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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' RESPONSE TO THE DIVISION'S
PROPOSED FINDINGS OF FACT**

Pursuant to the Post-Hearing Order dated October 18, 2016, Respondents James Winkelmann, Sr. and Blue Ocean Portfolios, LLC (“Respondents”) submit the following Response to the Division’s proposed findings of fact. For the Court’s convenience, with regard to any contested fact, this Response repeats the Division’s proposed fact and the testimony the Division cited in support of the same. This Response then identifies the misstatement or error contained in the proposed fact and sets forth either a counterstatement of fact or a correction along with its supporting testimony.

1. DIVISION’S PROPOSED FACT: During the period at issue in these proceedings, Winkelmann recognized that he owed fiduciary duties – including the duties of honesty, good faith, loyalty, disclosure of all material facts, and disclosure of conflicts of interest – but testified at trial that he only owed those duties to his clients’ advisory accounts, as opposed to the clients themselves.

RESPONSE: Misstates the testimony and evidence. Mr. Winkelman expressly admitted under oath that he when acting as an investment advisor, he owed a fiduciary duty to his investment advisor clients. His representation of the same appears on the Firm’s website, in email communications with investors, and in the Firm’s policies. (DX-3 and 4; DX-490; DX-90, p. 2; DX-127 p. 2; DX-127)

CITATION:

Division’s Original Citation in Support:	Testimony in Support of Striking Proposed Fact:
<p>Tr. 373:18-376:19</p> <p>Q And these things I just asked you about, you understand them now, but you also understood them back in 2011, correct?</p> <p>A Yes.</p> <p>Q And back in 2011, you understood that as an investment advisor, you owed fiduciary obligations to your advisory clients?</p> <p>A Yes, to our accounts, that's true.</p> <p>Q I'm sorry?</p> <p>A To our accounts.</p> <p>Q Your investment advisory accounts?</p>	<p>Tr. 1244:17 - 1245:19</p> <p>Q Before we move on to the offerings that are at issue in this case, I want to go back and explore briefly something that came up last week during your cross-examination by the Division counsel, okay?</p> <p>And you were insistent that as an investment advisor, Blue Ocean as an investment advisor, that your fiduciary duty runs to your client accounts. Do you recall that --</p> <p>A Yeah, I recall that testimony.</p>

Division's Original Citation in Support:	Testimony in Support of Striking Proposed Fact:
<p>A Accounts, yeah.</p> <p>Q And you understood that you had to be honest with your advisory clients?</p> <p>A Yes.</p> <p>Q And you understood that you have an affirmative duty of utmost good faith to act solely in the best interest of your clients?</p> <p>A Of our advisory account clients, that's true.</p> <p>Q And it's not only that you understood that you had those obligations; you required that your employees understand and abide by those obligations?</p> <p>A Of course.</p> <p>Q And, in fact, you required employees of Blue Ocean Portfolios to strictly comply with the fiduciary duties owed to advisory clients?</p> <p>A The accounts of the advisory clients, of course.</p> <p>Q Wait. I want to make sure we aren't getting messed up here. So you are saying you only owed fiduciary duties in regards to the client's money that was managed by Blue Ocean Portfolios and not to the clients themselves?</p> <p>A That's the way we operated our business.</p> <p>And back in 2011, you understood that you owed your clients a duty of loyalty?</p> <p>A Yes.</p> <p>Q And you understood you owed your clients a duty to make full and fair disclosure of all material facts?</p> <p>A Yes.</p> <p>Q And you understood you were [required] to disclose to your clients all information as to any potential or actual conflicts of interest?</p> <p>A Yes.</p> <p>Tr. 1505-5016:3:</p>	<p>Q Can you explain what you meant by that, that as far as you were concerned, that your fiduciary duty ran to your client accounts?</p> <p>A When the clients engaged us, we were serving as a fiduciary for -- on that relationship under the money that -- managing their money.</p> <p>Q All right. So we're clear, though, just so we can move on past this point, do you concede that when you're acting as an investment advisor, that you, in fact, owe a fiduciary duty to your investment advisor clients?</p> <p>A Yes.</p>

Division's Original Citation in Support:	Testimony in Support of Striking Proposed Fact:
<p>Q Right. So yes or no in connection with the royalty unit relationship, did you owe them fiduciary duties? A No, because the terms were spelled out.</p>	

2. Undisputed.
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24. Undisputed.

25. Undisputed.

26. Undisputed.

27. **DIVISION'S PROPOSED FACT:** Binkholder's radio show generated 70 to 100 leads per week for BOP.

RESPONSE: The proposed fact misstates evidence and misconstrues the cited testimony. The Division's own testimony, cited in support, supports the following corrected statement of fact.

CORRECTED STATEMENT OF FACT: *During the investigation, Mr. Winkelmann testified that Binkholder's radio show generated 70 to 100 leads per week for BOP."*

CITATION:

Division's Citation in Support:
Tr. 425:25-427:9
And Mr. Binkholder's show generated 70 to 100 potential leads per week for Blue Ocean Portfolios?
A I remember it generated a lot. Do you have a document that -- I don't know the specific number. I can't remember the specific number.
Q If I told you you testified to that, would you have any reason to disagree with the 70 to 100 figure?
A I would rather check our marketing material to give the Court an accurate recollection of how many leads came in.
Q Okay. Well, we don't -- in case we don't get a chance do that, Byron, can you please pull up Mr. Winkelmann's testimony, page 116, line 3 through 12. Mr. Watkins he was your lawyer at the time you were testifying?
A Yes. Mr. Watkins was my attorney at the time.
Q He's a lawyer here in St. Louis?
A Yes.
Q And he asks you -- basically start all over so you get the date right and you answer, Yeah the key role that Bryan Binkholder played all the time from 2009 from the inception of Blue Ocean, all the way until he was basically run out of the office when we learned about his federal investigation, he hosted a radio show that we sponsored. He generated 70 to 100 leads a week from The Financial Coach show. Blue

Division's Citation in Support:

Ocean Portfolios sponsored that. Am I accurately reading your testimony?

A That's what the testimony says.

Q Am I accurately reading it?

A Yes.

28. Undisputed.

29. **DIVISION'S PROPOSED FACT:** As part of that lawsuit, the court issued a consent injunction binding Winkelmann. (Ex. 205, p. 1 ("This Court's Consent Injunction (Doc. 71) was a specific and definite order [and] bound James A. Winkelmann, Sr.")). On October 18, 2012, the court issued an order finding that Winkelmann was in contempt for violating that injunction. (Ex. 205, pp. 1 and 2) ("Respondents have violated this Court's Consent Injunction...James A. Winkelmann, Sr. [is] in contempt of this Court's Consent Injunction").

RESPONSE: Incomplete and misleading as stated. Mr. Winkelman testified he and his son made the determination not to challenge the contempt order and to relinquish the allegedly infringement mark.

COUNTERSTATEMENT OF FACT: Neither Mr. Winkelmann nor his son contested the injunction. Mr. Winkelmann was fighting cancer and his son was in college. They instructed their attorney not to challenge the injunction and agreed to relinquish use of the mark.

CITATION:

Tr. 1442:24-1445:7

Q And then after the court entered an injunction against you, two years later the court held you in contempt for violating that injunction, correct?

