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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: **JAMES A. WINKELMANN, SR. AND BLUE OCEAN PORTFOLIOS, LLC,** **Respondents.**	ADMINISTRATIVE PROCEEDING File No. 3-17253

RESPONDENTS' REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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A. Existence of a Fiduciary Obligation With Regard to the Royalty Unit Offerings.

1. Winkelmann Operated As A Fiduciary When Acting In An Investment Advisor But Did Not Sell Royalty Units In That Capacity.

The Division dedicates an inordinate number of pages to arguing that Mr. Winkelmann carried fiduciary obligations when acting as an investment advisor and that he was aware of those obligations. Neither point is in dispute. As an investment advisor, when dealing with advisory clients, Mr. Winkelmann carried, and was aware he carried, fiduciary obligations to clients.

The real question posed to this Commission – which the Division fails to address – is whether an investment advisor can be held to a fiduciary standard outside of that advisor-client relationship where he has expressly informed the client that he was "taking off" his investment advisor "hat" and communicating outside of that relationship. In its Response,[1] the Divisione cites numerous cases, none of which addresses the situation at hand: whether an investment advisor continues to act as a fiduciary where he has expressly disclosed (1) that he is not operating in an investment advisory capacity with regard to the transaction at issue; (2) that he cannot make a recommendation to the client, given the change in capacity; and (3) an express declaration that the *reason* he cannot act and is not acting as a fiduciary is because it could give rise to a conflict of interest.

Instead of addressing the facts presented, the Division points to a handful of cases upholding the fiduciary duty in the *absence* of these express disclosures. Obviously, those cases are distinguishable and inapplicable here where the unrebutted evidence – confirmed by the

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[1] "Division's Response". Cited herein as Div.Resp.___.

Division's own investor witnesses – is that Mr. Winkelmann orally and in writing informed advisory clients when discussing the Offerings that[2]:

> Because of the fiduciary relationship we have with you, I cannot recommend that you or your family participating in this offering due to the potential conflict that such a recommendation will create, and this letter is not an offer. Nonetheless I wanted to make you aware of this situation and can provide you with offering material should your interest warrant.

His attorney, Michael Morgan of Greensfelder, reviewed and approved this cover letter to advisory clients enclosing the offering materials prior to their distribution.[3] Moreover, the Division's own expert witness agreed that this type of disclaimer was capable of properly informing a client that (1) the investment advisor was changing the capacity in which the advisor was interacting and (2) the proposed transaction fell outside the scope of the fiduciary relationship:[4]

> JUDGE PATIL: I have a question ...and counsel will object as they deem appropriate. But what difference, if any, would it make if Mr. Winkelmann was careful to tell investment advisory clients that "I'm not advising you to buy the Royalty Unit. I'm just presenting this as an offer and an option and I'm not recommending you take it. You have to make the decision for yourself"?
>
> ***
>
> THE WITNESS: The only possible way it could make a difference is if there were something that was simply a conflict of interest, then at least potentially that duty to disclose a conflict would be more robust in the context of advisory clients. And so to the extent that Mr. Winkelmann were to say, "Look, when it comes to this transaction, I am no longer acting as your investment advisor and I no longer owe you a fiduciary duty." And that's the key. Say "I'm

[2] RX-106 p. 401. *See also,* Section IV.C. of Respondents' Brief in Support, which discussed this same issue.

[3] RX-127, pp. 1-2 and 20-22, attached hereto as Exhibit 1. RX-127 was added to the record in this proceeding pursuant to the Commission's June 15, 2017 Order.

[4] Tr. 319:5- 320:22.

taking off my fiduciary duty hat and I don't owe you that duty anymore."

The Division has failed to address these facts. Instead, it has filled its Response with cases and authority setting forth the general parameters of the fiduciary relationship absent the language used by Blue Ocean and not considering the testimony of its expert witness.

Because the Division, which carries the burden on this issue, has failed to prove that Mr. Winkelmann violated a fiduciary obligation when he informed advisory clients of the Royalty Offerings, the Initial Decision's finding in the Division's favor on this issue (the existence of a conflict) should be reversed.

B.o No Conflicts Existed Under The Royalty Unit Structure.o

The Division also repeats its argument that the Royalty Unit structure was "ladled" [sic] with conflicts. This was addressed fully in Respondents' Brief in Support[5] and need not be repeated here. Instead, Respondents focus this Reply only on additional issues noted by the Division in its Response.

1.o The Division's "Implication" Theory Fails in light of Expresso Disclosures made.o

The Division asserts that the Offering Documents "implied" that investors "may" receive more than the minimum payment each month. In order to accept the Division's "implication" theory, however, the Commission must ignore the *express* language of the Offerings.

For example, the Offering Memoranda *expressly* disclosed that there was no established timeframe within, or deadline by, which investors would be repaid:[6]

[5] Section IV. B.

[6] RX-001 p. 98 (paragraph (r)); CX-124 (paragraph (p)); RX-003 p. 132 (paragraph (p); RX-004 p. 146 (paragraph (p)).

> The Subscriber acknowledges that the Royalty...may never be paid in full by the Company and the Royalty is not required to be paid in full before any scheduled date.

In addition, the Offering Memoranda disclosed that additional payments (1) were not guaranteed; (2)may never occur;[7] (3) occur at the company's "sole and absolute" discretion;[8] and (4) are noto required to be made by any particular date.[9] In the presence of these express, explicit warnings to investors that no repayment deadline or timeframe existed for the units, and that full repayment may never occur, the Division's reading of the documents, creating an "implied" understanding to the contrary, is unreasonable.

Additionally, the Division's "implication" argument should be rejected because it requires the Commission to piece together select sentences – or portions of sentences – in the Offering materials, while ignoring others. For example, with regard to both the Round 3 and Round 4 Offerings, the Division points to the representation in the Offering Memoranda that "investors should expect the bulk of their returns in 3-5 years," and argue that this statement could be reasonably interpreted by investors to *imply* a promise to repay them in 3-5 years. Then, it argues the "implied" 3-5 year time projection was buttressed by a chart that appears ten pages prior to the statement itself.[10]

The problem with this hunt-and-peck selection of statements is that is misconstrues the representations actually made to investors. First, consider the Chart cited by the Division, which appears on page 4 of the Offering Memoranda[11]:o

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[7] *Id.*

[8] RX-001 p. 82; Tr. 558:13-23 (Winkelmann); Tr. 272:20-23 (Laby); CX-124; RX-003 p. 132; RX-004 p. 146. Profitability is a defined term under the offering documents.

[9] RX-003 p. 13 ("Of course, no one can predict the future; actual rates of return will depend on several variables.")

[10] Div.Resp. p 8-9.

[11] The same is true for the chart that appears on page 9 of the Division's brief, regarding the Fourth Round Offering Memoranda, except that chart disclosed even longer repayment time periods in the event of lower performance.

