶ 6).

F. After the Close of the First Offering, BOP's Financial Situation Worsened and Binkholder Received an Investment Adviser Bar

Even after raising $650,000 in the first offering, BOP again started running out of money. For example, on October 18, 2011, Winkelmann realized that BOP's expenses were higher, and its revenues lower, than he had anticipated. (SOF ¶ 90). So Winkelmann sent Binkholder an email attaching BOP's financial statements, and wrote: "I am just a little worried! Our burn rate is higher than we want – the AUM is lower than we projected. We need to stop spending and start closing!" (*Id.*). Winkelmann did not share this negative information with investors. Indeed, only two days after emailing Binkholder, Winkelmann emailed his client and royalty unit investor, Jason Grau, and presented positive information about BOP's performance while withholding all the negative information Winkelmann shared with Binkholder. (SOF ¶ 91).

On December 20, 2011, Winkelmann again informed Binkholder that BOP was performing worse than they had anticipated, and warned that BOP was undercapitalized by over $250,000 and was running out of money. (SOF ¶ 92). Winkelmann presented Binkholder with two options, the first being reducing total monthly expenses by $18,000. (SOF ¶ 93). Winkelmann wrote of this option: "This would mean cutting advertising and general office expenses. Basically watching every penny spent – which means probably cutting the $2,000 per month that we each [receive from BOP].....more pain and suffering!" (*Id.*). Winkelmann's second option was: "Raise additional $1.8 - $2.0 million in capital for the general purpose of funding the Chicago office. This may be more work but also more reward since the pro-forma would include at least $8,500 for each of us each month. This would be a bonanza..." (SOF ¶ 94). Predictably, Winkelmann concluded his email by recommending that BOP "be bold" and initiate a second offering. (SOF

¶ 95). Consistent with his recommendation, Winkelmann contemporaneously created an "Action plan" to: (a) reduce monthly advertising spending by $7,000; and (b) raise his and Binkholder's monthly compensation from $2,000 to $10,000. (SOF ¶¶ 96-97).

BOP's fortunes continued to sour when, in late December 2011, Winkelmann first saw the Missouri Securities Division order that barred Binkholder from acting as an investment adviser. (FOF ¶ 56). Similar to Winkelmann offering royalty units to BOP's advisory clients, the bar order found that "Binkholder offered and sold promissory notes in entities under the ownership and/or control of Binkholder ('Binkholder Entities') to Binkholder's investment advisory clients." (SOF ¶ 99). The bar order additionally found: "Binkholder did not disclose to investors the ...the potential conflict of interest that could affect the advisory relationship between Binkholder and the investors." (*Id.*).

Rather than cutting ties with Binkholder, Winkelmann doubled down on their relationship and allowed Binkholder – now, a barred investment adviser – to continue to act as BOP's spokesman. To that end, in February 2012 BOP and Binkholder entered an amended Marketing and Sponsorship Agreement under which BOP continued to sponsor Binkholder's show but increased the payments to Binkholder to $7,000 per month. (SOF ¶ 105).

On February 27, 2012, Grau emailed Winkelmann with concerns about the performance of his royalty units. (SOF ¶ 104). Winkelmann responded by acknowledging that BOP's "payments/revenue growth are a little behind projections but we are not worried" (*Id.*). Winkelmann's email to Grau did not detail any of the negative financial information – including BOP being significantly undercapitalized and running out of money – Winkelmann had previously shared with Binkholder. (*Id.*).

G. The Second Offering

Needing cash to support the increased payments to himself and Binkholder, on March 10, 2012 Winkelmann initiated the second round royalty unit offering. (SOF ¶¶ 92-94, 107). BOP promised second round investors at least 0.25% of BOP's monthly cash receipts until the investor had been paid 2.5 times their investment. (FOF ¶ 9). Shortly before the offering memorandum was completed, Winkelmann emailed his subordinates edits to the memorandum which observed that inconsistencies existed in the advertising ratios contained in the memorandum. (SOF ¶ 106).

As in the first memorandum, the second memorandum contained numerous statements indicating a lack of conflict of interest between Winkelmann, BOP, and investors, while failing to disclose any conflict existing. (SOF ¶ 118). The memorandum also contained the representations that "the fewer number of [royalty] units issued, the better for owners and employees" and that BOP's use of the offering proceeds "would need to result in the potential for recurring revenues inuring to Blue Ocean Portfolios and to investor returns." (SOF ¶¶ 117, 120). However, the memorandum failed to disclose that investor proceeds would be used to fund compensation increases for Winkelmann or Binkholder. (SOF ¶ 118). Also, the memorandum continued to tout BOP's sponsorship of Binkholder's radio show, but did not disclose Binkholder's investment adviser bar. (SOF ¶ 119).

The second memorandum stated: "The key driver to the Blue Ocean Portfolio model is the efficacy or yield of the money spent on advertising...The key indicator on the advertising efficacy is to determine how much advertising is needed to generate one additional dollar in new recurring revenue. In 2011, this 'factor' was 0.79. Or in other words, Blue Ocean Portfolios spent $0.79 in advertising to buy $1.00 in new recurring annual revenue." (SOF ¶ 108). Later in the memorandum, BOP represents: "**Advertising Yield Factor;** this is the key driver of the Blue Ocean Portfolios model. This advertising factor for 2011 was 0.78. So far in 2012, this factor has dropped to 0.62." (*Id.*). The memorandum further represents: "the key business driver will be the ability of management to persistently convert advertising spending to new clients and new recurring revenues at a factor of less than 0.80. Higher conversion ratios will cause the payback period to be drawn out, thus lowering investor returns." (SOF ¶ 114).

The second memoranda contained multiple representations that BOP intended to pay investors more than the 0.25 minimum monthly percentage of cash receipts. (SOF ¶ 115). Further reinforcing the investors' belief that they would receive more than the minimum payments, the memorandum contained tables showing payout ranges from less than four years (for monthly payouts at 1.5%) to more than ten years (if payments were kept at a minimum). (SOF ¶¶ 115-116).

The second offering continued through May 22, 2012, and raised a total of $350,000 from ten investors, seven of whom were BOP clients. (FOF ¶ 8; SOF ¶ 107). Even before the offering ended, Winkelmann envisioned a third round. To that end, on April 23, 2012, Winkelmann emailed the royalty unit investors and invited them to participate in an upcoming third round offering. (SOF ¶ 121). Winkelmann's email noted that BOP "should again exceed our projections," and included positive projections of BOP's AUM and revenue growth. (*Id.*).

On August 1, 2012, Winkelmann emailed his client, Funfsinn, asking if Funfsinn wanted to review the upcoming third round offering memorandum. (SOF ¶ 122). Winkelmann falsely represented that first round royalty unit investors had been repaid $4,961 to date. (*Id.*). That statement was false, as BOP had only paid back first round investors $2,671 per royalty unit. (*Id.*).

H. The Third Offering

By August 9, 2012, BOP was preparing the third round offering memoranda. (SOF ¶ 123). That day, Jennifer Juris alerted Winkelmann that the current draft disclosed different advertising ratios, writing: "We just need to be consistent on whatever number we use in the document." (*Id.*).

On August 24, 2012, Winkelmann emailed each of the royalty unit investors and informed them of the third offering. (SOF ¶ 124). Winkelmann encouraged the investors to let him know "right away" if they were interested in investing because "we have many prospective investors and will give preference to the current royalty holders." (*Id.*). In fact, BOP did not have "many" prospective investors lined up to invest, as BOP would only be able to find four investors willing to purchase third round units. (FOF ¶ 10).

Despite having serious health issues at the time, on September 1, 2011 Winkelmann initiated the third offering. (SOF ¶¶ 125-126). The third offering provided investors with a lower monthly minimum payout percentage (0.10%) and lower total returns (2.25 times the principal investment) than the prior offerings. (FOF ¶ 11).

The third memorandum repeats many of the same misstatements contained in the second memorandum about: (a) lack of conflicts; (b) the alignment of Winkelmann and the investors' interest; (c) BOP issuing fewer units being better for Winkelmann; and (d) investor proceeds only being spent on activities that would result in higher revenues for BOP and better returns for investors. (SOF ¶¶ 130, 132-133). The third memorandum again touts BOP's sponsorship of Binkholder's radio show but fails to disclose his adviser bar. (SOF ¶ 131). The memorandum also fails to disclose any conflicts of interest or that investor proceeds would be used to increase Winkelmann's compensation. (SOF ¶¶ 130, 133).

The third memorandum represents: "The key driver to the [BOP] model is the efficacy, or yield, of the money spent on advertising...The key indicator on the advertising efficacy is to determine how much advertising is needed to generate one additional dollar in new recurring revenue; currently this 'factor' is 0.67. Or in other words, [BOP] spends $0.67 in advertising to buy $1.00 in new recurring annual revenue." (SOF ¶ 126). In another section, the memorandum again cites BOP's 0.67 "current" ratio but, without disclosing a discrepancy, presents advertising expense ($15,000) and revenue ($31,000) figures that calculate to a factor of 0.48. (SOF ¶ 128). The third memorandum contains the same representation from the second memorandum that BOP's advertising ratio for 2011 was 0.78. (SOF ¶ 132).

The third memorandum contains multiple statements indicating investors should expect more than the 0.10% minimum monthly payment percentage, including the representation: "Investors should expect the bulk of their return in years 3-5." (SOF ¶¶ 129, 134). The memorandum contains charts reflecting that, in order to be paid back in the "expect[ed]" three to five years, BOP would have to pay, *every single month*, more than twice the minimum monthly payout percentage. (SOF ¶¶ 129, 135).