MR. WOLPER: Same objection, Your Honor.

JUDGE PATIL: Overruled.

A Yes. May I explain, Judge?

JUDGE PATIL: At this point yes because I'm not quite -- if your understanding of what the order was because I understand that you don't necessarily apprehend what an injunction means versus a consent order. So if you give us your understanding that will help me.

A The understanding -- my son Jimmy came up with a parody of The North Face called South Butt for kids who didn't want to wear The North Face base. He thought a lot of kids would want to wear The South Butt. And he started this when he was 16 years old.

When he went to Mizzou when he was 19 years old he filed a trademark application.

A few weeks later The North Face sent a cease and desist letter to him threatening bankruptcy and all this stuff. Jimmy got in touch with a local attorney here and he said, no, this is not -- this is free speech. I'm free to have The South Butt and you're free to have The North Face, and The North Face filed a lawsuit. Was national attention.

Jimmy had to come home during spring break in April to attend a medi -- a judge-ordered mediation conference, and we reached an out-of-court settlement. Jimmy and I reached an out-of-court settlement with The North Face. During -- there was a lot of lawyers involved. I mean, Jimmy's deposition, there were sixteen lawyers there. I looked at Jimmy, I said Jimmy, you know, you made a lot of money, more than you ever thought. He goes you're right, dad, I want to go back to spring break.

He got on a plane -- he signed a paper and went back to spring break. The North Face lawyers missed Jimmy's other parody called The Butt Face, Never Stop Smiling, and it was a different parody, a different -- The North Face back in -- the counsel represented in October of 2012 got very upset that here's this kid still spoofing them with The Butt Face, and they -- they filed a motion with the court saying that The Butt Face was in violation of this consent order, this out-of-court settlement.

And we thought BS. We had all these lawyers looking at all this stuff and they missed The Butt Face. They knew about The Butt Face. I'm driving down to the courthouse. I get a call from my doctor, I was diagnosed with cancer that morning, and that day, Judge, I didn't have any fight in me. Jimmy was in the middle of midterms.

You know, Jimmy is a summa cum laude biomedical engineering student. He's now at Northwestern. He's one of the top Ph.D. students in the world working on cancer diagnostics. He didn't have time. I was diagnosed with cancer.

That day I didn't have any fight. Today I have fight. And if you want to mischaracterize this ridiculous South Butt, Butt Face stuff to tarnish me or my family, I'm not going to put up with it.

JUDGE PATIL: Excuse me, Mr. Winkelmann.

Can you get back to the issue of how you were held in contempt in relation to this?

A Because I gave -- we didn't challenge -- we didn't challenge the -- the motion that we were in contempt. I just didn't have any fight that day. And I just said, you know, Albert, just whatever. Just make it up. We'll agree -- we'll agree to take The Butt Face off. And

they – we agree that The Butt Face was in violation of The South Butt consent order. So

JUDGE PATIL: Thank you.

A Anyway, I'm sorry if I'm a little irritated.

JUDGE PATIL: That's fine. Please go ahead.

30. DIVISION'S PROPOSED FACT: In early 2011, Winkelmann came up with the idea for BOP to offer royalty units.

RESPONSE: Misstates the testimony. The testimony cited by the Division in support of the proposed fact shows Mr. Winkelmann together with Mr. Morgan came up with the idea of offering royalty units.

CORRECTED STATEMENT OF FACT: "In early 2011, Mr. Winkelmann and Mr. Morgan came up with the idea for BOP to offer royalty units."

CITATION:

Division's Citation in Support:

439:16 *Q So that gets us here to what brought us*
439:17 *here, the royalty units. In early 2011, you came up*
439:18 *with the idea of offering Blue Ocean Portfolios*
439:19 *royalty units?*
439:20 *A Mike Morgan at Greensfelder and I came up*
439:21 *with the idea.*
439:22 *Q But it was your idea?*
439:23 *A I had a lot of conversations with Mr.*
439:24 *Morgan.*
439:25 *Q It was your idea to offer royalty units to*
440:1 *Blue Ocean -- or to offer Blue Ocean Portfolios's*
440:2 *royalty units?*
440:3 *A After consultation with outside counsel,*
440:4 *yes.*
440:5 *Q And Mr. Binkholder, he wasn't involved in*
440:6 *the decision to offer royalty units?*
440:7 *A I bounced things off of him.*
440:8 *Q But it was your decision?*
440:9 *A Yes.*

31. Undisputed.

32. Undisputed.

33. **DIVISION'S PROPOSED FACT:** Winkelmann understood that the royalty unit offering was "critical" to fund BOP's business plan. (RX-003 at BO7496.)

RESPONSE: Misleading as stated. The testimony cited by the Division shows that proposed finding of fact should read as follows:

CORRECTED STATEMENT OF FACT: Winkelmann understood that the royalty unit offering was "critical" to fund the business plan set forth in the offering memoranda.

CITATION:

Division's Citation in Support:
446:6 Q Okay. And because Blue Ocean Portfolios 446:7 couldn't get a bank loan, it was critical to Blue 446:8 Ocean Portfolios to obtain outside financing through 446:9 a securities offer? 446:10 A I wouldn't say it's critical. We wanted 446:11 to implement a business plan, it was critical. 446:12 Q But it was critical? 446:13 A To fund the business plan. 446:14 Q Okay. Well, let's look at the third 446:15 offering memorandum, page 12, and the second to last 446:16 paragraph, the second sentence. 446:17 In April of 2011, Blue Ocean Portfolios 446:18 completed a royalty offering of \$650,000, 25 units. 446:19 It gave the investors a three-time payback and an 446:20 option to purchase 1 percent of the outstanding 446:21 equity for each of the \$25,000 unit. This initial 446:22 outside financing round was critical, in that it 446:23 enabled Blue Ocean Portfolios to prove the business 446:24 model. 446:25 You represented that to the investors, 447:1 right? 447:2 A The expansion of the business was 447:3 dependent on that financing, of course.

34. Undisputed.

35. Undisputed.

36. Undisputed.

37. Undisputed.

38. DIVISION'S PROPOSED FACT: During his investigative 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 of Enforcement that were calculated using BOP's financial records.

RESPONSE: Misstates the testimony. Testimony did not speak to all of the Firm's financial records, only certain records shown to him during the examination. Instead, as the testimony cited by the Division shows, Proposed Finding of Fact 38 should read:

COUNTERSTATEMENT OF FACT: During his investigative 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 of Enforcement that were calculated using BOP's financial records shown to Mr. Winkelmann during his testimony. These records included Testimony Exhibit 43.