Royalty Rate Per Unit	Internal Rate of Return	Months to Payback
0.10%	12%	133
0.25%	19%	83
0.40%	30%	54
0.55%	44%	38
0.70%	57%	28
0.85%	72%	22

This chart expressly warns investors that if the Company pays only the minimum, it could take more than 11 years to repay them. That is, the chart *expressly* discloses that the Division's *implied* 3-5 year time period may not occur. In the presence of express disclosures, it is implausible that the Offering Memoranda could fairly be read, as the Division argues, to *imply* the opposite.[12e]

Yet, the chart highlights a more foundational error in the Division's reasoning. Throughout the Offering Memoranda, the Firm made clear that its ability to repay investors more quickly was tied to its ability to generate sufficient revenue to achieve "recurring, sustainable profitability."[13] This chart, misread by the Division, puts the two concepts into a demonstrativee form. The higher the rate of return (i.e., the more successful the Company is at converting

[12] *Wu v. Stomber*, 883 F. Supp. 2d 233, 259 (D.D.C. 2012), *aff'd,* 750 F.3d 944 (D.C. Cir. 2014), and *aff'd,* 750 F.3d 944 (D.C. Cir. 2014); *In re TVIX Sec. Litig.*, 25 F. Supp. 3d 444, 453 (S.D.N.Y. 2014), *aff'd sub nom. Elite Aviation LLC v. Credit Suisse AG*, 588 Fed. Appx. 37 (2d Cir. 2014) ("To the extent that Plaintiffs' contra-indicator approach relies on reading individual words and phrases against each other in isolation, its consistency with these principles is questionable. The Court has, however, reviewed both the juxtaposition of the particular elements identified by Plaintiffs and the overall mix of information provided and, as explained below, concludes that Plaintiffs have not pleaded plausibly that a reasonable investor could have read the Offering Documents [to imply the things suggested]"); *In re ProShares Tr. Sec. Litig.*, 728 F.3d 96, 103 (2d Cir. 2013) ("Because the 'role of the materiality requirement is not to attribute to investors a child-like simplicity,' we presume that a reasonable investor can comprehend the basic meaning of plain-English disclosures and will not credit Plaintiffs' narrow reading [to the contrary]").

[13] RX-003 p. 4 (this language appears immediately below the above chart).e

advertising into revenue), the higher the royalty rate paid and, in turn, the fewer "months to payback."

The Division ignores the Firm's performance element, captured in the middle column, and instead asserts that this chart should be construed to *imply* that the additional payments would be coming regardless of the Firm's performance. This reading is contradicted not only by this chart, but by the stated objective of the Offering.

Moreover, the Division's interpretation (contemplating aggressive additional payments prior to profitability) presumes that a reasonable investor would have understood that the Firm intended to repay them using the funds accumulated under the Offering. That is, instead of using the funds for the purpose stated in the Offering Memoranda, the Firm really intended simply to hand those funds back to investors.

This ____ing, as well, is contradicted by the Offering Memoranda, which expressly stated the purpose of the offerings was to raise capital to expand the Firm's advertising, both in terms of the type of advertisements used and their geographic scope.[14] The funds raised were to bes used to purchase these advertising buys and fund the Firm during its expansion. And if – and only if – the Firm was successful in this expansion and achieved profitability did it contemplate making additional payments. These *express* disclosures informed investors that their payment amount hinged on Blue Ocean's *performance* alone. And that unless the Firm performed as hoped, the only payment investors could reasonably expect was the mandatory monthly payment.

Any other reading of this chart or the Offering Memoranda runs contrary to their express terms and should be rejected by the Commission.

[14] RX-001 p. 8-9; RX-002 p. 11-12; RX-003 and RX-004 p. 9-10 .

2. The Division Admits that Mr. Winkelmann Would be Compensated was Disclosed.

In its Response, the Division admits that the Offering Memoranda disclosed the fact that Mr. Winkelmann would be compensated.[15] Because that fact was disclosed, there can be noe liability for a disclosure failure. The Initial Decision's finding to the contrary should be reversed.

3. Mr. Winkelmann's Compensation did not Give Rise to a Material Conflict.

The Division also argues, as evidence that Mr. Winkelmann's salary created a material conflict of interest, that his compensation "in no way" benefited investors and, instead, only benefited Mr. Winkelmann. The Division has failed to prove such a claim.

Mr. Winkelmann was perhaps the most important of the "key" persons listed in the Offering Memoranda. As CEO, he was responsible for decisions regarding the Firm's business, advertising, and expansion plans. The testimony at the hearin_ including that of Ms. Juris, reflected the tremendous amount of work Mr. Winkelmann and his team put into meticulously tracking and monitoring the success of its advertising.[16] As of the evidentiary hearing, he is thee *only* one of the "key persons" identified in *any* of the Offering Memoranda that is still with the Company. He now runs Blue Ocean almost entirely by himself and, despite the loss of everyone else, Blue Ocean has still never missed a royalty payment.[17] Mr. Winkelmann's work as CEOe has been a tremendous benefit to investors – certainly justifying his $123,000 average salary.[18e]

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[15] RX-001 p. 12-14; RX-002 pp. 6-7. Nearly identical language appears in the other three offerings. Rounds 3 and 4 also disclose the Pro Forma operating expenses that the Firm expected to incur. RX-003 p. 21, RX-004 p. 21. Additionally, every investor witness called to testify admitted they understood Mr. Winkelmann was compensated.

[16] *E.g.* RX-054; RX-055; RX-006; RX-36; RX-37; RX-120; Tr. 861: 12-23 (Juris).

[17] Tr. 1401:7-11; Tr. 1402:24-1403:3.

[18] Tr. 1485:16-25.

In light of the Division's admission that the Offering Memoranda disclosed that Mr. Winkelmann would be compensated,[19] it cannot give rise to a violation under the securities lawse alleged in the OIP. Moreover, the Division's argument that Mr. Winkelmann's compensation "in no way" benefited investors is unsupported by the record (and, in fact, the evidence *disproved* the same).

The Division's arguments should be rejected and Initial Decision's finding to the contrary, should be reversed.[20e]

C. No Evidence Of Scienter.

The majority of the examples cited by the Division, supposedly indicative of scienter, relate to the purported conflict of interest created by Mr. Winkelmann earning a salary for running the company. This section addresses only the issues raised by the Division that were not previously addressed before the Commission, including (1) the "failing finances" argument; (2) the ATM loan; and (3) the subscription agreement.

1. No "Failing Finances."

The Division maintains, citing to a single exhibit, that Mr. Winkelmann issued the Royalty Units to "conceal" the Firm's "failing finances" and that he issued the offerings only to "increase his own compensation and settle personal debts.[21] There is no evidence of this.e

What the Division refuses to accept is that Blue Ocean was not running out of money, or on the brink of collapse, as suggested. Instead, at the time evidenced by the sole email the Division cites in support of its theory, the Firm was nearing the end of the funds accumulated in

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[19] Div. Response p. 11.