On October 2, 2012, Winkelmann emailed each of the royalty unit investors and again asked if they wanted to participate in the third offering. (SOF ¶ 136). In those emails, Winkelmann falsely represented that BOP had raised $325,000 in the third offering. (*Id.*). In reality, BOP had only raised $250,000 at the time of Winkelmann's email and, ultimately, would only raise $275,000 during the entire third round. (*Id.*; FOF ¶ 10). In an October 9, 2012 letter to a prospective investor, Winkelmann continued to lie about the success of the offering, this time boasting that BOP had raised $400,000 in the third offering. (SOF ¶ 137).

I. Binkholder's Criminal Investigation, the Missouri Regulatory Investigation, and BOP's Failing Finances Lead to the Fourth Offering

By November 2012, the third round offering was floundering. With the exception of a single royalty unit investment in October, BOP had not issued any royalty units since September. (SOF ¶ 138). On November 16, 2012, Winkelmann learned that Binkholder was the subject of a federal grand jury investigation. (FOF ¶ 57). When Winkelmann learned this, he immediately stopped having BOP make payments to Binkholder, and severed Binkholder's relationship with

BOP. (FOF ¶ 57). Binkholder later pled guilty to four counts of wire fraud, and was sentenced to 108 months imprisonment. (*Id.*).

On December 12, 2012, Winkelmann emailed Bryan Swift BOP's financial projections, which showed BOP running out of money by February 2013. (SOF ¶ 142). Winkelmann, who did not want the other royalty unit investors to know of BOP's failing finances, wrote: "I need to come up with a deal – I am hesitate (sic) to go back to some of the investor/clients with this bad news – need to be careful not to start any rumors." (*Id.*). The news only got worse when, on December 21, Winkelmann learned that the Missouri Securities Division was investigating him and BOP for potential violations of Missouri's securities laws. (SOF ¶ 144).

In the meantime, on December 1, 2012, investor and BOP client Ed Mahoney inquired with Winkelmann about the performance of his first round royalty unit, which at the time had only paid $3,778.54 for Mahoney's $25,000 investment. (SOF ¶ 139). Mahoney inquired about finding another person to buy his poorly performing unit, prompting Winkelmann to offer to attempt to find a buyer. (SOF ¶ 140). Even though Mahoney's royalty unit had better payout terms (3x payout and a warrant) than the 2.5x payout of the fourth offering, Winkelmann did not inform the fourth round royalty unit investors – BOP clients Bryan Swift and Dr. Gamache – that Mahoney had asked about selling his royalty unit. (SOF ¶ 141).

On January 25, 2013, Winkelmann emailed Greensfelder attorney Michael Morgan that "we need to raise money." (SOF ¶ 145). Winkelmann's email contained draft disclosures, written by Winkelmann, to include in the upcoming fourth round memorandum. (*Id.*). Those disclosures addressed Binkholder's criminal investigation and the Missouri regulatory investigation into Winkelmann and BOP. (*Id.*). Three days later, Winkelmann emailed Morgan and asked if BOP could legally raise $500,000 over the next two months. (SOF ¶ 146). Winkelmann wrote: "This would be our final round. I need go ahead and damn the torpedoes! I think the odds are that the state will fine us but not shut us down. If we stop growing we start [dying]." (*Id.*). By January 30, 2013, Winkelmann was inquiring whether prospective investors wanted to review the upcoming fourth round offering memorandum. (SOF ¶ 148).

Fourth round royalty units granted the purchaser no less than 0.05% of BOP's cash receipts until the investor received 2.5 times the original investment.[4] (FOF ¶ 13). On approximately February 15, 2013, BOP started the fourth offering, in which Winkelmann sought to raise $375,000. (SOF ¶¶ 149, 156). However, Winkelmann only provided the memorandum to three prospective investors, each of whom had previously purchased royalty units. (FOF ¶ 59). Thus, only three investors received the disclosures contained in the memorandum that: (a) Binkholder had received an adviser bar, in part, for not disclosing conflicts to clients; (b) Binkholder was under criminal investigation; and (c) BOP would run out of money by March 1, 2013 if it could not raise $50,000. (SOF ¶¶ 153, 155).

The fourth memorandum again fails to disclose any conflicts relating to the royalty units or that Winkelmann would use investor proceeds to increase his compensation. (SOF ¶ 155). Likewise, the memorandum repeats many of the misrepresentations from the earlier memoranda concerning: (a) lack of conflicts; (b) the alignment of Winkelmann and the investors' interests; and (c) the fact that issuing fewer units would be better for Winkelmann. (SOF ¶ 154).

The fourth memorandum contains conflicting information regarding the advertising ratio. For instance, the memorandum twice represents that BOP's advertising ratio was 0.89 for 2012 and later represents that BOP's "current" ratio is 0.89. (SOF ¶¶ 149-151). However, in these sections the memorandum presents inconsistent financial information where, if one calculates the ratio by

[4] Fourth round investors were required to purchase at least five $5,000 units. (FOF ¶ 13).

dividing advertising spending for a period by recurring revenue for that period, the resulting ratios are 0.32, 0.67, and 1.17. (SOF ¶¶ 149-150). The memorandum also repeats the misstatement from the second and third memoranda that BOP's advertising ratio for 2011 was 0.78. (SOF ¶ 151).

Like the third memorandum, the fourth memorandum represents: "Investors should expect the bulk of their returns in years 3-5." (SOF ¶ 152). The fourth memorandum also contains charts reflecting that investors would need to be paid, *every single month*, at least *four times* the minimum monthly payout percentage in order to receive the promised returns in five years. (*Id.*).

BOP only raised $125,000, from two advisory clients, in the fourth round offering. (FOF ¶ 12). Before BOP could raise additional funds, Winkelmann voluntarily agreed to the Missouri Securities Division's request that BOP stop issuing royalty units. (SOF ¶ 157).

On May 20, 2014, Ed Mahoney again complained to Winkelmann about the royalty units. (SOF ¶ 158). Mahoney's email observed that the pace of his royalty payments was so slow that the 74 year-old Mahoney would not be paid in full for another 30 years. (*Id.*). Mahoney wrote this email before the Division of Enforcement began investigating BOP. (*Id.*).

As of the third quarter of 2016, BOP had only paid the royalty unit holders a combined $525,672.51 on their cumulative $1.4 million investment. (FOF ¶ 14). BOP still owes the investors more than $3.3 million. (FOF ¶ 15).

J. Winkelmann's Compensation and Conflicts of Interest

Winkelmann decided when and in what amounts BOP should pay him. (FOF ¶ 60). In 2012, BOP paid 23 Glen Abbey Partners $125,000 as compensation for Winkelmann's services to BOP. (FOF ¶ 64). In 2013, Winkelmann increased his compensation by directing BOP to pay 23 Glen Abbey Partners $182,000 and an additional $7,200 in payments directly to Winkelmann. (*Id.*). In 2014, Winkelmann again upped his BOP compensation to $227,557. (*Id.*).

In addition to the compensation Winkelmann received either directly from BOP or through 23 Glen Abbey Partners, he also funneled BOP money to other companies he owned. Between August 2011 and March 2012, Winkelmann had BOP pay $41,000 in "management fees" to Longrow Insurance Agency, payments that Winkelmann admitted were to compensate him for his services to BOP. (SOF ¶¶ 161-162). Between October 2011 and September 2012, Winkelmann also had BOP pay more than $46,000 to another one of his companies, Blue Ocean ATM. (SOF ¶ 164). Winkelmann later put BOP's funds at risk when he used $70,000 of BOP's money as collateral so that Blue Ocean ATM could fill its ATM machines at a festival in August 2014.[5] (SOF ¶¶ 168-169). Even though Blue Ocean ATM made $4,000 at the festival, Winkelmann never gave any of this money to the royalty unit investors or otherwise compensated them for Blue Ocean ATM's use of BOP's money. (SOF ¶ 171).

On another occasion, in July 2012, Winkelmann used $50,000 of BOP's money to settle a personal debt – Winkelmann's individual settlement obligation in a lawsuit filed against him by one of Don Weir's victims. (SOF ¶ 165). Winkelmann never disclosed this payment to the royalty unit investors. (SOF ¶ 167).

At the same time Winkelmann was deciding whether to increase his compensation, funnel BOP money to his other companies, or use BOP money for personal expenditures, he also decided whether to pay the royalty unit holders the minimum, or more than the minimum, monthly percentage of BOP's cash receipts. (FOF ¶ 62). Using that discretion, between April 2011 and August 2014, Winkelmann generally had BOP pay the investors the minimum monthly

[5] In his email to the bank seeking to facilitate Blue Ocean ATM's use of BOP's money as collateral, Winkelmann wrote: "[BOP] has enough in the operating account to lend out this cash...Unfortunately this creates a bunch of regulatory scrutiny by the SEC when they examine [BOP] – nothing illegal just a hassle. I would rather avoid moving money back and forth between the two companies." (SOF ¶ 170).

percentages of BOP's receipts. (SOF ¶ 233) From April 2011 to June 2012, Winkelmann did increase the payout percentages two months per quarter, but only for the months when BOP's cash receipts were negligible. (*Id.*). For the every third month BOP received the lion's share of its revenues (client management fees which were deducted quarterly), Winkelmann always paid the minimum percentage. (*Id.*).

Winkelmann recognizes that an investment adviser selling its own securities to its advisory clients could create a conflict of interest. (SOF ¶ 172). Nevertheless, Winkelmann never disclosed actual or potential conflicts of interest in the offering memoranda, and he never discussed actual or potential conflicts with the royalty unit investors. (SOF ¶ 173). Winkelmann also never had BOP implement any policies or procedures related to disclosing any conflicts attendant to the royalty unit offerings. (FOF ¶ 65; SOF ¶ 174).