CITATION:

<p>Tr. 72:14-19 (Collins).</p>	<p>Q And where did you get the advertising revenue -- spend and annual revenue numbers referred to in Exhibit 440?</p>
	<p>A For 2010 it's based on Blue Ocean's 2010 profit and loss statement. And then for 2011 it's based on testimony Exhibit 43.</p>
<p>Tr. 1177:6-1178:8 (Palubiak).</p>	<p>Q Let's go to Mr. Winkelmann's investigative testimony, page 167, line 14 through line 168, line 1. And the question is, "You'll see that the new AUM for \$1 million AUM reads this is the key driver of the Blue Ocean model. The current conversion rate is \$2200 per \$1 million, so currently each \$2200 spend in advertising is converting to new annual renewable revenue of \$8,000. Would you agree that neither Exhibit 43 nor Exhibit 44 supports this statement?"</p>
	<p>"Answer: So as far as that this pro forma is looking further back than a few months to justify the \$2,200. That's the only response I'd have. We just wouldn't make that up. It would have to be based on statistics, the longest we had."</p>
	<p>And you considered that testimony, right?</p>
	<p>A Sure.</p>
	<p>Q But now we know, you know, at least in your report you're saying that Blue Ocean didn't use the longest statistics it had; they just went back to June 2010, correct?</p>
	<p>A I guess it's a matter of clarification on what you consider the right statistics to go back to in terms of longest. When's the right starting point? That's the way I looked at it when I had conversation with him.</p>

See also Response to Proposed Finding of Fact 39, below.

Division's Citation in Support:
1447:2 Q Okay. Well, let's see how your story on 1447:3 this issue has changed over time. Can we agree 1447:4 that when you testified during the investigation 1447:5 in front of Mr. Benson you couldn't explain the 1447:6 discrepancies between the advertising factors in 1447:7 the offering memoranda and <i>the Blue Ocean</i> 1447:8 <i>Portfolios financial records shown you by Mr.</i> 1447:9 <i>Benson, correct?</i> 1447:10 A I think my testimony shows that we 1447:11 didn't have all the 2010 financial records at the 1447:12 OTR testimony. 1447:13 Q Right. But again, you -- you testified 1447:14 here and you testified back at the testimony that 1447:15 you just couldn't explain those discrepancies, 1447:16 right? 1447:17 A Not during my OTR. 1447:18 Q Not during your testimony with Mr. 1447:19 Benson, correct? 1447:20 A Correct.

39. DIVISION'S PROPOSED FACT: Winkelmann realized after testifying during the investigation that he had been unable to explain the advertising ratio discrepancies presented to him during his investigative testimony.

RESPONSE: Misstates the testimony. Mr. Winkelmann's testimony makes clear that both he and Mr. Benson were aware during the investigative testimony that Mr. Winkelmann couldn't explain the discrepancies between the advertising factors used in the offering memoranda and the advertising factors contained in Testimony Exhibit 43.

COUNTERSTATEMENT OF FACT: Mr. Winkelmann was unable to explain, during his investigative testimony, the discrepancies between the advertising factors in the offering memorandum and those in Testimony Exhibit 43 (i.e., Division Exhibit 159).

Testimony Exhibit 43 is a document created in June of 2012. Testimony Exhibit 43 which was not used in the creation of any offering memorandum, Testimony Exhibit 43 contains data the Firm did not have the data in Testimony Exhibit 43 the time it prepared the First (March 2011) and Second (March 2012) Round offering memoranda.

Mr. Benson and Mr. Collins were aware that Mr. Winkelmann was unable to explain the discrepancies. Mr. Benson and Mr. Collins were likewise aware that while Mr. Winkelmann could not explain the computations during his investigative testimony, he

was adamant that “we just wouldn’t make that up. It would have to be based on statistics, the longest we had.”

<p>Division’s Citation in Support:</p>	<p>Testimony in support of Counterstatement of fact:</p>
<p>1447:2 Q Okay. Well, let's see how your story on 1447:3 this issue has changed over time. Can we agree 1447:4 that when you testified during the investigation 1447:5 in front of Mr. Benson you couldn't explain the 1447:6 discrepancies between the advertising factors in 1447:7 the offering memoranda and the Blue Ocean 1447:8 Portfolios financial records shown you by Mr. 1447:9 Benson, correct? 1447:10 A I think my testimony shows that we 1447:11 didn't have all the 2010 financial records at the 1447:12 OTR testimony. 1447:13 Q Right. But again, you -- you testified 1447:14 here and you testified back at the testimony that 1447:15 you just couldn't explain those discrepancies, 1447:16 right? 1447:17 A Not during my OTR. 1447:18 Q Not during your testimony with Mr. 1447:19 Benson, correct? 1447:20 A Correct.</p>	<p>Tr. 85:1-15 (Collins): Q Okay. Let's go back to Exhibit 440, please. And where did you get the advertising spending numbers and the annual revenue numbers for the first three months of 2011? A That's -- those numbers are based on testimony in Exhibit 43. Q And, Byron, can you pull up Exhibit 159. And can you actually just pull up the whole thing so we can see it? What's the testimony exhibit on trial exhibit 159? A 43. Q So are we talking about the same document here? A Yes, we are. Tr. 93:22-24 (Collins) Q You were there when Mr. Winkelmann testified to that effect? A Yes, I was. Tr. 100:2-6 (Collins) Q And where does all that data come from? A So for 2011 that's based on the testimony Exhibit 43 and for 2012 it's based on BO5639. Tr. 1177:1-24 (Palubiak): Q Let's go to Mr. Winkelmann's investigative testimony, page 167, line 14 through 168, line 1. And the question is, "You'll see that the new AUM for \$1 million AUM reads this is the key driver of the Blue Ocean model. The current conversion rate is \$2200 per \$1 million, so currently each \$2200 spent in</p>

Division's Citation in Support:	Testimony in support of Counterstatement of fact:
	<p>advertising is converting to new annual renewable revenue of \$8,000. Would you agree that neither Exhibit 43 nor Exhibit 44 supports this statement?"</p> <p>"Answer: So as far as that this pro forma is looking further back than a few months to justify the \$2,200. <i>That's the only response I'd have. We just wouldn't make that up. It would have to be based on statistics, the longest we had.</i>" And you considered that testimony, right?</p> <p>A Sure.</p>

40. Undisputed.

41. Undisputed.

42. **DIVISION'S PROPOSED FACT:** At trial, Winkelmann sought to explain his investigative testimony by claiming that he did not anticipate being asked about the advertising ratios. However, in September 2014, over four months prior to Winkelmann's investigative testimony, BOP received a SEC subpoena for: "All Documents that support or tend to support the 'advertising conversion factor' (also referred to as the 'factor' or 'advertising factor') referenced in each of the Blue Ocean Certificate of Royalty Units offering memoranda." (Ex. 309, p. 9 of PDF)

COUNTERSTATEMENT OF FACT: The subpoena contains nine separate requests, only one of which relates to the advertising factor. (DX-309 pp. 8-9)

COUNTERSTATEMENT OF FACT: The Wells Notice, issued after the completion of the examination, does not mention the advertising factors contained in the Offering Memoranda. (DX-312).

43. Undisputed.

44. Undisputed.

45. Undisputed.

46. Undisputed.

47. Undisputed.

48. Undisputed.

49. **DIVISION'S PROPOSED FACT:** In the offering memoranda, BOP never disclosed to investors its methodology for calculating the advertising ratio.

RESPONSE: Misleading; misstates the evidence.

COUNTERSTATEMENT OF FACT: Each offering memoranda disclosed not only the advertising ratio, but the approximate current advertising spend and the approximate AUM and revenues resulting therefrom. (RX-001-004)

50. Undisputed.

51. **DIVISION'S PROPOSED FACT:** Winkelmann agreed that had BOP included the Binkholder payments in the advertising ratio calculations, the ratio would have increased.