[20] *Augenstein v. McCormick & Co., Inc.*, 581 F. Supp. 452, 458 (D. Md. 1984); *O'Sullivan v. Trident Microsystems, Inc.*, C 93-20621 RMW (EAI), 1994 WL 124453, at *4 (N.D. Cal. Jan. 31, 1994) ("If the material containing the alleged omissions "actually discloses the facts that Plaintiffs claim are absent, there is obviously no omission.")

[21] Div. Response. p. 14-15.

the prior Offerings, primarily because it had just opened a Chicago location and was now purchasing advertisements in two locations.[22]

However, the Firm did not need money to survive as an advisory firm; it only needed additional funds to continue its current growth trajectory, as Mr. Winkelmann testified *immediately* after the testimony upon which the Division relies:[23]

> JUDGE PATIL: Excuse me for a minute. ...did you project how long would you have been able to sustain operations with large negative cash balances like that?
>
> THE WITNESS: Well, Judge, if you see this schedule, it's pretty interesting because it's not like we wake up and we're out of cash. We can see it coming three or four months out.
>
> ***
>
> JUDGE PATIL: Right. I think that the question about the payments to the Royalty Unit holders is if the entire entity is operating at a huge deficit...how would it be that four or five months down the line in the absence of a deal you'd be able to keep paying anybody?
>
> THE WITNESS: Well, we'd have to – of course royalty holders did get paid. What actually happened was we made significant reductions to expenses. That's what happened. Along with this modest round four that came in February. And that's the last time we went to any outside source for money.
>
> JUDGE PATIL: Okay. Thank you.

As discussed above and in Respondents' Brief in Support, the growth of the advertising campaign – aimed to bring in new clients and new recurring revenue – was the objective and foundation of the Offerings. This growth benefited investors, who shared in that revenue and, once the Firm achieved profitability, could possible receive additional repayments toward their principal and multiplier.

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[22] Tr. 726:8-20.

[23] 729:16-731:16.

This benefit is repeatedly disclosed in the Offering Memoranda. Additionally the record is replete with evidence of the Firm's diligent adherence to the campaign. Ms. Juris and Mr. Winkelmann testified at length about how the Firm tracked and monitored its advertisements, keeping only those that were most successful in converting new advisory clients. Respondents introduced into evidence the records the Firm used to track this data, adjust its spending, and increase new client revenue.[24e]

What is not supported by any evidence is the Division's sinister spin on the facts. Ignoring all the evidence to the contrary, the Division maintains that the *only* motivation behind the Offerings was Mr. Winkelmann's "repeated" desire to increase his compensation. Not only is there no evidentiary support for the Division's position, the evidence in the record compels a finding to the contrary. Accordingly, the Division's "failing finances" argument constitutes insufficient grounds for an award of scienter.

2. The ATM Pledge was an Advertising Opportunity Expressly Contemplated by the Offering Memoranda.

The Division has also alleged that a four-day collateral pledge Blue Ocean made to Blue Ocean ATM evidences Mr. Winkelmann's "intent to deceive" his investors. This unsubstantiated argument was soundly (and rightly) rejected in the Initial Decision and should likewise be rejected by the Commission.

Blue Ocean ATM was an affiliate of Blue Ocean Portfolio. Blue Ocean ATM used the pledged funds from its affiliate to secure a four-day bank loan needed to stock its ATMs with cash for a three-day festival.[25] What the Division ignores, as it did in the proceeding below, ise that this type of advertising – prominently featuring Blue Ocean ATMs with the Blue Ocean

[24] *See* note 16, above.

[25] Tr. 809:14-810:6 (Winkelmann).

name and logo – at local events was the type of promotional activity specifically contemplated by the Offering Memoranda,[26] as Mr. Winkelmann testified[27]:

> Q: And you didn't make Blue Ocean ATM pay Blue Ocean Portfolios any money for using Blue Ocean Portfolios' funds as collateral, correct?
>
> A: Again, I thought there was a great advertising benefit. I talked about this in my Wells notice is that clearly there's a good advertising benefit to have Blue Ocean in front of all these people. So there was certainly a benefit for Blue Ocean Portfolios to have Blue Ocean ATM in front of all these people.

The Initial Decision agreed.[28]

For the same reasons the Initial Decision rejected the Division's allegation that the ATM pledge created a conflict of interest, the Commission should reject the Division's argument that the ATM pledge evidences scienter. Not only was this type of promotion expressly disclosed to investors, it was in pursuit of the Offerings' express oojective.

3. The Subscription Agreement.

The Division again argues that the Subscription Agreement and the representation contained in paragraph (a) thereof constituted an attempt by Blue Ocean to induce its investors to lie wnen they purchased their units. This provision of the Subscription Agreement and its true meaning was addressed fully in Respondents' Brief in Support (Section IV.D.). The Division attributes undue weight to this provision and, amongst other things, has made wild extrapolations of its meaning in an attempt to find some indicia of scienter that would entitle it to judgment in its favor.

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[26] RX-2, pp. 6-7.

[27] Tr. 815:7-16 (Winkelmann)

[28] Initial Decision p. 65.

For all the reasons Respondents have already discussed, however, the Subscription Agreement was never intended to (and did not) carry the meaning the Division has attributed to it after the fact.

D. Section 206 Does Not Apply to Royalty Offerings Under the Facts Presented.

In the briefings before this Commission, the parties have contested whether or not Section 206 applies to the Royalty Unit Offerings. The Division continues to cite basic authority reflecting the fact that an investment advisor *generally* owes a fiduciary duty in transactions involving clients.[29] Yet, once again, it fails to address the true issue in this case: whether, undere the *specific* facts presented here, where an investment advisor has *expressly informed* the client that he is not acting as an investment advisor and *expressly informs* the client that he is not making a recommendation in that capacity, does presenting that offering to the client fall under Section 206.

The Division's own expert, helpfully, answered that question during his testimony.[30] Juxtapose that testimony with the language that Mr. Winkelmann, upon the advice of his counsel, included in the cover letter to advisory clients to whom the offering memoranda was transmitted:[31]

> Because of the fiduciary relationship we have with you, I cannot recommend that you or your family participating in this offering

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[29] The case law cited by the Division states generally that Section 206(1) applies broadly *within* the advisor-cliente relationship. It does not address either the impact of a disclaimer, like that discussed by Mr. Laby and used by Mr. Winkelmann, or events occurring outside of the advisor-client relationship. For example, the Division cites to *Lawrence LaBine,* Initial Decision Re. 9732016 SEC LEXIS 795 (Mar 2. 2016). Div. Resp. p. 19 fn. 13). That case stated: "It would be inconsistent with the remedial purpose of the Advisers Act to hold that LaBine could have 'switched hats' and disclaimed the fiduciary duties of an adviser ***without giving notice to his clients.***" This case, and others like it cited by the Division, where the issue presented is the *notice given to clients,* not only fail to support its position in this case, but contradict it.