K. The Advertising Ratios

In each of the offering memoranda and in other communications with investors, Winkelmann emphasized the importance of BOP's advertising ratio or "factor," often referring to the ratio as the "key driver" for BOP's business. (SOF ¶¶ 36, 67, 108, 126, 151). He personally selected what ratio to represent to investors in the offering memoranda. (SOF ¶ 252).

Winkelmann claims that BOP "constantly" and "meticulously" tracked the advertising ratio. (SOF ¶ 35). But it is undisputed that BOP never disclosed to investors its methodology for calculating the ratio or that BOP purportedly changed its methodologies over the course of the offerings. (SOF ¶¶ 49, 68, 110, 127). Moreover, Winkelmann's shifting accounts for how BOP calculated the advertising ratio, coupled with his inability to explain how BOP arrived at certain ratios disclosed in the offering memoranda, belie his claims that BOP fully and accurately represented the ratio to investors.

1. Winkelmann's Changing and Conflicting Story

At his investigative testimony, Winkelmann testified that BOP calculated the advertising ratio that BOP disclosed in the offering memoranda by dividing (a) total advertising spending for a given period by (b) the amount of new recurring revenue that BOP generated during that same period. (SOF ¶ 37). However, at his testimony, Winkelmann could not explain the discrepancies between the advertising ratios disclosed in the offering memoranda and the ratios presented to him by the Division that were calculated using BOP's financial records and the methodology Winkelmann testified to using. (SOF ¶ 38). Even though Winkelmann realized that he had been unable to explain the inconsistencies presented to him at his testimony, he offered no explanation in his Wells submission, which was submitted by his present attorneys, for how BOP calculated the advertising ratios. (SOF ¶¶ 39, 40).

When confronted at trial with his investigative testimony regarding how BOP calculated the advertising ratios, Winkelmann claimed that his investigative testimony was inaccurate and "wrong." (SOF ¶¶ 41, 47). When asked at trial to explain how BOP calculated the ratio, Winkelmann initially testified that the numerator component was revenue, but later reversed himself and testified that revenue composed the ratio's denominator. (SOF ¶ 43). Winkelmann eventually settled on a methodology that he did not describe in his investigative testimony or Wells submission, but one he more recently embraced in his prehearing brief and his expert's report: advertising spending for a period divided by revenues that *resulted* from the period of advertising, as opposed to new revenues generated *during* the period of the advertising. (SOF ¶¶ 47-48).[6]

[6] Winkelmann agreed that BOP could use multiple "look back" periods of advertising spending and resulting revenues, and that the longer the period used, the more reliable BOP's ratio would be. (SOF ¶¶ 45-46).

When Winkelmann called Juris – the BOP employee who tracked the advertising ratio – to testify, she refuted the new methodology described in Winkelmann's trial testimony, prehearing brief, and expert report. (SOF ¶¶ 237-240, 245, 248). Namely, Juris testified that BOP calculated its advertising ratio using recurring revenues generated *during* the period of advertising at issue. (*Id.*). Juris also testified she did not know how Winkelmann selected the ratios that BOP cited in the offering memoranda. (SOF ¶ 252). In response to the Court's question whether Winkelmann or Juris had the more accurate account of how BOP calculated the advertising ratio, Winkelmann testified that Juris's account was more accurate. (SOF ¶ 57).

Winkelmann testified that advertising includes "messaging to entice an individual to take action," and that advertising includes BOP's sponsorship of a radio show. (SOF ¶ 50). However, Winkelmann chose to exclude payments to Binkholder from the advertising expense component of the ratio, and agreed that had BOP included those payments, the ratio would have increased. (FOF ¶¶ 48-49; SOF ¶ 51). Winkelmann's decision to exclude the Binkholder payments from advertising expenses differed from his accounting treatment for payments to another BOP paid spokesman, radio show host Charlie Brennan. (SOF ¶ 53). Indeed, Winkelmann classified as advertising expenses both payments made directly to Brennan and to the radio station which aired his show. (*Id.*). In making the decision to exclude the Binkholder payments, Winkelmann did not consult with an accountant, IRS instructions, or FASB. (SOF ¶ 52).

2. Michael Collins's Calculations

SEC staff accountant Michael Collins calculated BOP's advertising ratios using the same methodology described by Winkelmann during his investigative testimony (which Collins attended) and Juris during her trial testimony: BOP's advertising expenses for a given period divided by its new recurring revenues generated *during* the period of the advertising expenses. (SOF ¶¶ 210-211). For his calculations relating to the "current" ratios cited in the first, second, and third memoranda, Collin calculated the ratios using various look-back periods, and always used the most conservative figure when comparing his calculations to the ratios represented in the memoranda. (SOF ¶¶ 212, 215, 216, 220, 222, 223, 225, 226).

Collins's calculations resulted in advertising ratios that were significantly higher (i.e., worse) than the ratios cited in the offering memoranda. (SOF ¶¶ 215, 218, 222, 225, 227). Collins also calculated the advertising ratios including BOP's payments to Binkholder. (SOF ¶¶ 219, 222, 225, 227). Including those expenses resulted in even higher ratios, and a greater disparity from the ratios represented in the offering memoranda. (*Id.*).

To support his calculations, Collins used advertising spending and revenue data from three BOP internal financial documents. First, for the 2010 data, Collins used BOP's 2010 Profit and Loss Statement (Ex. 35). (SOF ¶¶ 213, 215). The data on that financial statement was consistent with BOP's 2010 "Advertising Transaction Detail" report, which was Respondents' trial exhibit RX-008. (SOF ¶ 213).

Second, for the 2011 data, Collins used Exhibit 159, a BOP spreadsheet that tracked, from January 2011 to June 2012, BOP's monthly advertising spending, new recurring annual revenues, and advertising ratio. (SOF ¶¶ 215, 216, 221, 224). Winkelmann testified the Exhibit 159 was one of the documents that BOP used to track the advertising ratio, and that Exhibit 159 contained data that was available to BOP at the time of the third offering memorandum. (SOF ¶¶ 54). Winkelmann also testified that the later in time BOP calculated the ratio for a given period, the more favorable the ratio would be, and that the ratio would only decrease (i.e., improve) the further in time BOP calculated the ratio for any period. (SOF ¶ 56).

The 2011 advertising spending information on Exhibit 159 was consistent with the 2011 advertising spending information contained in two other documents devoted to BOP's 2011 advertising data: (a) Exhibit 86, which was a listing of BOP's 2011 monthly advertising expenditures by vendor; and (b) Respondents' Exhibit RX-018, which was a "2011 Advertising Analysis" spreadsheet. (SOF ¶¶ 55, 216). Juris confirmed that Exhibit 159 tracked revenues generated *during* each month of advertising, and that the exhibit came from a printout of a July 2012 spreadsheet. (SOF ¶¶ 244-245). She also testified that the January 2011 data in Exhibit 159 would have been available to BOP at the time of the first offering memorandum. (SOF ¶¶ 246).

Third, for the 2012 advertising and revenue data, Collins used a spreadsheet reflected on Exhibit 396, page BO 5639, which detailed monthly advertising spending, new recurring annual revenues, and the advertising ratio from June 2011 to December 2012. (SOF ¶¶ 221, 224, 226, 227). Juris agreed that page BO 5639 contained identical data to Exhibit 163, a spreadsheet she created to track the advertising ratio.[7] (SOF ¶ 257). She also agreed that page 5639 contained the best 2012 data BOP had as of early 2013. (SOF ¶ 258).

3. The 0.22 Ratio Cited in the First Memorandum

The first memorandum does not disclose how BOP calculated the 0.22 ratio represented to investors. (SOF ¶ 68). Winkelmann was the only witness who worked at BOP at the time of the first memorandum; Juris had not yet started at BOP. (SOF ¶ 236). Winkelmann testified at trial that BOP calculated the 0.22 ratio by using: (a) BOP's advertising expenses going back to June 2010; and (b) recurring revenues generated during February 2011. (SOF ¶¶ 69-71). However, no contemporaneous document shows BOP calculating the ratio this way. Moreover, Winkelmann's testimony conflicted with his pre-hearing brief, which says that BOP calculated the 0.22 ratio using revenues generated through mid-March 2011. (SOF ¶ 70). Winkelmann's trial testimony also was

[7] Exhibit 163 contains a comment from Winkelmann that he inserted into the "Advertising Factor" column: "Measure Advertising Efficacy – lower the better." (SOF ¶ 257).

inconsistent with his investigative testimony, where Winkelmann testified that BOP calculated the 0.22 ratio using data going back as far as BOP had it, which was January 2010. (SOF ¶¶ 71, 212).

On the other hand, Collins calculated the ratio using the methodology Winkelmann described in his investigative testimony: using advertising spending and revenues generated *during* the period of advertising going back to the start of BOP in January 2010. (SOF ¶¶ 210, 215). Collins's calculations resulted in a 0.37 ratio. (SOF ¶¶ 215).[8]

4. The 0.78 2011 Ratio Cited in the Second, Third, and Fourth Memoranda

At trial, Respondents presented *no evidence whatsoever* showing how BOP calculated the 0.78 ratio for 2011 cited in the second, third, and fourth memorandum. (SOF ¶ 112).[9] Indeed, neither Winkelmann, Juris, Palubiak (Respondents' expert witness), nor Respondents' prehearing brief, offered *any* explanation for how BOP calculated its 2011 advertising ratio to be 0.78. (*Id*).[10]

On the other hand, Collins used the 2011 advertising data from Exhibit 159 and divided BOP's advertising expenses (excluding Binkholder payments) by its new recurring revenues to calculate a ratio for the year of 1.28. (SOF ¶¶ 218). While Winkelmann now claims that the 2011 data on Exhibit 159 did not exist when BOP issued the second memorandum, he concedes that the data was available and valid at the time of the third and fourth memorandum. (SOF ¶ 54). Further, Winkelmann fails to identify any other document which contains accurate advertising and revenue figures for 2011.