RESPONSE: Misstates the testimony.

COUNTERSTATEMENT OF FACT: Winkelmann agreed that had BOP included the Binkholder payments in the advertising ratio calculations, the *average* would have increased.

Division's Citation in Support:
493:15 Q And had Blue Ocean Portfolios included the 493:16 payments made to Binkholder as advertising expenses, 493:17 it would have <i>driven up the average</i> , correct? 493:18 A Of course, if you would have increased any 493:19 of these numbers. Any additional number you put 493:20 into the advertising spend would affect it, of 493:21 course. 493:22 Q That's why Mr. Collins on his charts, when 493:23 you said the factor over statement amount, when the 493:24 Binkholder payments were included, the factor was 493:25 always more overstated than if they were excluded? 494:1 A Fair enough.

52. Undisputed.

53. Undisputed.

54. **DIVISION'S PROPOSED FACT:** Winkelmann testified that Division Exhibit 159 was one of the documents that BOP used to track the advertising ratio. Winkelmann confirmed that Exhibit 159 contained data that was available to BOP at the time it prepared the third offering memorandum.

RESPONSE: Misstates the testimony.

CORRECTED STATEMENT OF FACT: Winkelmann testified that Division Exhibit 159 was the *type* of document Blue Ocean would have used to track the advertising ratio.

Division's Citation in Support:

487:12 Q And Exhibit 159 is the *type of document*
487:13 Blue Ocean Portfolios would use to track the
487:14 advertising ratio?
487:15 A One of the documents, yes.
488:18 Q So the information contained on Exhibit
488:19 159 would have been available to Blue Ocean's, Blue
488:20 Ocean Portfolios in September 2012, correct?
488:21 A Some of the information -- most of the
488:22 information because we would still have business
488:23 coming in in June, July, August, September, going
488:24 forward that the new client and the resulting
488:25 anticipated revenue could be attributed back to when
489:1 the lead first showed up.
489:2 Q So the -- but the advertising spend data
489:3 should be set. That's not going to change as you
489:4 move into the future, right?
489:5 A Unless there's some discrepancies on the
489:6 invoices and there was frequently times when we were
489:7 disputing the charges. I would think those disputes
489:8 would be less than 15 percent of the advertising
489:9 number.
489:10 Q So Exhibit 159 shows data that was
489:11 available as of June -- well, the end of June 2012,
489:12 correct?
489:13 A Yes.
489:14 Q And the third offering memorandum would
489:15 have come out on September 1st, 2012?
489:16 A Yes.

55. DIVISION'S PROPOSED FACT: The 2011 advertising spending information on Exhibit 159 was consistent with the 2011 advertising spending information on Exhibit 86, which was a chart devoted to 2011 advertising expenditures. (Compare Ex. 159 and Ex. 86).

RESPONSE: Misleading to the extent it suggests that the data contained in DX 159 or DX-86 was data available to the firm during any given month in 2011 (the time period they purport to cover).

COUNTERSTATEMENT OF FACT: Neither DX 159 nor DX 86 were documents created in 2011. DX-159 was created in June 2012. (RX-54 pp. 51-61). DX-86 is part of a series of documents produced to the SEC in response to Item 4 of the subpoena served by the SEC during the 2013 examination (DX-395 p. 30). DX-86 does not appear in any of the Firm’s regularly-generated monthly reports. (RX-55).

CITATION:

Tr. 919:22-920:3 (Juris);	Q Okay. And just really quickly, let’s compare this to what’s been marked as CX159. I’m sorry, Division exhibit. And zoom in. Okay. And is this the same document that appeared at RX54, page 58? A It is the same.
Tr. 920:4-9 (Juris);	Q Okay. I have a couple questions for you on this page. So I think you said - - correct me if I’m wrong - - these numbers are current as of the date of the report which was for June generated in July of 2012; is that right? A That is correct.
Tr. 928: 17-22 (Juris).	Q And if you go back to CX159, Alan. And can you tell by looking at the numbers here whether a 1 percent assumption is used in the June 2012 data as of this July 2012 report. A It is not 1 percent.

- 56. Undisputed.
- 57. Undisputed.
- 58. Undisputed.
- 59. Undisputed.
- 60. Undisputed.

61. **DIVISION’S PROPOSED FACT:** Winkelmann’s letter said that BOP would issue the royalty units in \$100,000 increments, and that BOP “already [has] 4 units reserved from friends and family members.” (Ex. 7). This statement was misleading because the offering had not yet begun and BOP would not sell \$400,000 in royalty units until May 16, 2011. (Ex. 455).

COUNTERSTATEMENT OF FACT: Mr. Winkelmann testified that when he sent the February 16, 2011 letter, he believed the content to be true and accurate.

CITATION:

<p>Tr. 1367:15-1368:12 (Winkelmann).</p>	<p>Q So now number one, go back to number one. This is an email to Mr. Roger Riney dated February 16, 2011. As of the date of that email, sir, was there an offering open?</p> <p>A No.</p> <p>Q All right. So numbers two and three, if we could look at those. One is an email dated April 25 to Mr. Bean, and the other is May 3 email to Mark, and they say that you made false representations regarding advertising spends, right?</p> <p>A Yes.</p> <p>Q Do you see that? And revenues that were being obtained as a result.</p> <p>A Yes.</p> <p>Q Did you believe those figures to be true when you send those emails to Mr. Bean and to -- to Mark, respectively?</p> <p>A Yes.</p> <p>Q Were you attempting to be accurate?</p> <p>A Yes.</p> <p>Q Were you trying to be inaccurate?</p> <p>A No.</p>
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62. DIVISION'S PROPOSED FACT: Winkelmann's letter to Riney also stated: "We are spending about \$2,200 to land \$1 million in new AUM that generates approximately \$9,000 in recurring annual revenue." (Ex. 7). This statement conflicted with, and overstated BOP's revenue generation compared to, BOP's representation the following month in the first offering memorandum that "each \$1 million in AUM generates roughly \$8,000 in new recurring annual revenues." (RX-001, BO 7250). The \$2,200 divided by \$9,000 (0.24) advertising ratio in the letter also conflicted with BOP's advertising ratios (calculated as advertising spending for a period divided by new annual revenue generated during that period) going back to January 2010, which ranged from 0.37 to 0.44. (Ex. 440).

RESPONSE: The Proposed Finding of Fact assumes that the Firm's calculations were required to include all of calendar year 2010, a requirement for which no evidence was presented. Mr. Winkelmann testified the Firm's advertising campaign (and data tracking) did not begin until around June 2010. (RX-006). The Proposed Finding of Fact is also argumentative and includes legal conclusions. The letter and the offering memorandum include different data because they were created at different times. They are not "conflicting" or "overstatements." Rather, they are accurate statements made at two, different moments in time. Respondents move to strike the second and third sentences.

COUNTERSTATEMENT OF FACT: Mr. Winkelmann testified that when he sent the February 16, 2011 letter, he believed the contents to be true and accurate.

