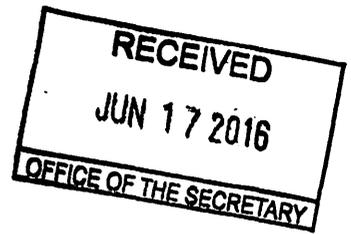


UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING  
File No. 3-17253

**In the Matter of**

**JAMES A. WINKELMANN, SR.,  
and BLUE OCEAN PORTFOLIOS,  
LLC,**

**Respondents.**

**THE DIVISION OF ENFORCEMENT'S  
RESPONSE IN OPPOSITION TO  
RESPONDENTS' MOTION FOR MORE  
DEFINITE STATEMENT**

The Division of Enforcement (the "Division") hereby opposes the motion of Respondents James A. Winkelmann, Sr. ("Winkelmann") and Blue Ocean Portfolios, LLC ("Blue Ocean") for a more definite statement. For the following reasons, the Court should deny Respondents' motion.

**Background**

The OIP alleges that Respondents, both of whom are investment advisers, made fraudulent misrepresentations and omissions, and breached their fiduciary duties, in the course of offering Blue Ocean securities to Respondents' advisory clients and other investors. The OIP's core allegations involve Respondents' (i) overstatements of Blue Ocean's success in converting advertising spending into revenue; (ii) misstatements and omissions regarding conflicts of interest between Respondents and their investors; and (iii) failure to disclose that Winkelmann's business associate, who was the focus of Respondents' advertising campaign, had been barred by Missouri securities regulators.

Notably, Respondents claim that only a two-sentence paragraph, OIP paragraph 16, lacks sufficient detail for them to adequately defend against the Division's charges. That paragraph alleges that Winkelmann made additional misstatements, beyond those identified in the offering memoranda described in the OIP's preceding paragraphs, to his advisory clients. (OIP, ¶ 16). Paragraph 16 also

specifically references an instance where Winkelmann emailed an advisory client and misrepresented, by over 85%, the amounts earlier investors had been repaid. (*Id.*)

Because the OIP sufficiently apprises Respondents of the charges against them, and because the Division need not disclose its evidence at this early stage of these proceedings, the Court should deny Respondents' motion.

### Argument

This Court recognizes, and Respondents acknowledge, that Respondents are not, at this stage, entitled to disclosure of evidence that the Division may present at the hearing. *See, e.g., Marc Sherman*, AP Ruling Rel. No. 2106, 2014 SEC LEXIS 4694, \*4 (Dec. 5, 2014) (citing *Morris J. Reiter*, Exchange Act Rel. No. 6108, 1959 SEC LEXIS 588, \*4-5 (Nov. 2, 1959)); *Natural Blue Resources, Inc.*, AP Ruling Rel. No. 2082, 2014 SEC LEXIS 4642, \*2 (Dec. 3, 2014) (citing *Reiter*); Respondents' Mot. at 2-3 ("respondents are not entitled to disclosure of the [Division's] evidence prior to the hearing"). Indeed, in both *Sherman* and *Natural Blue Resources*, this Court denied motions for more definite statements where, as in this case, the OIP contained "a number of specific allegations relating to" the respondents. *Sherman* at \*4; *Natural Blue Resources* at \*2.

Respondents claim that the OIP must plead with particularity the who, what, when, and how surrounding each actionable misstatement. However, this Court recognizes that Federal Rule of Civil Procedure 9(b) does not apply to these proceedings. *Alfred Bauer*, I.D. Rel. No. 134, 1999 SEC LEXIS 19, \*7-9 (Jan. 7, 1999); *see also MGS I Secs., Inc.*, AP Ruling Rel. No. 570, 1998 SEC LEXIS 2411, \*2-3 (Oct. 21, 1998) (rejecting respondents' request to require the Division to "identify pretrial 'what the purported misrepresentations and omissions were, when they were made, who heard or saw them made, how or why they were false or misleading'") (Murray, C. ALJ).

Here, OIP paragraphs 5 through 15 contain specific allegations relating to misstatements and omissions contained in four offering memoranda that Respondents gave their advisory clients and other prospective investors. (OIP, ¶¶ 5-15). These paragraphs lay out Respondents': (i) false statements concerning the effectiveness of their advertising program and their ability to generate revenue; (ii) false statements and omissions regarding conflicts of interest that existed between Winkelmann and investors; (iii) failure to disclose the investment adviser bar imposed against Winkelmann's business associate, whose radio program was "the cornerstone of Blue Ocean's advertising strategy;" and (iv) failure to disclose over \$100,000 in payments that Blue Ocean made as purported "management fees" to certain of Winkelmann's other companies. (*Id.*).

Respondents' motion does not claim that any of these allegations lack particularity or specificity. Instead, Respondents take issue with the two sentences of paragraph 16. The first such sentence alleges that Winkelmann made additional false and misleading statements to his advisory clients, beyond those contained in the offering memoranda. The second identifies a specific misstatement made in an email from Winkelmann to an advisory client, in which Winkelmann significantly overstated the amounts earlier investors had been repaid.<sup>1</sup>

Consistent with the allegations in paragraph 16, at the hearing the Division may present evidence of additional oral and written misrepresentations and omissions involving similar subject matter to the specific allegations pled in paragraphs 5 through 15 of the OIP, and the email referenced in paragraph 16. However, the Division has not yet determined the specific evidence it will introduce on these topics or the witnesses it will call to testify. Nor is the Division required to make such

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<sup>1</sup> While the Division contends that paragraph 16 is sufficiently pled, the Division identifies the referenced email as an August 1, 2012 email from Winkelmann to an advisory client, which was produced by Blue Ocean and is labeled BO-2800.

disclosures at the early stages of these proceedings. *See, e.g., Morris Reiter*, 1959 SEC LEXIS 588, \*4-5 (when respondent was provided “the nature of the alleged false and misleading statements and omissions” at issue, any specific misstatements constituted “matters of evidence which need not be presented in advance of the hearing.”).<sup>2</sup> Finally, to address Respondents’ concerns that they be able to prepare a defense to the Division’s claims, the Division represents that it will not assert that Respondents are liable in this proceeding for making misstatements or omissions on subject matters unrelated to those alleged in the OIP.

Dated: June 16, 2016

Respectfully submitted:



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<sup>2</sup> The Division intends to meet and confer with Respondents to propose a schedule for the exchange of witness and exhibits lists, expert reports, and pre-hearing briefs sufficiently in advance of the hearing to allow Respondents to prepare to defend the claims against them.