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[8] Collins also calculated the advertising and revenue data solely for March 2011, the last month before the first memorandum was circulated, which also results in a 0.37 ratio. (SOF ¶ 215).

[9] Winkelmann additionally represented that BOP's 2011 ratio was 0.78 in a February 8, 2012 email to Ed Mahoney and in a February 22, 2012 email to James Zenner. (SOF ¶ 102-103).

[10] Respondents also failed to introduce evidence supporting the 0.89 factor for 2011 that Winkelmann represented in a January 20, 2012 email to investor James Zenner. (SOF ¶ 100).

5. The 0.62 Ratio Cited in the Second Memorandum

Without offering any explanation for how BOP arrived at the figure, the second memorandum represents: "So far in 2012, this [advertising] factor has dropped to 0.62." (SOF ¶ 108). No contemporaneous document shows BOP with a 0.62 ratio in March 2012. Winkelmann testified that BOP arrived at this number by using a different methodology than the "current" ratio cited in first memorandum,[11] but concedes that the second memorandum does not disclose any change in methodology. (SOF ¶ 109). Multiple investors – Daniel and Gail Grossman and Ed Mahoney – invested in BOP's first and second royalty unit offerings. (SOF ¶ 110). Winkelmann conceded that these investors had no way of knowing that BOP had purportedly changed its methodology between these two offerings or that the ratios presented in the first two offering memoranda did not present an apples-to-apples comparison of BOP's advertising efficiency. (*Id.*).

The closest Winkelmann could come to explaining the 0.62 ratio was through Juris's testimony. Juris discussed RX-036, a February 2012 advertising report that was available at the time the second memorandum was finalized on March 10, 2012. (SOF ¶ 240). Per RX-036, BOP's ratio for February 2012 was 0.67, not 0.62.[12] (SOF ¶ 242). Juris testified that, at the time of the second memorandum, BOP calculated the ratio by dividing advertising expenses for a month by recurring revenues generated *during* that month. (SOF ¶ 240). Juris also testified that had BOP used the methodology espoused by Winkelmann, his expert, and his attorneys – revenues *resulting* from a month of advertising – the February 2012 factor would have been 1.76. (SOF ¶ 243).

[11] Whereas Winkelmann claims the first memorandum divided advertising expenses for a 9-month period by revenues for a single month (February 2011), he testified that beginning with the second memorandum, BOP divided advertising expenses for a period by revenues *resulting from* the period of advertising. (SOF ¶ 109).

[12] The February 2012 report also showed factors for November 2011 (1.45), December 2011 (1.02), and January 2012 (0.74), none of which are disclosed in the second memorandum. (SOF ¶ 242).

Moreover, Juris confirmed that the ratios in RX-036 were calculated using an assumption that BOP generated 1% fees from its assets under management. (SOF ¶ 241). However, this assumption conflicted with BOP's actual experience of earning only 0.8% management fees, a figure which, notably, was disclosed in the first memorandum. (SOF ¶¶ 62, 241). Had BOP calculated the ratio using its actual 0.8% experience, the ratios contained in RX- 036 would have been higher, and the February 2012 ratio in that exhibit would have been 0.84. (SOF ¶ 241).

6. The 0.67 Ratio Cited in the Third Memorandum

The third memorandum represents that BOP's "current" advertising ratio is 0.67, which conflicted with other representations in the memorandum that BOP was spending $15,000 per month on advertising and generating $31,000 in new recurring revenues (the memorandum does not disclose this conflicting ratio of 0.48, or the fact that a discrepancy exists). (SOF ¶¶ 126, 128). Again, Respondents did not present any contemporaneous document showing that BOP's ratio was 0.67 when the third memorandum was finalized on September 1, 2012.

The closest Respondents could get to 0.67 was the July 2012 advertising report (RX-54, p. 63), which was generated in early August 2012 and was the last advertising report created prior to the September 1, 2012 third memorandum. (SOF ¶¶ 247, 249). That report showed that BOP's ratio for the month of July was 3.00, but that its trailing six-month factor was 0.69 (using the "geometric mean") or 0.71 (using the "average" factor). (SOF ¶ 249). To the extent that BOP was basing its "current" ratio methodology in the third memorandum using trailing six month data, there is no disclosure that BOP changed methodologies from its prior practice of using only one month of spending and revenues, which Juris testified was the case at the time of the second memorandum. (SOF ¶¶ 240, 249). There is also no disclosure that using trailing six-month data resulted in a significantly better factor than using only a single month's data.

7. The 0.89 Ratio Cited in the Fourth Memorandum

The fourth memorandum represents that BOP's advertising ratio for 2012 was 0.89. (SOF ¶ 149). However, like the third memorandum, the fourth memorandum contains conflicting advertising and revenue information which, when calculated, yields ratios of 0.32, 0.67, and 1.17. (SOF ¶¶ 149, 150). But the fourth memorandum does not disclose these ratios or the fact that discrepancies exist. (*Id.*).

Winkelmann claims that the 0.89 ratio for 2012 is supported by RX-120, page 1, which is an advertising spreadsheet containing monthly data for 2012 that reflects a trailing 12-month factor of 0.89. However, BOP operated offices in both Chicago and St. Louis at the time, and that spreadsheet contains data only for BOP's St. Louis office. (SOF ¶¶ 253-256). The second page of RX-120 is spreadsheet containing similar advertising data for BOP's unsuccessful Chicago office, and shows that, in 2012, BOP spent $69,660 on advertising to generate a mere $2,574 in recurring revenues from that office (a ratio over 27.0). (SOF ¶ 256). Had BOP included the Chicago data in its calculations, its company-wide December 2012 trailing 12-month ratio would have been higher than the 0.89 St. Louis-only ratio. (*Id.*).

L. The Custody Rule, BOP's Forms ADV, and Compliance Issues

Respondents concede that, prior to 2015, BOP failed to take the measures required for advisers with custody of client funds. (FOF ¶ 70). Winkelmann was aware of the custody rule during the period at issue in these proceedings. (FOF ¶ 66). He posted the following on BOP's website: "It is never a good idea to have one company act as both the custodian and advisor of your wealth… You are increasing the odds of an unfavorable outcome when the investment 'advice' is coming from the same organization that is also the custodian of your wealth. It is very important that you clearly understand the relationship between your advisor and the actual custodian of your wealth." (SOF ¶ 183).

From May 2011 through May 2012, BOP's practice was to accrue in BOP's bank account the percentage of cash receipts due the investors and then pay the accrued amounts on a monthly basis. (FOF ¶ 67). In May 2012, BOP altered this practice by paying the accrued amounts on a quarterly basis. (FOF ¶ 68). Winkelmann testified during the investigation that for the period between when the cash receipts came into BOP's bank account and when they were paid to investors, the accrued funds belonged to the investors. (SOF ¶ 184).

Winkelmann signed, controlled the contents of, and caused to be filed with the Commission BOP's Forms ADV. (FOF ¶ 69). Between June 2011 and November 2014, BOP filed at least 20 Forms ADV which represented that BOP did not have custody of client assets. (SOF ¶ 186). Beginning in February 2015, BOP began filing Forms ADV which represented that BOP had custody of client assets. (SOF ¶ 188). Also in February 2015, BOP began filing Form ADV brochures stating that BOP "is considered to have custody" of the accrued percentage of BOP's cash receipts owed to the royalty unit investors. (SOF ¶ 189). Around that time, Winkelmann also set up a new BOP bank account that would automatically sweep and segregate for the royalty unit investors 15% of BOP's incoming funds. (SOF ¶ 190).

Winkelmann was ultimately responsible for BOP's compliance program. (FOF ¶ 71). He developed and approved BOP's compliance manuals, and was responsible for implementing and monitoring BOP's policies and procedures related to custody. (FOF ¶ 36, 71). Consistent with BOP's Forms ADV, which represented that BOP did not have custody of client assets, BOP's compliance policies prohibited BOP from maintaining custody of client assets. (SOF ¶¶ 192-193).

III. LEGAL ANALYSIS

The Division proved by a preponderance of the evidence that Respondents violated, and that Winkelmann caused violations of, the securities laws provisions at issue in the OIP.[13] *See Mohammed Riad*, Exchange Act. Rel. 78049A, 2016 SEC LEXIS 2396, *6 (July 7, 2016).