CITATION:

<p>Tr. 1367:15-1368:12 (Winkelmann).</p>	<p>Q So now number one, go back to number one. This is an email to Mr. Roger Riney dated February 16, 2011. As of the date of that email, sir, was there an offering open?</p> <p>A No.</p> <p>Q All right. So numbers two and three, if we could look at those. One is an email dated April 25 to Mr. Bean, and the other is May 3 email to Mark, and they say that you made false representations regarding advertising spends, right?</p> <p>A Yes.</p> <p>Q Do you see that? And revenues that were being obtained as a result.</p> <p>A Yes.</p> <p>Q Did you believe those figures to be true when you send those emails to Mr. Bean and to -- to Mark, respectively?</p> <p>A Yes.</p> <p>Q Were you attempting to be accurate?</p> <p>A Yes.</p> <p>Q Were you trying to be inaccurate?</p> <p>A No.</p>
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COUNTERSTATEMENT OF FACT: The Round 1 offering memoranda calculated the advertising factor to be .22. (RX-001 p. 9).

COUNTERSTATEMENT OF FACT: Ms. Juris confirmed that the January 2011 advertising cost (3,024) divided by the January 2011 recurring revenue (13,514) equaled 0.22.

CITATION:

<p>Tr. 924:24-925:4 (Juris).</p>	<p>Q And so then just to humor us again, if you take the advertising spend for January, the 3,024, and divide it by a 1 percent fee - - I'm sorry, the revenue generated by a 1 percent fee, that 13,514, what factor do you get?</p> <p>A 0.22.</p>
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COUNTERSTATEMENT OF FACT: 0.22 and .024 are two hundredths of a point apart. Mr. Collins testified that a one point difference was not “material.”

CITATION:

Tr. 91:15-18 (Collins).	Q And in preparing Exhibit 441, did you consider the difference between 0.78 and 0.79 to be material? A I did not.
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COUNTERSTATEMENT OF FACT: Enforcement’s own calculations often differed by several hundredths of a point from the allegedly “correct” advertising factors alleged in the OIP. (Compare: OIP ¶7 with CX-440; OIP ¶8 with CX-442; OIP ¶9 with CX-443).

63. Undisputed.

64. Undisputed.

65. Undisputed.

66. Undisputed.

67. Undisputed.

68. **DIVISION’S PROPOSED FACT:** The first offering memorandum does not disclose BOP’s methodology for calculating the advertising ratio, or disclose that BOP had calculated the .22 ratio by including advertising expenses only going back to June, as opposed to January, 2010. (RX-001). Winkelmann agreed that including advertising expenses going back to January 2010 would have resulted in a more reliable ratio.

RESPONSE: Misstates the testimony and the evidence.

Mr. Winkelmann did not agree that including expenses back to January 2010 would have resulted in a “more reliable ratio.” Instead, Mr. Winkelmann testified that, as a general concept, a longer look back period generated a more accurate representation of the Firm’s overall advertising efficiency. Data to “look back to,” however, only existed as of the start of the Firm’s advertising campaign and data tracking (June 2010). The Division misstates the evidence when it insinuates (i.e., argues) that pre-June 2010 data should have been included when the Firm calculated the factor, or that incorporating it into the calculations would, in fact, be “more reliable.” To the contrary, incorporating data from months prior to the inception of the advertising plan would corrupt the Firm’s calculations, by including expenses and revenues that predated the campaign (and which were not part of the Firm’s customer-tracking program).

Further, it is inaccurate to say that the First offering memorandum “does not disclose BOP’s methodology for calculating the advertising ratio.” To the contrary, the First offering memorandum states:

“Currently Blue Ocean Portfolios is spending approximately \$5,000 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 Blue Ocean Portfolios \$2,200 in advertising – a 22/100 ratio.

This paragraph discloses the methodology – the *current* advertisement cost over the revenue it is *currently converting* to.

Finally, with regard to the fact that the data was based on the Firm’s advertising campaign success as of its inception in June of 2010, the First offering memorandum explicitly states: “Since June of 2010, Blue Ocean Portfolios advertising and sales system has been generating about \$2 million in new AUM per month.”

Because the proposed fact is not supported (but is contradicted) by the evidence, the proposed fact should be stricken.

69. Undisputed.

70. DIVISION’S PROPOSED FACT: Winkelmann’s testimony that BOP calculated the .22 ratio by using recurring revenues from February 2011 conflicts with his pre-hearing brief, which says that BOP used revenues generated through the middle of March.

RESPONSE: The Pre-hearing brief does not say that the 0.22 ratio was calculated using revenues generated through the middle of March. Instead, the testimony cited by the Division actually states that: “as of mid-March the Firm had brought in approximately \$25,000.” Mid-march was when the First Round offering memorandum was prepared. That is, the revenue figure is based on the data possessed as of mid-March, not the mid-March numbers. The proposed fact, unsupported by the evidence, should be stricken.

71. DIVISION’S PROPOSED FACT: Winkelmann’s testimony that BOP calculated the .22 ratio using advertising expenses only going back to June 2010 also conflicts with his investigative testimony, that BOP calculated that ratio using advertising expenses going back as far as BOP had that data.

RESPONSE: Misstates the testimony; argumentative. The quoted language does not state that Mr. Winkelman testified during his investigative testimony that “BOP calculated that ratio using advertising expenses going as far back as BOP had data.” It should be stricken as unsupported. Beyond that, while BOP had a ledger showing its advertising expenses for all of calendar year 2010, its advertising tracking data goes back only to June 2010 (or a few days before the month began). When Mr. Winkelmann refers to the “longest” statistics he had, therefore, he was referring to the advertising data contained in the master spreadsheet (which came into existence in the final days of May, 2010). The proposed fact should be stricken as unsupported and argumentative. (RX-006).

The Division’s proposed fact should be stricken as unsupported and argumentative.

72. Undisputed.

73. **DIVISION'S PROPOSED FACT:** The first round memorandum represented that "the investor will receive *no less than* 0.25% of the cash receipts of Blue Ocean Portfolios, LLC on a monthly basis until such time as the Royalty Unit holder receives a total of \$75,000." (RX-001, BO 7255) (emphasis added). The memorandum does not say that investors will only receive 0.25%.

COUNTERSTATEMENT OF FACT: The Certificates associated with the First Round Offering expressly stated that any additional payments beyond the 0.25% would be made at Blue Ocean's "sole and absolute discretion." (RX-1, p. 82).

COUNTERSTATEMENT OF FACT: Nothing in the offering memorandum obligates the Firm to pay any amount more than the 0.25% (RX-001).

74. **DIVISION'S PROPOSED FACT:** The first offering memorandum contained 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." (RX-001, BO 7256). The table did not allow an investor to calculate the payback time for minimum 0.25% payments and an advertising ratio greater than 0.38.

COUNTERSTATEMENT OF FACT: The table did expressly disclose that, under the assumptions contained therein, an investor should not expect to be repaid for 9.7 years. (RX-001 p. 11).

75. **DIVISION'S PROPOSED FACT:** According to the table, even if BOP doubled the minimum monthly payment percentage to 0.5%, with an advertising ratio of .38 the time to payback would be more than 7 years. (RX-001, BO 7256).

COUNTERSTATEMENT OF FACT: The First Round offering memorandum disclosed that it may take more than seven years for investors to be repaid.