[30] Tr. 319:- 320:22 (Laby) ("And so to the extent that Mr. Winkelmann were to say, 'Look, when it comes to thise transaction, I am no longer acting as your investment advisor and I no longer owe you a fiduciary duty.' And that's the key.") The relevant testimony by Mr. Laby appears on pages 2-3, above.

[31] RX-106 p. 401. This letter is discussed in greater detail in Section IV.C, below.e

> due to the potential conflict that such a recommendation will create, and this letter is not an offer. Nonetheless I wanted to make you aware of this situation and can provide you with offering material should your interest warrant.

The Division remains unable to point to any authority that would contradict the opinion of its expert witness and show that an investment advisor, who clearly and expressly informs his client that he is not acting in an advisory capacity in a particular circumstance, is nonetheless unable to impose any limitations on parameters of his role as a fiduciary.[32]

E. Mr. Winkelmann Established That He Relied Upon The Advice Of His Counsel.

1. The Evidence Establishes that Mr. Morgan was Aware the Firm would sell Royalty Units to Clients when he drafted and reviewed the Offering Memoranda.

Respondents dedicated a large section of their Brief in Support to identifying the most poignant examples in the record reflecting Mr. Morgan's ongoing awareness of the fact that the Firm intended to, and later did, sell Royalty Units to advisory clients.[33] The written emailo communications between Mr. Winkelmann and Mr. Morgan show that Mr. Morgan was aware of this intention prior to the first offering in 2011 and continued to be aware for the entire time period at issue.

At no point did Mr. Morgan ever indicate to Mr. Winkelmann or the Firm – who had retained him to assist in the drafting and preparation of the offering documents – that those sales did (or could) give rise to a conflict of interest between the Firm and its advisory clients. Despite the fact that Mr. Morgan and Mr. Winkelmann traded multiple drafts of the documents, including dozens bearing Mr. Morgan's redlines, the issue was never raised. Moreover, Mr. Morgan,

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[32] "[I]nvestment risk from arbitrary securities law enforcement is no less a threat to capital formation than investment risk resulting from lax enforcement; they are two sides of the same coin." *Brief for Mark Cuban as Amici Curiae Supporting Petitioner Kokesh,* Case No. 16-529 2017 WL 929704 (U.S.), 1 (U.S., 2017).

[33] Resp. Br. Supp. pp. 26-36.

aware of the client sales, continued to review, edit, and approve the Offering Memoranda and all of the representations therein, stating the contrary, i.e., that there were no conflicts to disclose.

Faced with a mountain of examples clearly evidencing Mr. Morgan's knowledge and awareness, the Division has retreated to an impractical position, wherein it concludes that, absent a traditional "opinion letter" from an attorney, there can be no reliance on counsel defense. Its position fails.

The reliance on counsel defense does not require that the attorney issue a written statement confirming every potential legal issue thatsarises in connection with the representation. Instead, the defense requires complete, truthful disclosure to the attorney of the relevant facts necessary to render legal advice.[34S]

Here, the most central fact Mr. Morgan was aware of was that the Firm intended to (and did) sell Royalty Units to clients. Indeed, one of the first emails between Mr. Winkelmann and Mr. Morgan relating to the First Offering (and pre-dating that offering) is titled "Client notice of capital raise" and attaches a letter *to advisory clients* with Mr. Winkelmann informing Mr. Morgan "this is my idea for the letter to clients."[35S]

There are many, many other examples of Mr. Morgan's awareness of this fact, cited in Respondents' Opening brief, including several screenshots of the relevant emails. Perhaps most

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[34] *S.E.C. v. Steadman*, 967 F.2d 636, 642 (D.C. Cir. 1992) (respondents reasonably relied on counsel's opinione issued 17 years prior that they did not need to register securities); *S.E.C. v. Prince*, 942 F. Supp. 2d 108, 138, 143-44 (D.D.C. 2013) ("Thus, the Court concludes that, even if Prince had been a *de facto* officer required to file § 16(a) reports, he did not fail to file such reports with the requisite scienter because, in reasonable and good faith reliance on [counsel's] advice, he believed he was not required to file them. Because such scienter is required to establish the SEC's claim that Prince participated in a scheme to defraud that violated Section 10(b) and Rule 10b-5 of the Exchange Act, the SEC has failed to establish an essential element of that claim."); *In re Digi Int'l, Inc., Sec. Litig.*, 14 F. App'x 714, 717 (8th Cir. 2001) ("We fully agree with the district court that Coopers & Lybrand's changing posture about how to account for the AetherWorks investments, coupled with the opinions of outside legal counsel rendered to Digi during the pertinent time frame, establishes that no reasonable jury could find the necessary element of scienter even if the accounting treatment was improper. As the district court correctly noted, '[t]he undisputable fact that the Defendants were in consultations with their outside accountants and legal counsel during the period in question is in itself evidence which tends to negate a finding of scienter.'").

[35] RX-106 p. 2.e

illustrative of Mr. Morgan's awareness is his revision of a draft letter to clients written to inform them of the First Round Royalty Offering, containing the following representation[36]:

> _____ Because of the fiduciary relationship we have with you, I cannot recommend that you or your family participate in this offering due to the potential conflict that such a recommendation will create, and this letter is not an offer. Nonetheless I wanted to make you aware of this ~~offering~~ situation and ~~will~~ can provide you with ~~a complete offering document~~ materials should your interest warrant. Please do not hesitate to call should you have any questions or comments.

The redlines in the above text are Mr. Morgan's.[37]

The Division has no response to this evidence. Instead, it raises two unviable arguments in an attempt to distract. First, after tacitly admitting that the record indeed contains evidence of Mr. Morgan's awareness of the fact the Firm intended to sell royalty units to clients, the Division argues that Mr. Morgan was not aware of the *number* of clients the Offerings would be marketed to. It fails, however, to point to any authority (or reason whatsoever) that the number of client sales was a relevant fact to Mr. Morgan in determining the legality any of client sale, as a general matter.

Second, the Division argues that the Commission should ignore the voluminous email communications and redlined drafts of the Offering Memoranda exchanged between Mr. Morgan and Mr. Winkelmann and instead look to a single sentence in the Firm's Form ADV responding to Item 6.B. (Other Business Activities).[38] This argument likewise fails as it belied by thee evidence in the record. In fact, the Division's position is carefully constructed to avoid looking

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[36] RX-127 (Attached as Exhibit 1).s

[37] *Id.* The Division attempts to deflect the import of this evidence by suggesting that, because it appears in the covers letter announcing the Offering Memoranda, and not in the document itself, Mr. Winkelmann could not have expected investors to rely upon it. This position runs against its own theories in this case (attempting to hold Mr. Winkelmann liable for statements made in extraneous emails despite written offering materials). Moreover, it misses the point. The draft letter to advisory clients, revised and redlined by Mr. Morgan, conclusively shows that Mr. Morgan, who is now deceased, was well aware of Mr. Winkelmann's intention to sell royalty units to Firm clients *before any of the offerings were ever made.* That is, it evidences Mr. Morgan's knowledge and consideration of the issue prior to the issuance of the first offering memoranda, containing the disclosure language (or lack of disclosure language) at issue in this proceeding.