A. Respondents Violated the Securities Act's and Exchange Act's Antifraud Provisions

Exchange Act Section 10(b) and Rule 10b-5 prohibit in connection with the purchase or sale of securities: (1) employing any device, scheme or artifice to defraud; (2) making material misstatements of fact or statements that omit material facts; or (3) engaging in any act, practice or course of business which operates or would operate as a fraud or deceit. Securities Act Section 17(a) contains similar prohibitions in the "offer or sale of any securities." *See, e.g., Bernerd E. Young,* Exchange Act Rel. No. 774421, 2016 SEC LEXIS 1123, **63-65 (Mar. 24, 2016); *David F. Bandimere*, Exchange Act Rel. No. 76308, 2015 SEC LEXIS 4472, **37-41 (Oct. 29, 2015). Sections 10(b) and 17(a) are violated when a respondent engages "in conduct that produces a false impression." *Dennis J. Malouf*, Advisers Act Rel. No. 4463, 2016 SEC LEXIS 2644, *20 (July 27, 2016). Such conduct "encompasses 'making' a misrepresentation; it also encompasses, among other things, drafting or devising a misrepresentation." *Id.*

Investment advisers, such as Respondents (FOF ¶ 2), may violate Sections 10(b) and 17(a) by "failing to correct a material misstatement in violation of a fiduciary duty to do so." *Malouf*, 2016 SEC LEXIS 2644, at *30, *47. For advisers, a "breach of duty of disclosure may be viewed

[13] To prevail on its causing charges, the Division need only establish: (1) a primary violation occurred, (2) respondent's act or omission was a cause of the violation, and (3) respondent knew, or should have known, that his conduct would contribute to the violation. *Robert M. Fuller*, 56 S.E.C. 976, 984 (Aug. 25, 2003). Negligence is sufficient to establish causing liability if scienter is not an element of the primary violation. *See KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1175-76 (Jan. 19, 2001).

as a device or scheme, an implied misrepresentation, and an act or practice, violative of all three subdivisions" of Section 17(a) and Rule 10b-5. *J.S. Oliver Cap. Mgmt., L.P.*, Exchange Act Rel. No. 78098, 2016 SEC LEXIS 2157, *27 n.27 (June 17, 2016) (citations omitted); *see also Larry C. Grossman*, Advisers Act Rel. No. 4543, 2016 SEC LEXIS 3768, *24-25 (Sept, 30, 2016) (respondent's receipt of fees "by means of the undisclosed compensation agreements and the untrue statements and omissions of material fact to his clients ... violated Securities Act Section 17(a)(2).").

A representation or omission is material "if there is a substantial likelihood that a reasonable investor would have considered the [misrepresented information or] omitted information important in deciding whether or not to invest and if disclosure of the omitted fact would have significantly altered the total mix of information available to the investor." *David F. Bandimere*, 2015 SEC LEXIS 4472, *40-41 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 240 (1988)). Moreover, a person "who elects to disclose material facts 'must speak fully and truthfully, and provide complete and non-misleading information with respect to the subjects on which he undertakes to speak,' and incomplete disclosures 'implicate a duty to disclose whatever additional information is necessary to rectify the misleading statements.'" *Bandimere* at *40-41 (citations omitted).

To prove a violation of Securities Act Section 17(a)(1) and Exchange Act Section 10(b) and Rule 10b-5, the Division must establish scienter, which can be established through recklessness. *Bernerd E. Young*, 2016 SEC LEXIS 1123, *64. Violations of Securities Act Sections 17(a)(2) and 17(a)(3) can be proven by a showing of mere negligence. *David F. Bandimere*, 2015 SEC LEXIS 4472, *39; *J.S. Oliver Cap. Mgmt.*, 2016 SEC LEXIS 2157, *12; *Dennis J. Malouf*, 2016 SEC LEXIS 2644, *53 ("Section 17(a)(3)'s prohibition thus applies, for example, where, as a result of a defendant's negligent conduct, investors receive misleading information about the nature of an investment or an issuer's financial condition. It also applies, for example, where, as a result of a defendant's negligent conduct, prospective investors are prevented from learning material information about a securities offering.").

Respondents repeatedly violated Section 10(b), Rule 10b-5, and Section 17(a). They did so by making numerous false and misleading statements about BOP's advertising ratios, the success of the royalty unit offerings, the use of investor proceeds, and the alignment of Winkelmann's and investors' interests. They also engaged in a scheme to lure advisory clients with claims that BOP was conflict free and always acted in their best interests, and then selling those same clients BOP royalty units without disclosing the significant conflicts attendant to the offerings.

For the advertising ratios, Respondents made false statements by representing to investors ratios that were not supported by BOP's internal financial figures. Examples include repeatedly representing that BOP's 2011 ratio was 0.78 (contrary to its own internal financial data), and also representing that its 2012 ratio was 0.89 (a figure which excluded the Chicago office's significant advertising expenditures).

To the extent Winkelmann actually relied on BOP's internal data when selecting the ratios presented to investors, those representations were, at the very least, misleading. Even believing Winkelmann's story that he based the ratios from BOP advertising reports,[14] the evidence shows that Winkelmann: (a) cherry picked data and methodologies; and (b) did not disclose such cherry picking to investors.

For instance, in order to support the 0.22 ratio from the first memorandum, Winkelmann claims that he used a 9-month advertising period (June 2010 through February 2011) for the

[14] Respondents failed to introduce contemporaneous advertising reports showing the ratios represented in the offering memoranda, and no such reports are known to actually exist.

numerator and one month's worth of revenues (February 2011) for the denominator. There is no contemporaneous document showing that Winkelmann used this methodology, which conflicts with his investigative testimony that BOP used data going back to January 2010. Even if Winkelmann is to be believed, investors would have no way of knowing the mathematical gymnastics required to arrive at the 0.22 ratio.

Assuming Winkelmann's explanation for the 0.62 ratio in the second memorandum is correct, there is no disclosure that BOP switched methodologies (to simply divide February 2012's advertising expenses by the new revenues generated that month, as Winkelmann apparently now claims). There is also no disclosure that: (a) BOP relied on a faulty assumption (that its revenues were 1% of AUM when in reality they were 0.8%) in its ratio calculations; or (b) using the methodology Winkelmann claims was most accurate (revenues *resulting* from a period's advertising) resulted in a much higher ratio. Similarly, for the 0.67 ratio cited in the third memorandum, there is no disclosure that: (a) BOP again changed methodologies (to apparently use a six-month look-back); or (b) Winkelmann selected the ratio from a variety of available figures (depending on methodology, the length of period at issue, or the most recent month used to calculate the ratio), and chose the one that made BOP look the best.

Winkelmann also repeatedly made false and misleading statements about lack of conflicts and the alignment of his and investors' interests. Specifically, the offering memoranda repeatedly represent that Winkelmann's interests were aligned with investors and that BOP eliminates conflicts of interest. The memoranda also falsely represent that it would be better for Winkelmann if less units were sold and that BOP would only use investor proceeds on expenditures that would generate revenues for BOP. Beyond the memoranda, Winkelmann on numerous occasions falsely represented to investors that he would always act in their best interests. These statements were false and misleading because Winkelmann would routinely use BOP money – that could have been used to repay investors or otherwise benefit investors through investment in advertising or other revenue-generating activities – to increase his compensation, pay personal debts, or fund his other companies.

In an effort to sell more royalty units, Winkelmann additionally falsely represented in one-on-one correspondence with potential investors: (a) how much money BOP had raised; and (b) the amount investors had been repaid. (SOF ¶¶ 88-89, 122, 136, 137).

Winkelmann and BOP also omitted important information from investors, most of whom were clients to whom Winkelmann and BOP owed fiduciary obligations to disclose all material facts. Such omissions included the purported change in methodologies used to calculate the ratios or that Winkelmann was cherry picking the ratios he presented to investors. Other omitted material information include: (a) the Binkholder bar; (b) Winkelmann's funneling of BOP money to his other companies and to pay personal debts; and (c) Winkelmann's practice of routinely paying investors near minimal returns while increasing his own compensation.

Winkelmann's misrepresentations and omissions were material. The offering memoranda described the advertising ratio as the "key driver" of BOP's success and ability to repay investors. In each memorandum, and in one-on-one correspondence with investors, Winkelmann misstated the ratio by significant amounts. Further establishing the materiality of the ratios, investors Grau, Buckowitz, and Swardson each testified that the ratio was important to their investment decision and they would have wanted to know if the ratios presented in the memoranda were misstated. (SOF ¶¶ 268, 277, 295).

Likewise, given the central role of Binkholder's radio program in BOP's advertising campaign, and the prominence given to Binkholder in the offering memoranda, the omission of the

Missouri bar order was also material. This is particularly so given that the Missouri regulators entered the bar because Binkholder failed to disclose conflicts of interest while selling securities in his businesses to advisory clients, and Winkelmann engaged in similar conduct by continuing to target his own advisory clients during the second and third royalty unit offerings.[15] Similarly material was Winkelmann's omission that BOP steadily increased his own compensation while paying investors near minimum returns. Any reasonable investor would have wanted to know that excess funds available to them were being used to increase Winkelmann's pay. Grau, Buckowitz, and Swardson confirmed that knowing Winkelmann would use investment proceeds to increase his compensation would have impacted their investment decision. (SOF ¶¶ 266, 279, 298).

While Winkelmann's state of mind is irrelevant to the Section 17(a)(2) and 17(a)(3) claims, the Division established that Winkelmann acted with scienter. Regarding the consistently misstated advertising ratios, Winkelmann either knew they were misstated or was reckless in repeatedly misstating them to investors. Indeed, Winkelmann had access to, and systematically reviewed, internal BOP financial information which either showed BOP's actual advertising ratio or allowed Winkelmann to easily calculate it. Despite scrutinizing and having access to this information, Winkelmann repeatedly authored and approved offering memoranda, and drafted correspondence to investors, which significantly misstated the ratio or failed to disclose that Winkelmann was cherry picking from methodologies and look-back periods to select the most favorable ratio. *See, e.g.*, *Elam v. Neidorff*, 544 F.3d 921, 929 (8th Cir. 2008) ("allegations that a defendant made materially misleading statements, while in possession of conflicting information, support a strong inference of scienter"); *Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270

[15] Ten of the fourteen investors who purchased royalty units through these offerings were BOP advisory clients. (FOF ¶¶ 8, 10). Moreover, Grau and Swardson both testified they would have wanted to know about Binkholder's regulatory issues when they invested. (SOF ¶¶ 269, 299).