COUNTERSTATEMENT OF FACT: The payback timetable depended on several variables including how fast the recurring revenue stream grows, the conversion rate of the advertising budget, and the valuation of the client portfolios. (RX-001 p. 12).

COUNTERSTATEMENT OF FACT: The two repayment scenarios, provided in the First Round offering memorandum (RX-001 pp. 11-12) were based on certain financial assumptions. The Firm expressly cautioned investors that "no one can predict the future; actual rates of returns will depend on several variables."

COUNTERSTATEMENT OF FACT: The First Round offering memorandum expressly cautioned investors that "it is important for investors considering the purchase of royalty units to realize the sensitivity of the key drivers that will impact their return: number of units issued...monthly advertising budget...new AUM...and Royalty per Unit. (RX-001 pp. 10-11).

76. Undisputed.

77. Undisputed.

78. Undisputed.

79. Undisputed.

80. Undisputed.

81. Undisputed.

82. DIVISION'S PROPOSED FACT: Winkelmann further wrote to Mr. Bean: "Last quarter our assets under management increased \$11 million. The new recurring annual revenue that will be realized from these new assets is about \$100,000. We spent approximately \$22,000 last quarter in advertising to generate this new business. So we are investing 22 cents and getting back 1 dollar in recurring revenue." (Ex. 32). Winkelmann agreed that he was referring to the first quarter of 2011, which had ended at the time of his email.

COUNTERSTATEMENT OF FACT: The First Round Offering Memorandum also disclosed that the Firm was spending 22 cents to earn 1.00 (equivalent to an advertising ratio of 0.22). RX-001.

83. DIVISION'S PROPOSED FACT: Contrary to Winkelmann's email to Mr. Bean, for first quarter of 2011, BOP spent \$18,685 on advertising and generated \$42,070 in new recurring annual revenues. (Ex. 440). \$18,685 divided by \$42,070 results in an advertising ratio of .44, not 0.22.

RESPONSE: Proposed Fact 83 should be stricken as argumentative and against the weight of the evidence. This proposed fact is based on DX-440, a document created by Mr. Collins that is based on data that did not exist (and was not available to the Firm) at the time the offering document was created. As articulated in Respondents' brief, the data Mr. Collins used in his calculations was based on data as of June 2012. (Respondent's Pre-Hearing Brief, p. 8). The Division has admitted this fact (See Division's proposed finding of fact No. 244). That data differed from the Firm's real-time data in March 2011. The Firm did not have the data used by Mr. Collins in March or April 2011. Mr. Collins' data did not become available until June 2012. The Division did not introduce any evidence that Mr. Winkelmann possessed the purportedly "correct" data contained in proposed fact number 83 at the time the email was sent.

Proposed Fact 83 should be stricken as argumentative and unsupported by the evidence presented.

84. Undisputed.

85. DIVISION'S PROPOSED FACT: Winkelmann's letter to Mr. Funfsinn stated: "We are spending about \$2,500 to land \$1 million in new assets that generate approximately \$8,000 in recurring annual revenue." (Ex. 40). \$2,500 divided by \$8,000 results in an

advertising ratio of .31, which differs from the .22 ratio disclosed in the first offering memorandum.

COUNTERSTATEMENT OF FACT: Mr. Winklemann's letter to Mr. Funfsinn was sent in May 2011 – more than a month after the March 31, 2011 Offering Memorandum was distributed. (Compare RX-001 p. 1 and DX-40).

COUNTERSTATEMENT OF FACT: Mr. Winklemann testified that the figures contained in the email to Mr. Funfsinn came from the Firm's financial records that were available at the time. Mr. Winklemann further testified that he believed the figures to be true and accurate.

CITATION:

Tr. 1368:5-16

Q Did you believe those figures to be true when you sent those emails to Mr. Bean and to --to Mark [Funfsinn], respectively?

A Yes.

Q Were you attempting to be accurate?

A Yes.

Q Were you trying to be inaccurate?

A No.

Q Do you know where the figures that appeared in those emails came from?

A From the Blue Ocean records that we had available.

86. Undisputed.

87. **DIVISION'S PROPOSED FACT:** On May 10, 2011, Mr. Funfsinn emailed Winklemann with questions about the royalty unit offering memorandum. (Ex. 45). Winklemann responded: "I understand the document is not perfect and I appreciate that you took the time to review." (Ex. 45). Winklemann agreed that, after Mr. Bean, Mr. Funfsinn was a second potential investor pointing out an ambiguity in the first round offering memorandum.

RESPONSE: The proposed fact is misleading and inaccurate in that it fails to state the "ambiguity" identified by Mr. Funfsinn and insinuates that the "ambiguity" relates to the advertising ratio (the sole misleading statement identified in the OIP). Mr. Funfsinn's email poses four questions, none of which has anything to do with the advertising plan or the stated factor. Instead, Mr. Funfsinn asked Mr. Winklemann (1) about state residency requirements (2) whether he should confer with an attorney; (3) when the funds would be transferred from investors to BOP; and (4) how the 1% warrant worked. Accordingly, proposed fact number 87 should be stricken.

COUNTERSTATEMENT OF FACT: Mr. Funfsinn's email did not question or identify any "ambiguities" with regard to the advertising figures contained in the Round One Offering Memorandum. (DX-45).

COUNTERSTATEMENT OF FACT: Mr. Funfsinn's email did not question or identify any "ambiguities" with regard to the advertising conversion ratio. (DX-45).

88. Undisputed.

89. **DIVISION'S PROPOSED FACT:** Contrary to Winkelmann's email to King, as of May 17, 2011, BOP had only raised \$425,000, and the first round offering would continue until the last first round investor purchased his royalty unit on July 13, 2011. (Ex. 455).

RESPONSE: Mr. Winkelmann's email to Mr. King stated: "So far we have raised about \$650,000 we are going to close the offering at the end of May." DX-455, which the Division cites in support of the above fact, cautions in a subscript that the "date purchased" which appears on the chart is the date that the subscription agreement or check was executed. DX-455 does not include dates that investors committed to the raise.

COUNTERSTATEMENT OF FACT: As of May 17, 2011, BOP had received subscription agreements, checks or wire transfers for funds totaling \$425,000. The last first round investor executed his subscription agreement or signed his purchase check on July 13, 2011. (Ex. 455).

90. Undisputed.

91. **DIVISION'S PROPOSED FACT:** On October 20, 2011, Winkelmann sent an email to royalty unit investor and advisory client Jason Grau. (Ex. 71). In that email, Winkelmann presented positive information about BOP, including representing that BOP "grew 14.5% for the quarter." (Ex. 71). Winkelmann's email to Grau contained none of the negative information Winkelmann disclosed to Binkholder in his email from two days earlier. (Compare Ex. 70 and Ex. 71).

RESPONSE: Misstates the testimony and argumentative. The email to Mr. Binkholder does not refer to "negative" information, only the fact that the AUM was lower than projected.