[38] The Division also points to a single sentence in the subscription agreement which was addressed above as well ass in Section IV.D. of Respondents' Brief in Support of Petition for Review (page 37).

at the extensive record Respondents created reflecting Mr. Morgan's awareness of the client sales and, more importantly, the fact that *despite* this knowledge, he nonetheless reviewed and approved the language of the Offering Memoranda and the representation that the interests of the Firm and its investors were "aligned." A single sentence in the Form ADV (also reviewed by Mr. Morgan and post-dating the First and Second round Offerings) can neither erase nor outweigh the importance of a multitude of emails reflecting not only Mr. Morgan's awareness of the client sales, but his participation in drafting the documents to tender the Offering Memoranda to them.[39]

This knowledge is relevant here for three reasons. First, it shows Mr. Winkelmann *did* provide Mr. Morgan with the information needed to render proper legal advice as to the sufficiency of the language in the Offering Memoranda – i.e. that he would be selling to clients to whom, as an investment advisor, he owed a fiduciary obligation. Thus, the record shows both that Mr. Winkelmann disclosed this issue to his counsel and followed counsel's advice in believing the sales to be legal. These facts, without more, establish the requisite elements of the reliance on counsel defense. Accordingly, the Initial Decision erred in finding to the contrary – including its finding of scienter.

Second, but equally importantly, the fact that Mr. Winkelmann sought and heeded Greensfelder's advice rebuts and undermines any finding of negligence.[40] The fact that Mr.

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[39] Indeed, RX-127, a letter to advisory clients announcing the First Round Offering Memoranda, was drafted and revised by Mr. Morgan to be sent to Firm clients.

[40] *Streber v. C.I.R.*, 138 F.3d 216, 219–20 (5th Cir. 1998) ("In this case we find that the Tax Court clearly erred when it sustained the Commissioner's assessment of a negligence penalty, because appellants reasonably relied on the advice they received from their attorney, Edwin Hunter. Due care does not require young, unsophisticated individuals to independently examine their tax liabilities after taking the reasonably prudent step of securing advice from a tax attorney.")

Winkelmann took the "reasonably prudent step of securing advice" from counsel evidences the *reasonableness* of his conduct and undermines any finding of negligence[41]

Third, even were the Commission to disagree with Mr. Morgan's and Greensfelder's assessment of the client sales, their failure either to recognize the issue or appreciate its importance further reflects Mr. Winkelmann's lack of scienter and negligence. That is, if determining whether an investment advisor could sell royalty units to advisory clients pursuant to a written disclaimer like that presented here was so nuanced an issue that an experienced, highly rated, expensive securities counsel like Greensfelder got it wrong, the abstruse nature of the issue weighs heavily against a finding that Mr. Winkelmann acted unreasonably or with scienter in believing his counsel's analysis to be correct.

For all these reasons, the Initial Decision's determination that Mr. Winkelmann and Blue Ocean did not establish a good faith reliance on counsel as to sales to advisory clients should be reversed. In the absence of scienter, a required element of the Division's claims under Sections 17(a)(1), Section 10(b), Rule 10b-5 and Section 206(1), the findings against Mr. Winkelmann on those claims should be reversed and any sanctions associated therewith vacated.

Further, because the same evidence shows Mr. Winkelmann acted reasonably, the Division's claims under Section 206(2), Section 207, and Section 17(a)(2)and (3) should be denied.

2. Mr. Winkelmann did not "Conceal" anything from Greensfelder.

The Division also argues that the reliance on counsel defense should fail because Mr. Winkelmann "concealed" information from Greensfelder that it needed to make a proper rendering of legal advice. First, it argues that Greensfelder did not advise Mr. Winkelmann as to

[41] Negligence employs a "reasonableness" standard.

the legality of selling royalty units to clients. Yet, as already set forth herein and in Respondents' p or su ssions, the vidence shows that Greensfelder was not only aware of the sales, it r sed and ned the l r Mr. Winkelmann would be using to inform his advisory cli s of the o ring while also informing them:

> Because of the fiduciary relationship we have with you, I cannot recommend that you or your family participate in this offering due to the potential conflict that such a recommendation will create, and this letter is not an offer. Nonetheless I wanted to make you aware of this ~~offering~~ situation and ~~will~~ can provide you with ~~a complete offering document~~ materials should your interest warrant. Please do not hesitate to call should you have any questions or comments.

While the Division may not agree with Greensfelder's conclusion, the evidence conclusively shows both the law firm's awareness of the sales to advisory clients and its advice to Mr. Winkelmann as to how he should convey that offer to them, given the fact that they are advisory clients to whom he otherwise owes fiduciary obligations.

Second, the Division contends that Greensfelder was unaware that Mr. Winkelmann "would keep investor payments at minimum levels."[42] This is merely a combination of the Division's erroneous argument that the fact Mr. Winkelmann was compensated by Blue Ocean gave rise to a material conflict of interest and its position that Mr. Winkelmann should have used Offering proceeds to repay investors aggressively, instead of spending the funds to run the company and extend the reach of its advertising and marketing plan (the stated purpose of the offerings). Each issue is addressed elsewhere in this brief and in Respondents' prior submissions.

Third, the Division repeats its argument that the bar Order entered against Mr. Binkholder constituted notice to Mr. Winkelmann (and presumably the entirety of the securities industry) that failure to disclose conflicts of interest could give rise to regulatory issues. For the

[42] Div. Response p. 28.

reasons already set forth in Respondents' Response to the Division's Brief in Support[43], that argument should be rejected in this context as well.[44]

3. No Negligence

As stated above, for the same reason Mr. Winkelmann acted without scienter, he acted reasonably when he communicated with, and relied upon, the advice of his counsel with regard to the Royalty Unit Offerings. Accordingly, any finding of negligence is belied by the evidence.[45]

F. Sanctions Imposed Were Not In The Public Interest.

The Section of the Division's brief devoted to sanctions primarily repeats its "indicia" of wrongdoing, which have already been addressed.[46] Respondents limit this reply solely to new issues not already briefed.

1. Respondents' Good Faith Reliance upon the Advice of their Counsel Weighs against a Finding that Sanctions are Within the Public Interest.