F.3d 645, 665 (8th Cir. 2001) ("One of the classic fact patterns giving rise to a strong inference of scienter is that defendants published statements when they knew facts or had access to information suggesting that their public statements were materially inaccurate.").

Further evidence of Winkelmann's scienter is that he not only misstated the advertising ratios, but routinely did so in a way that made BOP's advertising program look more successful than it actually was. Additional evidence of Winkelmann's scienter and/or recklessness is his shifting explanation for BOP's ratios, his failure to explain his methodologies in his Wells submission, his recanting of his investigative testimony, and the fact that Juris contradicted the explanations for the ratios offered in Winkelmann's testimony, prehearing brief, and expert report.

As for the other misrepresentations and omissions in the offering memoranda – such as misrepresenting Winkelmann's "alignment" with investors and failing to disclose the Binkholder bar[16] and that Winkelmann routinely paid himself at investors' expense – Winkelmann also acted with scienter. As BOP's CCO with over 30 years of securities industry experience, Winkelmann either knew that the offering materials misstated and omitted material information, or was reckless in authoring and approving the memoranda which contained the misstatements and omissions. *See, e.g., Dennis J. Malouf*, 2016 SEC LEXIS 2644, *67 (finding scienter when respondent investment adviser, "an experienced securities professional, had an independent obligation to disclose his conflict, understood that obligation, and must have known that clients would be misled by his failure to correct the representation that no conflict existed."); *Larry Grossman*, 2016 SEC

[16] Winkelmann's failure to disclose the Binkholder bar order is even more egregious, given that Binkholder was barred for engaging in the same conduct as Winkelmann: offering securities in his own business to advisory clients without disclosing the conflicts of interest inherent in such an offering. (SOF ¶ 99). The fact that Winkelmann didn't disclose the bar to his attorneys until late 2012, when Binkholder became the subject of a criminal investigation, and then lied at trial that he told this attorneys about the bar a full year earlier, is additional evidence of Winkelmann's scienter. (SOF ¶¶ 178-182).

LEXIS 3768, *18-19 (adviser acted with scienter when he knew he was receiving compensation by virtue of client investments but failed to disclose conflict).

Also evidencing Winkelmann's scienter is his repeated concealment from investors that BOP's finances were failing and that he needed the proceeds from the royalty units to increase his own compensation and settle personal debts. One such example is Winkelmann's December 2012 email to Bryan Swift where admitted not wanting to share the "bad news" of BOP's poor finances with the other investors. (SOF ¶ 142). Further evidence of Winkelmann's attempt to conceal BOP's failing finances was his decision, in February 2013, to provide the fourth offering memorandum (which actually disclosed BOP's dire financial condition) to only three prospective investors, each of whom had previously purchased royalty units. (FOF ¶ 59; SOF ¶ 153).

Another instance demonstrating Winkelmann's scienter occurred in late 2012, when Mahoney requested that Winkelmann find a buyer for his poorly performing first round royalty unit. (SOF ¶ 140). Rather than match Mahoney with a prospective fourth round investor – creating a win-win situation for investors whereby Mahoney would sell his royalty unit and the prospective investor would buy a royalty unit that not only paid higher returns than the units Winkelmann was offering in the fourth round, but also included a warrant to buy a 1% equity stake in BOP – Winkelmann simply proceeded with the fourth round offering so that he could raise additional funds and increase his own compensation. (SOF ¶¶ 141).

And Winkelmann's scienter is further confirmed by his decision to ignore the express advice of the Greensfelder attorneys. Specifically, Winkelmann sold royalty units to his advisory clients even though the Greensfelder-written Subscription Agreements required investors to represent and warrant that they had not received investment advice from BOP. (SOF ¶¶ 177). Because Winkelmann reviewed and approved the Subscription Agreements, he either knew or was reckless in not knowing that the eighteen BOP clients who purchased royalty units made false representations in order to invest. (FOF ¶ 5).

B. Violations of the Advisers Act's Antifraud Provisions

Advisers Act Section 206(1) prohibits investment advisers from "directly or indirectly . . . employ[ing] any device, scheme, or artifice to defraud any client or prospective client." 15 U.S.C. § 80b-6(1). Section 206(2) formulates a "broad proscription against 'any . . . practice . . . which operates . . . as a fraud or deceit upon any client or prospective client.'" *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191 (1963) (citing Section 206(2)).[17]

Sections 206(1) and 206(2) "prohibit investment advisers from misstating material facts or omitting facts necessary to make a prior statement non-misleading in promotional literature and other communications to clients or prospective clients." *Anthony Fields, CPA*, Exchange Act Rel. No. 74344, 2015 SEC LEXIS 662, *58 (Feb. 20, 2015). Additionally, "Section 206 prohibits 'failures to disclose material information, not just affirmative frauds.'" *Montford & Co., Inc.*, Advisers Act Rel. No. 3829, 2014 SEC LEXIS 1529, *50-51 (May 2, 2014) (quoting *SEC v. Wash. Inv. Network*, 475 F.3d 392, 395 (D.C. Cir. 2007)). Investment advisers may be found liable under Sections 206(1) and 206(2) "for their fraudulent conduct regardless of whether they 'made' misstatements." *Dennis J. Malouf*, 2016 SEC LEXIS 2644, *54.

Section 206(2) further establishes a fiduciary relationship between the adviser and its clients, and imposes on the adviser "duties of 'utmost good faith, and full and fair disclosure of all material facts' and 'to employ reasonable care to avoid misleading [its] clients.'" *Bernerd E. Young*, 2016 SEC LEXIS 1123, *38-39 (quoting *Capital Gains*, 375 U.S. at 194). "These fiduciary responsibilities also include a 'duty to disclose any potential conflicts of interest

[17] Winkelmann's claim that he only owed fiduciary duties to his client accounts, as opposed to the clients themselves, is refuted by the plain text of Sections 206(1) and (2).

accurately and completely, and to recognize ... a potential conflict.'" *Timbervest, LLC*, Advisers Act Rel. No. 4197, 2015 SEC LEXIS 3854, *15 (Sept. 17, 2015) (citations omitted); *see also, Edgar R. Page*, Advisers Act Rel. No. 400, 2016 SEC LEXIS 1925, *14 (May 27, 2016) ("Advisers are required as a matter of law to disclose 'economic conflicts of interests' to their clients.") (citations omitted); *Dennis J. Malouf*, 2016 SEC LEXIS 2644, *61 ("By failing to correct UASNM's multiple representations that he did *not* have a conflict, Malouf breached his fiduciary duties as an investment adviser."); *Larry Grossman*, 2016 SEC LEXIS 3768, *24 (failure to disclose conflicts violated Sections 206(1) and (2)).

Section 206(1) requires a showing of scienter, while negligence suffices to establish a Section 206(2) violation. *J.S. Oliver Cap. Mgmt.*, 2016 SEC LEXIS 2157, *12; *Dennis J. Malouf*, 2016 SEC LEXIS 2644, *54.

For the same reasons that they violated the Exchange Act's and Securities Act's antifraud provisions, Winkelmann and BOP violated Advisers Act Section 206. *Dennis J. Malouf*, 2016 SEC LEXIS 2644, *70 ("Facts showing a violation of Section 17(a) or 10(b) by an investment adviser will also support a showing of a Section 206 violation." (quoting *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 383 (S.D.N.Y. 2007)). Additionally, Winkelmann and BOP violated Section 206 by breaching the fiduciary duties owed to their advisory clients who purchased royalty units. By repeatedly making false and misleading statements about BOP's advertising ratios, and by making the other misrepresentations and omissions discussed above, Winkelmann and BOP breached the duties of loyalty, due care, and honesty owed to their clients. By failing to disclose the conflicts attendant to the royalty unit offerings, whereby Winkelmann faced the recurring choice of whether to increase payments to investors or to increase his own compensation, Winkelmann breached his duty to recognize and fully disclose all conflicts of interest. And by routinely choosing to pay himself more – including by steadily increasing his compensation, using BOP funds to settle personal debts, and funneling at least $87,000 from BOP to his other businesses – while keeping investor payments at near-minimum levels, Winkelmann violated the duty of loyalty to always act in his clients' best interest.[18]

C. Violations of the Custody Rule

Advisers Act Rule 206(4)-2, the "Custody Rule," is designed to "provide for a more robust set of controls over client assets designed to prevent those assets from being lost, misused, misappropriated or subject to advisers' financial reverses." 75 F.R. 1456, 1457 (Jan. 11, 2010). The custody rule requires that advisers who have custody of client assets put in place a set of procedural safeguards to prevent loss, misuse or misappropriation of those assets. An adviser has "custody" of client assets if it holds, directly or indirectly, client funds or securities, or if it has the ability to obtain possession of those assets. 17 C.F.R. § 275.206(4)-2(d)(2). An adviser who has custody must, among other things: (a) maintain client funds in a separate account for each client under that client's name, or in accounts that contain only the clients' funds and securities under the investment adviser's name as agent or trustee for the clients; (b) notify each client in writing of the qualified custodian's name, address, and the manner in which the funds or securities are maintained; (c) have a reasonable basis, after due inquiry, for believing that the custodian sends account statements directly to each client at least quarterly; and (d) have an independent public accountant perform a surprise examination of the client funds and securities of which the adviser has custody at least once during each calendar year. *Id.* at § 275.206(4)-2(a)(1) - (4). "Lack of intent is no defense" to a custody rule violation. *Abraham & Sons Capital, Inc.*, Advisers Act. Rel. No. 1956, 2001 SEC LEXIS 2773 *27 and n.28 (July 31, 2001) (finding

[18] The Division presented unrebutted expert testimony from Professor Arthur Laby that Winkelmann violated applicable industry standards of conduct with respect to disclosure and fiduciary obligations. (Ex. 363, pp. 3, 20-28).

advisory firm's president aided and abetted custody rule violation when firm violated rule and the president was "responsible for that violation").