CORRECTED STATEMENT OF FACT: On October 20, 2011, Winkelmann sent an email to royalty unit investor and advisory client Jason Grau. (Ex. 71). In that email, Winkelmann presented positive information about BOP, including representing that BOP "grew 14.5% for the quarter." (Ex. 71). Winkelmann's email to Grau did not contain information regarding BOP's lower-than-projected AUM which Mr. Winkelmann and Mr. Binkholder discussed via email from two days earlier. (Compare Ex. 70 and Ex. 71).

92. Undisputed.

93. Undisputed.

94. **DIVISION'S PROPOSED FACT:** The second option presented in Winkelmann's email 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..." (Ex. 83, BO 4920). Winkelmann testified that of the two options, it would be better for him to receive \$8,500 per month as opposed to \$2,000 per month.

COUNTERSTATEMENT OF FACT: Mr. Winkelmann further testified that the "bonanza" would be for the AUM conversion and "not for us individually" – referring to himself and Mr. Binkholder.

CITATION:

Tr. 586:3-11

Q Let's look at the two options, which is cutting your compensation from \$2,000 per month to nothing, more pain and suffering. And the other one is the bonanza of you and Binkholder getting \$8500 every month?

A Quite a bonanza, 8500 each.

Q Those are the two options, right?

A I think the bonanza would be for the AUM conversion, not for us individually.

95. **DIVISION'S PROPOSED FACT:** Winkelmann concluded his email to Binkholder by recommending that BOP initiate a second royalty unit offering: "So I figure we should be bold and raise Blue Ocean Royalty 2 with a conversion rate of 2.25x." (Ex. 83, BO 4920). Winkelmann agreed that he was advocating raising more money from investors so that he could increase his own compensation.

RESPONSE: Proposed fact 95 misstates Mr. Winkelmann's testimony and misconstrues his email to Mr. Binkholder. The email states that the company's expenses had exceeded projections and that the company needed additional capital if it was going to continue its advertising push at the current rate. Mr. Winkelmann's email laid out two options for he and Mr. Binkholder to consider: (1) cutting expenses or (2) raising additional funds.

Option 2, which the Division refers to in this proposed fact, proposes raising capital "for the general purpose of funding the Chicago office." Mr. Winkelmann writes in his email that Option 2 will require more work but result in a higher compensation for he and Mr. Binkholder. Neither the email nor the testimony state that Mr. Winkelmann "advocated raising money from investors" for the sole purpose of increasing his compensation.

CORRECTED FACT: Winkelmann concluded his email to Binkholder by stating that BOP should "be bold" and initiate a second royalty unit offering: "So I figure we should be bold and raise Blue Ocean Royalty 2 with a conversion rate of 2.25x." (Ex. 83, BO

4920). Mr. Winkelmann told Mr. Binkholder that this plan would require more work, but also additional compensation.

96. DIVISION'S PROPOSED FACT: Winkelmann was shown internal BOP financial materials (Ex.395, BOP 5317) which Winkelmann agreed were created around the same time as his December 20, 2011 email to Binkholder.

RESPONSE: Misstates the evidence and the testimony. Mr. Winkelmann's testimony, cited by the Division, did not address either DX-395 or the page marked BOP 5317 in its entirety. Indeed, that page includes data through March of 2014 and could not possibly have been created in or around December 2011.

Instead, the testimony related only to one "very small" chart on that page. To the extent the Division suggests otherwise, it misstates the evidence

RESPONSE: CORRECTED STATEMENT OF FACT: Winkelmann was shown internal BOP financial materials (Ex.395, BOP 5317) and was asked about the "second chart all the way on the right." Mr. Winkelmann testified the last available month on that chart is November of 2011. Winkelmann agreed that the small chart all the way on the right was created around the same time as his December 20, 2011 email to Binkholder.

CITATION:

Tr. 588:5-589:23

Q And let's go to Exhibit 395. And this is Item No. 4, monthly advertising reports, 2011 and miscellaneous. And we can take a long while to get there through correspondence, but I can represent to you during the investigation Mr. Benson subpoenaed documents related to the 2011 ad ratio, and do you see that BO 5300 in the corner?

A Yes.

Q That's what Blue Ocean Portfolios produced, do you see that?

A Okay.

Q All right. Let's go to page 18 of Exhibit 395. *And we have a bunch of charts here. Okay. And I want you to look at the second chart all the way on the right. And it's small, so Byron will you please blow it up?* And you see this chart it says add expense summary?

A Correct.

Q And the last available month is November of 2011. Do you see that?

A Correct.

Q And we have annualized expenses of \$328,000. Do you see that?

A Correct.

Q And you have the new annualized revenue of \$320,000?

A Correct.

Q And do you have the calculator? What are you going to get if you divide \$328,053 by \$320,000?

A Looks like 1.03 on this.

Q And that's the same factor number you cited to Mr. Binkholder in that -- what's the date on that email? That December 20th, 2011 email?

A Yes.

Q And I believe you testified the factor was the number that changed constantly and you monitored it in real time, right?

A Yes.

Q So can we safely assume, then, the date on this ad expense summary in 395 is from somewhere close in time to the date on your email to Mr. Binkholder, which is December 20th, 2011?

A Yes.

97. Undisputed.

98. Undisputed.

99. Undisputed.

100. Undisputed.

101. Undisputed.

102. **DIVISION'S PROPOSED FACT:** On February 8, 2012, Ed Mahoney – a royalty unit investor, BOP advisory client, and Winkelmann's relative through marriage – emailed Winkelmann, and asked whether his royalty unit investment's growth "depend on you getting more customers" and whether "the worth of your company grow[s] any way other than new customers." (Ex. 97, BO 878). In his response to Mahoney's email, Winkelmann wrote:

“Last year we spent \$0.78 in advertising to obtain \$1.00 in new recurring revenue.” Winkelmann was conveying to Mahoney that BOP’s advertising ratio for 2011 was .78 (Tr. 599:12-14). Winkelmann concluded by writing the “bulk of investor returns will be in years 3-5.” (Ex. 97, BO 877).

RESPONSE: The statement that “Winkelmann concluded by writing the ‘bulk of investor returns will be in years 3-5’” is incomplete and misleading. The actual text of the email is:

The bulk of the investor returns will be in years 3-5, *at that point it is estimated that the AUM will be \$150-200 million and there is excessive revenue/cash flow to pay back the investor faster.*

(DX-97) (emphasis added to show missing text). This omission of text makes the statement misleading as written. The reason that Mr. Winkelmann estimated the “bulk” of repayment would occur in the years three to five of the investment was because he estimated the AUM would be between \$150 and 200 million at that time. As disclosed in the offering memorandum, in the section entitled “Business and Investor Risk”:

Under the planned expenses and advertising assumptions, Blue Ocean Portfolios will produce a positive cash flow at approximately \$124 million in AUM. It is the objective of Blue Ocean to achieve this threshold within 24 months. Any unforeseen event that slows down or prevents this threshold will result in lower returns for the investors, lower bonus payments for the employees, and a delay in any potential distributions to the owners.

RX-002 p. 18. BOP’s AUM never hit the \$124 million mark, which would have meant the company was cash-flow positive and capable of paying higher returns to investors. BOP’s AUM also never hit the \$150-200 estimate set forth in Mr. Winkelmann’s email to Mr. Mahoney.