When considering whether or not sanctions are within the "public interest," the Commission should take into account the extent to which Respondents relied upon the advice and counsel of their attorneys at Greensfelder. Given the many factors the Commission must consider in determining whether the public interest justifies the imposition of any sanction, "it

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[43] *See,* pages 5-7 (Section II.A.). *See also,* RX-106 p. 355.s

[44] It is also worth noting that the Division attempts to refute the evidence that Greensfelder was aware of ands approved of sales of royalty units to clients with an argument that Mr. Winkelmann failed to tell Greensfelder of Binkholder's bar. The two issues are unrelated. Beyond that, in addition to the evidence listed in Respondents' Response to the Division's Brief in Support (pp 45-46), RX-106 p. 3 contains some background information Mr. Winkelmann provided to Mr. Morgan in advance of the Royalty Unit Offerings (the "GHG" bates prefix indicates the page was produced by Greensfelder). That letter sets forth the (then) current status of Missouri's (then) investigation into Mr. Binkholder and the conduct at his prior RIA. Since the investigation was not yet complete, the Bar Order did not yet exist. Nonetheless, Mr. Winkelmann's frank disclosure to his attorneys of the investigation, its context, and even the information the State had requested, contradicts the Division's allegation that Mr. Winkelmann sought to "conceal" this fact of "paramount importance" from his counsel.

[45] *Streber*, 138 F.3d 216, 219–20.

[46] *See* Respondents Brief in Support Sections IV.E. – IV.H. (pp. 40-45).

seems inescapable that evidence relevant to a party's *degree* of culpability must be considered in deciding that issue."[47] As the *Binder* Court explained[48]:e

> The "public interest" standard is obviously very broad, requiring that the Commission consider the full range of factors bearing on the *judgment* about sanctions that the expert agency ultimately must render. In reaching that judgment, questions such as the precise nature and details of counsel's advice, and indeed, the totality of the circumstances surrounding the lawyer-client relationships in question, are undoubtedly relevant.

Relevant here, the evidence presented showing Mr. Winkelmann's reliance upon the advice and counsel of his attorneys at Greensfelder is relevant not only to scienter and negligence, but to whether any sanction is warranted in this case. In fact, under *Binder* even were the Commission to find that Mr. Winkelmann and Blue Ocean failed to establish a reliance on counsel defense to the Division's claims, the evidence presented would nonetheless be relevant to (and refute) the Division's position that sanctions (especially the unjustified sanctions they seek) are within the public interest.

Here, the evidence reflects that Respondents retained experienced, highly rated, securities counsel to advise them on the offerings to ensure that the offerings and the offering materials complied with the federal securities laws. The email correspondence, showing Greensfelder's review and revision of the offering documents, as well as their correspondence with Mr. Winkelmann, reflects that they were intimately involved in the process and that Mr. Winkelmann relied upon their ongoing advice.

In the event, therefore, that the Commission finds that Respondents violated a rule or statute because of the language included in (or omitted from) the Offering Memoranda, it should find that no sanction against Respondents is in the public interest, given that Respondents'

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[47] *Blinder, Robinson & Co., Inc. v. S.E.C.*, 837 F.2d 1099, 1109 (D.C. Cir. 1988).

[48] *Id.*

"*degree* of culpability" is extremely low (regardless of how culpable Greensfelder may be). As such, even if this Honorable Commission upholds the Initial Decision's finding that a conflict existed, it should further determine, for the reasons set forth herein and in Respondents' Brief in Support[49] that the imposition of a sanction would not be in the public interest, and reverse the Initial Decision's imposition of the same.

G. Constitutionality

On July 21, 2017, the Petitioner in *Lucia* filed a petition for certiorari in the Supreme Court of the United States. The issue presented in *Lucia*[50] is the same issue presented here: whether the Commission's Administrative Law Judges are inferior officers subject to the requirements of the appointments clause. Respondents have also been informed that the Solicitor General is considering whether to seek certiorari in *Bandimere v. SEC*,[51] in which the 10th Circuite held that the Commission's ALJs are subject to the requirements of the appointments clause. Because that issue, presented here, has been presented to the Supreme Court on certiorari, the Commission should stay this proceeding pending the Supreme Court's disposition of the petition for certiorari and/or any further proceedings before the Supreme Court in either *Lucia* or *Banidmere.*

II. CONCLUSION

For the reasons set forth in connection with this appeal, the Commission should: (1)e vacate the findings and sanctions imposed in the Initial Decision in light of the 10th Circuit's holding in *Bandimere* that the ALJs assigned to oversee the administrative proceedings were not appointed in conformity with the Appointments Clause of the Constitution; (2) in the alternative,

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[49] *See,* pages 44-45.

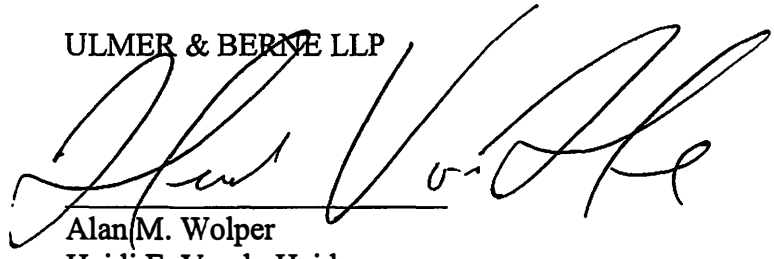
[50] *Raymond J. Lucia Companies, Inc. v. SEC* (D.C. Cir. No. 15-1345). *See* Doc No. 1664721.

[51] *Bandimere v. Sec. & Exch. Comm'n*, 844 F.3d 1168, 1179, 1188 (10th Cir. 2016).

stay this proceeding in light of the Petition for Certiorari filed in *Lucia,* until the issue is either resolved by the United States Supreme Court or certiorari is denied; (3) reverse the erroneous findings of fact and conclusions of law contained in the Initial Decision as set forth herein and in Respondents' Brief in Support; (4) in the alternative, remand this proceeding to the ALJ for further review of the issues raised herein; and/or (5) if the findings at issue be upheld, vacate the sanctions imposed on Respondents, including the permanent bar, in conformity with the applicable sanction parameters and authority.

Dated: July 28, 2017

ULMER & BERNE LLP



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Heidi E. VonderHeide
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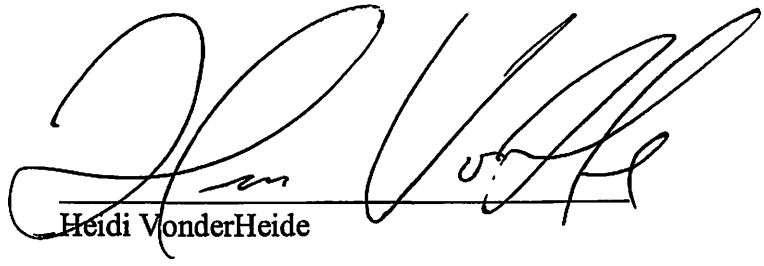
Suite 3600
Chicago, IL 60610
(312) 658-6500
Fax: (312) 658-6501
awolper@ulmer.com
hvonderheide@ulmer.com

CERTIFICATE OF COMPLIANCE

In accordance with Rule 450(d) of the Rules of Practice, I certify that this brief, exclusive of the cover page, table of contents, table of authorities, and signature block is in compliance with the 7,000-word limit. The brief contains 6,871 words, according to the word processing system used to prepare the brief.