BOP violated the custody rule by accruing in BOP's lone operating bank account the percentage of BOP cash receipts owed to the royalty unit investors who were BOP advisory clients. Winkelmann knew about the custody rule and understood that all accrued amounts belonged to the investors. Winkelmann further understood that these accrued amounts owed to the investors were held as cash in BOP's lone bank account for months at a time, and were commingled with BOP's operating cash (and, as such, were subject to claims of BOP's creditors). (SOF ¶ 184). Further, after being confronted during the Division's investigation with the suggestion that BOP in fact had custody of royalty unit investor funds, BOP changed its Form ADV disclosures to reflect that it had custody of client funds. (SOF ¶¶ 187, 189). Nevertheless, Respondents concede that, prior to 2015, BOP failed to take the measures required for advisers with custody of client funds. (FOF ¶ 70).

Winkelmann caused BOP's custody rule violations. As BOP's CEO and CCO, Winkelmann determined BOP's process for when investors would be paid, how the amounts owed to investors would be commingled with other funds in BOP's operating account, and whether or not to have BOP comply with the requirements of the custody rule.

D. Violations of Advisers Act Section 206(4) and Rule 206(4)-7

Advisers Act Rule 206(4)-7 "requires, among other things, that an investment adviser adopt and implement written policies and procedures reasonably designed to prevent violations by the investment adviser or its supervised persons of the Advisers Act and the rules adopted thereunder." *Anthony Fields, CPA*, 2015 SEC LEXIS 662, *69. An adviser violates Rule 206(4)-7 when it fails to adhere to its own written compliance policies. *J.S. Oliver Capital Mgmt.*, 2016 SEC LEXIS

2157, *35; *Donald L. Koch*, Advisers Act. Rel. No. 3836, 2014 SEC LEXIS 1684, *77-78 (May 16, 2014).

BOP violated Rule 206(4)-7 because its compliance policies and procedures manuals falsely stated that BOP did not have custody of client assets, and that client funds would be maintained by custodians other than BOP. As CCO, Winkelmann was tasked, in writing, with implementing BOP's custody policies and procedures. (FOF ¶ 71; SOF ¶¶ 191-193). Accordingly, Winkelmann caused BOP's violation of Rule 206(4)-7.

E. Violations of Advisers Act Section 207

Advisers Act Section 207 "makes it unlawful for 'any person willfully to make any untrue statement of a material fact' in Form ADV or 'willfully to omit to state . . . any material fact which is required to be stated therein.'" *J.S. Oliver*, 2016 SEC LEXIS 2157, *32 (quoting 15 U.S.C. § 80b-7); *see also Zion Capital Mgmt. LLC*, Advisers Act Rel. No. 2200, 2003 SEC LEXIS 2939, *26 (Dec. 11, 2003) (violation of Section 207 where adviser failed to disclose conflicts of interest in Form ADV). "Scienter is not required for violations of Section 207," such that there is "no requirement that the respondent 'also be aware' that he 'violat[ed] one of the Rules or Acts.'" *J.S. Oliver* at *32.

During the relevant period, BOP filed at least 20 Forms ADV which falsely represented that BOP did not have custody of client funds. (SOF ¶ 186). Winkelmann controlled the contents of those forms, and caused the forms to be filed with the Commission. (FOF ¶ 69). Thus, both he and BOP violated Rule 207. *Larry Grossman*, 2016 SEC LEXIS 3768, *24-27 (Rule 207 violation where adviser "stated falsely (in the IAAs, Form ADV, and other disclosures) that [adviser] and related entities would not have custody over client funds...A reasonable investor would have wanted to know the risk that funds could be accessed by the investment adviser.")

F. Respondents' Reliance Defense Fails

Respondents have asserted reliance on counsel as an affirmative defense, premised on their consultations with Greensfelder attorneys. To invoke such a defense, Respondents are required to show: "(1) that they made complete disclosure to counsel; (2) that they sought advice on the legality of the intended conduct; (3) that they received advice that the intended conduct was legal; and (4) that they relied in good faith on counsel's advice." *William Scholander*, Exchange Act Rel. No. 77492, 2016 SEC LEXIS 1209, *25-26 and nn. 37-38 (Mar. 31, 2016); *see also The Robare Group, Ltd.*, Advisers Act Rel. No. 4566, 2016 SEC LEXIS 4179, *33-34 (Nov. 7, 2016).

Any reliance defense fails because for the key issues in this case, Winkelmann failed to make complete disclosures to or seek advice from counsel, and never received advice that his contemplated conduct was legal. For instance, there is no evidence in the record that Winkelmann consulted with attorneys, or any other professionals, regarding the advertising ratios disclosed in the offering memoranda.

Regarding Winkelmann's claim that he did not owe fiduciary duties to his advisory clients in the course of the royalty unit offerings, Winkelmann admitted that he never asked Greensfelder attorneys whether or not he owed such duties. (SOF ¶ 175). On the issue of offering royalty units to advisory clients, Winkelmann did not follow the advice of counsel because he had his clients sign Subscription Agreements – which Greensfelder prepared – that required each investor to represent and warrant that he or she was not a BOP advisory client. (SOF ¶¶ 176-177).

As for not disclosing the Binkholder bar, Winkelmann's claim that he sought and received advice on the subject is belied by the evidence and is not credible. Despite Winkelmann testifying that Greensfelder attorneys scrutinized the Binkholder bar order and then extensively discussed the bar with him, the invoices show that Greensfelder never made billing entries for such work. (SOF ¶¶ 178-179). The record further shows that Winkelmann did email a copy of the Binkholder bar order to Greensfelder, but did so *in 2013*, not late 2011 when Winkelmann learned of Binkholder's bar. (SOF ¶ 182). Additionally, Winkelmann has demonstrated, by recanting at trial his investigative testimony, that his sworn testimony is not credible.

Finally, any reliance defense fails because, as an experienced securities professional who understood his fiduciary obligations and routinely touted them to clients and investors, Winkelmann did not need to be told that he couldn't lie to clients, omit important information, fail to disclose conflicts, or put his interests ahead of his clients. *See, e.g., Riad,* 2016 SEC LEXIS 2396, *135-136 ("These were not technical, compliance-related or legal judgments that respondents could reasonably have believed others were independently evaluating. In short, [respondents] could not in good faith have relied on any advice that purported to excuse them from the duty to speak the truth to investors about the Fund's investment strategies, performance, and risks."); *The Robare Group, Ltd.,* Advisers Act Rel. No. 4566, 2016 SEC LEXIS 4179, *36 (Nov. 7, 2016) (respondents "could not reasonably rely on any advice that the disclosures were adequate because they knew their obligations as investment advisers, that they were required to disclose potential conflicts of interest, and that the Arrangement presented such a conflict but was not disclosed.").

IV. THE COURT SHOULD IMPOSE SANCTIONS IN THE PUBLIC INTEREST

The public interest would be well served by sanctioning Respondents. In determining whether sanctions should be imposed, the Court may consider the following elements: the egregiousness of the actions; the isolated or recurrent nature of the infractions; the degree of scienter involved; the sincerity of respondent's assurances against future violations; a respondent's recognition of the wrongful nature of his conduct; and the likelihood that a respondent's occupation will present opportunities for future violations. *See Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds,* 450 U.S. 91 (1981); *Mohammed*

Riad, 2016 SEC LEXIS 2396, *151-52. The Commission stresses flexibility in analyzing these factors, such that "no one factor is dispositive." *Riad* at *152. The Court also may consider the extent to which a sanction will have a deterrent effect. *Schield Management Co.*, Exchange Act Rel. No. 53201, 58 S.E.C. 1197, 1217-18 (Jan. 31, 2006).

Winkelmann acted egregiously and with scienter by making false and misleading statements and failing to disclose conflicts to advisory clients. *See, e.g., Larry Grossman*, 2016 SEC LEXIS 3768, *84-85 ("Grossman's conduct [repeatedly failing to disclose conflicts] was egregious...We conclude that Grossman's efforts to defraud his clients and abuse their trust demonstrate that he lacks the competence and requisite professional ethics required for him to meet these standards and operate as a fiduciary."). Winkelmann's fraud continued over the course of two years and four separate offerings. Winkelmann has offered no assurances against future violations and refuses to acknowledge the wrongful nature of his conduct.[19] To the contrary, he testified he has not done anything wrong and continues to blame the Commission and Missouri regulators for his current situation. Absent an appropriate sanction, Winkelmann will continue to operate as an adviser and fiduciary to investors, and will have ample opportunity to commit future violations.

A. The Court Should Enter a Cease-and-Desist Order

Section 21C of the Exchange Act, Section 8A of the Securities Act, and Section 203(k) of the Advisers Act authorize the Commission to issue a cease-and-desist order against any person who "has violated" the statute or rules thereunder. Here, Respondents' violations raise a sufficient risk of future violations to support the entry of such an order. "The risk of future violations required to support a cease-and-desist order is significantly less than that required for an

[19] Further negating any assurances against future violations is the fact that in 2012, during the period at issue in these proceedings, Winkelmann was held in contempt for willfully violating a court order. (SOF ¶¶ 28-29).

injunction, and, absent evidence to the contrary, a single past violation ordinarily suffices to raise a sufficient risk of future violations." *Rodney R. Schoemann*, Securities Act Rel. No. 9076, 2009 SEC LEXIS 3939, *48 (Oct. 23, 2009), *aff'd, Schoemann v. SEC*, 398 F. App'x 603, 604 (D.C. Cir. 2010). Given Respondents' repeated violations of the securities laws, including the antifraud provisions, and Winkelmann's failure to recognize the wrongful nature of his conduct, the Court should impose a cease-and-desist order.

B. The Court Should Order Disgorgement and Prejudgment Interest

Section 21C(e) of the Exchange Act, Section 8A(e) of the Securities Act, and Section 203(k) of the Advisers Act authorize the Commission to order disgorgement, plus reasonable interest. In enforcement actions, "disgorgement restores the *status quo ante* by depriving violators of ill-gotten profits." *Zacharias v. SEC*, 569 F.3d 458, 471 (D.C. Cir. 2009). The disgorgement award "need only be a reasonable approximation of the profits causally connected to the violation," and "the burden of uncertainty in calculating ill-gotten gains falls on the wrongdoers who create that uncertainty." *Id.* at 473.

In cases involving offering fraud, courts routinely order issuers to disgorge the proceeds received from the fraudulent offering. *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). In this case, BOP's proceeds from the fraudulent royalty 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). (FOF ¶¶ 1, 14).

Moreover, the Court should hold Winkelmann and BOP jointly and severally liable for disgorgement 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*, 2016 SEC LEXIS 1925, *52 (quoting *SEC v. Whittemore*, 659 F.3d 1, 10 (D.C. Cir. 2011)) (emphasis in original); *see also SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004) (recognizing the "well settled principle that joint and several liability is appropriate in securities laws cases where two or more individuals or entities have close relationships in engaging in illegal conduct."); *Gordon Brent Pierce*, Exchange Act Rel. No. 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.*, 2016 SEC LEXIS 2157, *49-50 (ordering joint and several disgorgement);

To the extent the Court declines to hold Winkelmann jointly and severally liable for the disgorgement of BOP's offering proceeds, the Court should order Winkelmann to disgorge at least the $678,757 he personally benefitted from the royalty unit offerings. This figure includes the $125,000, $189,200, and $227,557 yearly sums BOP paid to compensate Winkelmann, respectively, in 2012, 2013, and 2014. (FOF ¶ 64). It also includes the additional $41,000 BOP paid Longrow Insurance Agency to compensate Winkelmann for his services to BOP, the $46,000 BOP paid Blue Ocean ATM, and the $50,000 BOP paid to extinguish Winkelmann's personal settlement obligation in a lawsuit against him. (SOF ¶¶ 161-165).

Winkelmann relied on the fraudulent royalty unit offerings to keep BOP's business afloat and his compensation flowing. Specifically, BOP's financial condition was dire at the time Winkelmann decided to initiate the first, second, and fourth offerings. (FOF ¶¶ 45-46; SOF ¶¶ 92-95, 142, 145). Without the proceeds of those offerings, BOP would have had difficulty staying in business, let alone funding the significant and increasing payments made for

Winkelmann's benefit.[20] Accordingly, these payments 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 O. Trautman*, Exchange Act. Rel. No. 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).

C. The Court Should Order Civil Penalties

The public interest likewise supports requiring Respondents to pay significant civil penalties for their misconduct. In considering whether to impose penalties, factors to consider include: (1) whether the violations involved fraud, deceit, manipulation or reckless disregard of a regulatory requirement; (2) the harm caused to others; (3) the extent to which any person was unjustly enriched; (4) prior violations by the respondent; (5) the need for deterrence; and (6) such other matters as justice may require. Exchange Act § 21B(a)(2); Securities Act § 8A(g); Advisers Act § 203(i).

Third tier penalties may properly be imposed for "each act or omission involving fraud or deceit that additionally resulted in (or created a significant risk) of substantial losses to other persons or that resulted in substantial gains to the wrongdoer." *Anthony Fields, CPA*, 2015 SEC LEXIS 662, *102-104; *Mohammed Riad*, 2016 SEC LEXIS 2396, *161-162; *Bernerd Young*, 2016 SEC LEXIS 1123, *95. As in *Fields*, *Riad*, and *Young*, third-tier penalties against Respondents are

[20] Winkelmann's dependence on the royalty unit offerings to fund his compensation is best demonstrated by Exhibit 83, a December 20, 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 round offering and using the proceedings to raise their monthly compensation to $8,500. (SOF ¶¶ 92-95). 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 if it could not raise at least $50,000 by March 1, 2013. (SOF ¶ 153; FOF ¶ 59).

warranted.[21] Respondents' misconduct involved fraud, deceit, manipulation of BOP's advertising data, and reckless disregard of the statutorily imposed fiduciary duties owed to their advisory clients. Winkelmann's misconduct has harmed his clients by keeping their royalty unit payments at near-minimal levels that are not commensurate with the returns suggested by the inflated advertising ratios and payback schedules contained in the offering memoranda. Winkelmann further harmed investors by diverting to himself significant sums – that could have been used to repay investors – resulting in Winkelmann receiving substantial gains.[22] For these reasons, the amount of any civil penalty assessed against Respondents should be sufficient to deter them and others from engaging in the type of conduct at issue in this proceeding.

D. The Court Should Impose Industry Bars

Under Section 15(b)(6)(A) of the Exchange Act and Section 203(f) of the Advisers Act, the Commission may bar or suspend persons from being associated with an investment adviser or other types of firms in the securities industry. *Larry Grossman*, 2016 SEC LEXIS 3768, *53. In order to bar Winkelmann or BOP, the Court must find that: (1) they willfully violated the Advisers Act or its rules; and (2) based on the *Steadman* factors, a bar is in the public interest. *Larry Grossman*, 2016 SEC LEXIS 3768, *81-84. In assessing the *Steadman* factors, "the 'degree of risk [that the respondent] poses to the public' and the extent of the respondent's 'unfitness to serve the investing public' are central considerations." *Grossman* at *83-84 (quoting *Meadows v. SEC*, 119 F.3d 1219, 1228 & n.20 (5th Cir. 1997)).

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[21] Should the Court determine that third-tier penalties are not warranted, the Division requests the imposition of second or first tier penalties.

[22] BOP also realized substantial gains as a result of the royalty unit offerings. BOP raised $1.4 million though the offerings, money that was "critical" to allowing BOP to stay above water and implement its business plan. (SOF ¶ 33; FOF ¶ 1).

Based on the relevant factors and Respondents' willful violations of the securities laws and breaches of their fiduciary obligations, the Court should impose a full associational bar precluding Respondents' involvement in the securities industry. *See, e.g., Dennis Malouf*, 2016 SEC LEXIS 2644, *94 ("Malouf's betrayal of his clients' trust involved a core tenet of his responsibility as an investment adviser--his duty to disclose material facts, including his conflict of interest, to his clients."); *Larry Grossman*, 2016 SEC LEXIS 3678, *85 ("We conclude that Grossman's efforts to defraud his clients and abuse their trust demonstrate that he lacks the competence and requisite professional ethics required for him to meet these standards and operate as a fiduciary."); *Mohammed Riad*, 2016 SEC LEXIS 2396, *151-156 (imposing permanent bar and noting: "scienter-based antifraud violations by investment advisers often result in industry-wide, permanent bars, and we have barred advisers even for committing fraud without scienter" (citations omitted)); *J.S. Oliver*, 2016 SEC LEXIS 2157, *40 ("Although he was an investment adviser charged with fiduciary duties to his clients, Mausner persistently and systematically failed to act in the best interests of those clients."); *Anthony Fields*, 2015 SEC LEXIS 662, *91-99; *Bernerd Young*, 2016 SEC LEXIS 1123, *90-91.

As in the above decisions, the Court should bar Respondents from the securities industry and send a message that Respondents' conduct is unacceptable for those with fiduciary obligations or who offer securities to investors. Over the course of four offerings and multiple years Winkelmann repeatedly made false statements and omissions and breached his fiduciary duties to his advisory clients. Winkelmann's conduct is all the more egregious given that he had decades of experience operating as a fiduciary in the securities industry, and he ignored the findings of the Binkholder bar order and the advice of his attorneys by offering royalty units to advisory clients.

Winkelmann's failure to accept responsibility for his misconduct, and his systematic attempts to blame the Commission and the Missouri regulators, further buttress the need for a bar.

Finally, Winkelmann has proven to be a terrible judge of character while serving as an investment adviser. Indeed, his previous two advisory business partners, Weir and Binkholder, have both been criminally convicted and imprisoned for defrauding clients. Given his track record of associating with crooked advisers, let alone his conduct in this case, Winkelmann should no longer be afforded the privilege to remain in the industry and act in a fiduciary capacity.[23]

V. CONCLUSION

The Division of Enforcement respectfully requests that the Court issue an Initial Decision finding that Respondents engaged in the violations described in the Order Instituting Proceedings and imposing appropriate sanctions.

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[23] To the extent the Court is concerned that barring Respondents would result in BOP being unable to repay the royalty unit investors, the Court should consider barring Winkelmann but allowing BOP to stay in business. Given Winkelmann's testimony that BOP could succeed without his day-to-day management of the company, it appears that BOP could continue to operate under its current ownership by Winkelmann's family company (23 Glen Abbey Partners) or if Winkelmann sells BOP to a third-party. (SOF ¶¶ 201-204). Further, Respondents have not asserted an "inability to pay" defense, and Winkelmann testified that he has resources other than BOP to pay personal obligations. (SOF ¶¶ 199-200).

Word Count Certification

The undersigned counsel for the Division of Enforcement hereby certifies that this brief is 16,334 words, exclusive of the tables of contents and authorities, which complies with the Court's October 18, 2016 Post-Hearing Order.

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