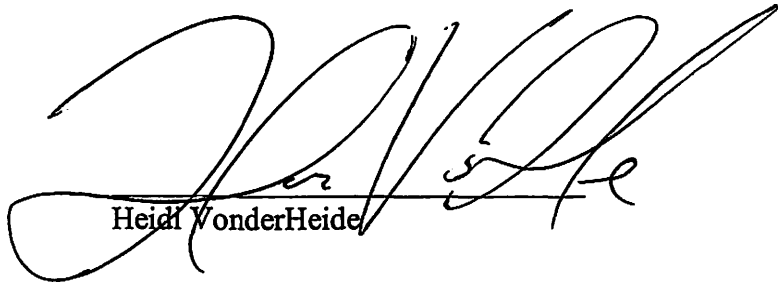


Heidi VonderHeide

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2017, I served a copy of the foregoing **RESPONDENTS' REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW**, as follows:

Original and three copies to: Via facsimile transmission and overnight mail delivery	Brent J. Fields, Secretary Office of the Secretary Securities and Exchange Commission 100 F. Street, N.E. Washington, D.C. 20549 Fax: (202) 772-9324
One copy to: Via e-mail and overnight mail delivery	David F. Benson Benjamin J. Hanauer Division of Enforcement U.S. Securities and Exchange Commission 175 W. Jackson Blvd., St. 900 Chicago, IL 60604 Fax: (312) 353-7398 bensond@sec.gov hanauerb@sec.gov
One copy: Via e-mail and overnight mail delivery	Hon. Jason S. Patil Administrative Law Judge Securities and Exchange Commission 100 F Street, N.E. Washington, D.C. 20549-2557 ALJ@sec.gov



Heidi VonderHeide

EXHIBIT 1

From: Jim
To: mm
Subject: what about our accreditted investors
Date: Monday, March 28, 2011 7:05:25 PM
Attachments: Jay Shield BOP Royalty Cover.docx

---

this is the letter I came up with ,,,,

would like to send this out to a handful of accreditted investors - Schnucks, Shields, Holland, etc.

--

James A. Winkelmann, Principal

Blue Ocean Portfolios, LLC

Registered Investment Advisors

16020 Swingley Ridge, Suite 360

Chesterfield, MO 63017

Office: 636-530-9393

Cell: [redacted]

www.BlueOceanPortfolios.com

March 24, 2011

DRAFT

Jay Shields
President
Schaeffer Oil Company
102 Barton Street
Saint Louis, MO 63104

RE: Blue Ocean Portfolios

Dear Jay,

Thanks to clients like you we have been steadily growing our Blue Ocean Portfolios business. Since our launching the company in August of 2009 we have grown the AUM to approximately $40 million and we are growing every day due to our effective radio advertising on KMOX , our weekly radio program on FM 97.1 –The Financial Coach Show and of course our compelling approach to portfolio management. We are spending about $2,500 to land $1million in new assets that generate approximately $8,000 in recurring annual revenue. As you can see this business model and advertising system has the potential to create a very valuable cash flow.

I made the decision that once we had acquired about $40 million in assets that we would expand the business. That threshold will be easily met and we will be raising up to $1 million in new capital for our business to increase the advertising budget from $6,000 per month to approximately $25,000 per month and to hire a few more representatives to support the anticipated expanded activity. If we can maintain similar advertising efficiency we would expect the new customer portfolio assets to grow at a rate of $4-6 million per month just in the St. Louis market. This advertising system could work all over the country. The cash flow from this recurring revenue model has the potential to be very valuable.

My idea for the new capital would be to sell Blue Ocean Royalty Units for $25,000 each. Each one of these Blue Ocean Royalty units would give the purchaser rights to at least 0.25% of the cash receipts of Blue Ocean, LLC until the unit holder would be re-paid $75,000. These payments would be made every quarter. Then the unit holder would have a warrant to purchase 0.25% of Blue Ocean Portfolios for $25,000. We already have several units spoken for from friends and family members reserved. Because of the fiduciary relationship we have with you I cannot recommend that you or your family participate in this offering due to the potential conflict that such a recommendation will create. Nonetheless I wanted to make you aware of this offering and will provide you with a complete offering document should your interest warrant. Please do not hesitate to call should you have any questions or comments.

Sincerely yours,

Jim Winkelmann
President

Kelly Hennessy

From: Michael Morgan <mm@greensfelder.com>
Sent: Tuesday, March 29, 2011 12:06 PM
To: Jim
Subject: Re: what about our accreditted investors
Attachments: ~$CS-#1267320-v1-cover_letter_for_accrediteds_. .doc

Follow Up Flag: Follow up
Flag Status: Flagged

my comments

Michael Morgan
Greensfelder, Hemker & Gale, P.C.
10 S. Broadway, Suite 2000
St. Louis, MO 63102

[redacted] (cell)e
314-241-9090 (main)e

>>> Jim <jim@blueoceanportfolios.com> 3/28/2011 7:05 PMe>>>e
this is the letter I came up with ,,,,e

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Office: 636-530-9393

Cell: [redacted]

www.BlueOceanPortfolios.com

Kelly Hennessy

From: Jim <jim@blueoceanportfolios.com>
Sent: Tuesday, March 29, 2011i1:29 PM
To: Michael Morgan
Subject: Re: what about our accreditted investors

Follow Up Flag: Follow up
Flag Status: Flagged

Mike - the file you sent is corrupted and/or won't open. Please resend.

----- Original Message -----
From: "Michael Morgan" <mm@greensfelder.com>
To: "Jim" <jim@blueoceanportfolios.com>
Sent: Tuesday, March 29, 2011i12:06:12 PM
Subject: Re: what about our accreditted investors

my comments

Michael Morgan
Greensfelder, Hemker & Gale, P.C.
10 S. Broadway, Suite 2000
St. Louis, MO 63102

[redacted] (cell)i
314-241-9090 (main)i

>>> Jim <jim@blueoceanportfolios.com> 3/28/2011 7:05 PM >>>i
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Cell: [redacted]

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Cell: [redacted]

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Kelly Hennessy

From: Michael Morgan <mm@greensfelder.com>
Sent: Tuesday, March 29, 2011 1:47 PM
To: jim@blueoceanportfolios.com
Subject: Re: what about our accreditted investors

Follow Up Flag: Follow up
Flag Status: Flagged

#
----Original Message----
From: Jim <jim@blueoceanportfolios.com>e
To: Morgan, Michael <mm@greensfelder.com>e

Sent: 3/29/2011 1:28:39 PM
Subject: Re: what about our accreditted investors

Mike - the file you sent is corrupted and/or won't open. Please resend.

---- Original Message ----
From: "Michael Morgan" <mm@greensfelder.com>e
To: "Jim" <jim@blueoceanportfolios.com>e
Sent: Tuesday, March 29, 2011 12:06:12 PMe
Subject: Re: what about our accreditted investorse

my comments

Michael Morgan
Greensfelder, Hemker & Gale, P.C.
10 S. Broadway, Suite 2000
St. Louis, MO 63102

[redacted] (cell)
314-241-9090 (main)

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Kelly Hennessy

From: Jim <jim@blueoceanportfolios.com>
Sent: Tuesday, March 29, 2011 1:51 PM
To: Michael Morgan
Subject: Re: what about our accreditted investors

Follow Up Flag: Follow up
Flag Status: Flagged

nothing attatched

----- Original Message -----
From: "Michael Morgan" <mm@ elder.com>
im@blueoceanportfolios.co
: Tuesday, March 29, 2011a M
Subject: Re: what about our acc nvestors

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-----Original Message-----
From: Jim <jim@blueoceanportfolios.com>
To: Morgan, Michael <mm@greensfelder.com>

Sent: 3/29/2011 1:28:39 PM
Subject: Re: what about our accreditted investors

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Sent: Tuesday, March 29, 2011a 12:06:12 PMa
Subject: Re: what about our accreditted investorsa

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From: Michael Morgan <mm@greensfelder.com>
Sent: Tuesday, March 29, 2011 1:51 PM
To: jim@blueoceanportfolios.com
Subject: Re: what about our accreditted investors

Follow Up Flag: Follow up
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Cell: [redacted]

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Kelly Hennessy

From: Jim <jim@blueoceanportfolios.com>
Sent: Tuesday, March 29, 2011 2:23 PM
To: Michael Morgan
Subject: Re: what about our accreditted investors

Follow Up Flag: Follow up
Flag Status: Flagged

still nothing

----- Original Message -----
From: "Michael Morgan" <mm@greensfelder.com>
To: jim@blueoceanportfolios.com
Sent: Tuesday, March 29, 2011t1:51:28 PM
Subject: Re: what about our accreditted investors

----Original Message----
From: Jim <jim@blueoceanportfolios.com>t
To: Morgan, Michael <mm@greensfelder.com>t

Sent: 3/29/2011t1:28:39 PM
Subject: Re: what about our accreditted investors

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Sent: Tuesday, March 29, 2011t12:06:12 PMt
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Office: 636-530-9393

Cell: [redacted]

www.BlueOceanPortfolios.com

Kelly Hennessy

From: Michael Morgan <mm@greensfelder.com>
Sent: Tuesday, March 29, 2011 2:32 PM
To: Jim
Subject: Re: what about our accreditted investors

Follow Up Flag: Follow up
Flag Status: Flagged

It's lost. I am doing it. MM

Michael Morgan
Greensfelder, Hemker & Gale, P.C.
10 S. Broadway, Suite 2000
St. Louis, MO 63102

[redacted] (cell)e
314-241-9090 (main)e

>>> Jim <jim@blueoceanportfolios.com> 3/29/2011 2:22 PM >>>e
still nothinge

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To: jim@blueoceanportfolios.come
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Chesterfield, MO 63017

Office: 636-530-9393

Cell: [redacted]

www.BlueOceanPortfolios.com

--

James A. Winkelmann, Principal

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Registered Investment Advisors

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Kelly Hennessy

From: Michael Morgan <mm@greensfelder.com>
Sent: Tuesday, March 29, 2011 2:39 PM
To: Jim
Subject: Re: what about our accreditted investors
Attachments: Jay Shield BOP Royalty Cover.docx

Follow Up Flag: Follow up
Flag Status: Flagged

second try

Michael Morgan
Greensfelder, Hemker & Gale, P.C.
10 S. Broadway, Suite 2000
St. Louis, MO 63102

[redacted] (cell)e
314-241-9090 (main)e

>>> Jim <jim@blueoceanportfolios.com> 3/28/2011 7:05 PM >>>e
this is the letter I came up withe,,,e

would like to send this out to a handful of accreditted investors - Schnucks, Shields, Holland, etc.

--

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March 24, 2011

DRAFT

Jay Shields
President
Schaeffer Oil Company
102 Barton Street
Saint Louis, MO 63104

RE: Blue Ocean Portfolios

Dear Jay,

Thanks to clients like you we have been steadily growing our Blue Ocean Portfolios business. Since our launching the company in August of 2009 we have grown the AUM to approximately $40 million and we are growing every day due to our effective radio advertising on KMOX, our weekly radio program on FM 97.1 –The Financial Coach Show and of course our compelling approach to portfolio management. We are spending about $2,500 to land $1million in new assets that generate approximately $8,000 in recurring annual revenue. As you can see this business model and advertising system has the potential to create a very valuable cash flow.

I made the decision that once we had acquired about $40 million in assets that we would expand the business. That threshold will be easily met and we will be raising up to $1 million in new capital for our business to increase the advertising budget from $6,000 per month to approximately $25,000 per month and to hire a few more representatives to support the anticipated expanded activity. If we can maintain similar advertising efficiency we would expect the new customer portfolio assets to grow at a rate of $4-6 million per month just in the St. Louis market. This advertising system could work all over the country. The cash flow from this recurring revenue model has the potential to be very valuable.

My idea for the new capital ~~would be~~is to ~~sell~~ privately place up to 40 Blue Ocean Royalty Units for $25,000 each. Each one of these Blue Ocean Royalty units would give the ~~purchaser~~ unit holder rights to at least 0.25% of the cash receipts of Blue Ocean, LLC until the unit holder would be re-paid $75,000. These payments would be made every quarter. Then the unit holder would have a warrant to purchase 0.25% of Blue Ocean Portfolios for $25,000. We already have several units spoken for from friends and family members ~~reserved~~.

_____ Because of the fiduciary relationship we have with you, I cannot recommend that you or your family participate in this offering due to the potential conflict that such a recommendation will create, and this letter is not an offer. Nonetheless I wanted to make you aware of this ~~offering~~ situation and ~~will~~ can provide you with ~~a complete offering document~~ materials should your interest warrant. Please do not hesitate to call should you have any questions or comments.

Sincerely yours,

Jim Winkelmann
President

Kelly Hennessy

From: Jim <jim@blueoceanportfolios.com>
Sent: Tuesday, March 29, 2011 3:34 PM
To: Michael Morgan
Subject: Re: what about our accreditted investors

Follow Up Flag: Follow up
Flag Status: Flagged

greate picking up the proof today.

----- Original Message -----
From: "Michael Morgan" <mm@greensfelder.com>
To: "Jim" <jim@blueoceanportfolios.com>
Sent: Tuesday, March 29, 2011 2:39:04 PM
Subject: Re: what about our accreditted investors

second try

Michael Morgan
Greensfelder, Hemker & Gale, P.C.
10 S. Broadway, Suite 2000
St. Louis, MO 63102

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