CORRECTED STATEMENT OF FACT: On February 8, 2012, Ed Mahoney – a royalty unit investor, BOP advisory client, and Winkelmann’s relative through marriage – emailed Winkelmann, and asked whether his royalty unit investment’s growth “depend on you getting more customers” and whether “the worth of your company grow[s] any way other than new customers.” (Ex. 97, BO 878). In his response to Mahoney’s email, Winkelmann wrote: “Last year we spent \$0.78 in advertising to obtain \$1.00 in new recurring revenue.” Winkelmann was conveying to Mahoney that BOP’s advertising ratio for 2011 was .78 (Tr. 599:12-14). Winkelmann concluded by writing the “bulk of investor returns will be in years 3-5 *at that point it is estimated that the AUM will be \$150-200 million and there is excessive revenue/cash flow to pay back the investor faster.*” (Emphasis added to show corrected text).

COUNTERSTATEMENT OF FACT: According to Mr. Winkelmann’s email to Mr. Mahoney, on February 8, 2012, BOP had an AUM of \$68 million.

103. Undisputed.

104. Undisputed.

105. Undisputed.

106. DIVISION'S PROPOSED FACT: On March 7, 2012, Winkelmann emailed Sara Meystadt and Jennifer Elbert (Juris) edits and comments he had made for the second round offering memoranda. (Ex. 110). One of the comments, in the Advertising Yield Factor section of the memorandum, read as follows: "This advertising factor for 2011 was 0.78. So far, in 2012 this factor has dropped to 0.59 [earlier you have 0.50]." (Ex. 110, p. 2 of PDF). Winkelmann agreed that this comment was alerting him or his staff that an inconsistency existed in the memorandum relating to the advertising factor.

COUNTERSTATEMENT OF FACT: In response to his colleagues' comment pointing out the "inconsistency," Mr. Winkelmann corrected the figure. The same provision in the final version of the Round 2 Offering Memorandum states: "So far, in 2012 this factor has dropped to 0.62."

107. Undisputed.

108. Undisputed.

109. DIVISION'S PROPOSED FACT: Winkelmann testified that there was a change in the methodology used to calculate the advertising ratios presented in the first and second offering memoranda. According to Winkelmann, for the first memorandum, BOP calculated the factor by dividing BOP's advertising spending going back to June 2010 by its new recurring revenues generated in February 2011. According to Winkelmann, for the second offering memoranda, BOP divided its advertising spending for the year of 2011 by new recurring revenue that resulted from, or could be traced to, the 2011 advertising.

RESPONSE: The first and third sentence of Proposed Finding of Fact 109 should be stricken as they misstate the testimony and are misleading. The testimony referred to did not reflect a "change in methodology" between the two memoranda. Indeed, the testimony above did not even relate to the same calculations.

The second sentence is nearly entirely accurate: Mr. Winkelmann testified that, for the first memoranda, BOP calculated the Firm's *current* factor by dividing BOP's advertising spending going back to June 2010 by its new recurring revenues generated in February 2011. The third sentence, however, where the purported "change" in methodology occurred, does not relate to the calculation of the Firm's *current* factor (the 0.62 factor alleged inaccurate in paragraph 9 of the OIP). The testimony cited with regard to the second offering memoranda calculated the Firm's *past* factor for the calendar year 2011. There was no "change" in methodology. Instead, there were simply two different calculations – one current and one past.

COUNTERSTATEMENT OF FACT: Winkelmann testified that, for the first memoranda, BOP calculated the Firm's current advertising factor by dividing BOP's advertising spending going back to June 2010 by its new recurring revenues generated in

February 2011. The first round offering memorandum (dated March 31, 2011) did not calculate an advertising factor for the year 2011, since the year was not yet complete.

The second round offering memorandum calculated the 2011 factor to be 0.78. (RX-002). Mr. Winkelman testified that BOP calculated this factor by dividing its advertising spending for the year of 2011 by new recurring revenue that resulted from, or could be traced to, the 2011 advertising.

Tr. 661:4-663:3

661:4 Q But it was just revenue that came in
661:5 during a single month regardless of when the
661:6 advertising that led to that revenue was expensed,
661:7 right?

661:8 A It's my recollection yesterday I
661:9 testified that the round one number was a result of
661:10 the new business that culminated in February of
661:11 2011 relative to the advertising spend going back
661:12 to the average advertising spend going back to June
661:13 2000 --

661:14 Q Right, but the --

661:15 A -- 10.

661:16 Q The denominator piece, just the new
661:17 revenue, that just came from a single month, right?

661:18 A Correct.

661:19 Q February 2011?

661:20 A Correct.

662:11 Q Okay. So let's talk about .79.

662:12 A Yes.

662:13 Q I thought we'd covered this yesterday,
662:14 but now I'm not so sure. Numerator, what's the
662:15 time period of advertising?

662:16 A The time period in the advertising would
662:17 be the advertising spend in 2011.

662:18 Q Okay. And the denominator would be the
662:19 new recurring revenue that was traced or resulted
662:20 from the 2011 advertising, correct?

662:21 A Yes.

662:22 Q Okay. And that is different from the
662:23 methodology you used for the first offering
662:24 memorandum, correct?

662:25 A Correct. Because --

663:1 Q Can you -- and I just -- can I just hold

663:2 you to "Correct" --

663:3 A Okay.

110. DIVISION'S PROPOSED FACT: Winkelmann agreed that there was no disclosure in the second offering memorandum that BOP had changed methodologies for calculating the advertising ratio. Winkelmann agreed that investors who purchased royalty units in the first round – including his clients the Grossmans and Mr. Mahoney – would not have been able to discern that BOP had switched methodologies.

RESPONSE: Proposed Finding of Fact 110 should be stricken as misleading, inaccurate, and unsupported by the evidence. As stated in response to Proposed Finding of Fact number 109, above, there was no change in methodology. Accordingly, there was no “change” to disclose.

111. Undisputed.

112. DIVISION'S PROPOSED FACT: At trial, Winkelmann did not introduce any exhibits or offer any testimony purporting to show how BOP arrived at a 0.78 or 0.79 advertising ratio for 2011.

RESPONSE: This proposed fact is inaccurate. Mr. Winkelmann introduced exhibits showing that, as of the time he prepared the second round offering memorandum in March of 2012, the advertising ratio as of December 31, 2011 was approximately 0.79. (RX-037 p. 3).

113. DIVISION'S PROPOSED FACT: Regarding the “current” factor of 0.62 disclosed in the second memorandum, Winkelmann’s prehearing brief claims that this number was calculated using a six-month look-back.

RESPONSE: Proposed Finding of Fact 113 should be stricken as argumentative. It also is misleading as it misstates the text of Respondents’ pre-hearing brief. Respondents’ pre-hearing brief does not state that the number was calculated using a “six-month look-back,” but, rather, that the Firm, at the time, had six months of data to review (the February and March 2012 monthly reports look back to November 2011 – an approximately six-month period). In full, Respondents’ brief states (bold font supplied):

This time, the Firm had considerably more data from which to draw. It was able to look back over the prior six months to review the historical efficiency (i.e., the ad factor). Between November 2011 and February 2012, it had fallen from 1.45 to 0.67. By the middle of March 2012, when the Firm was working with Greensfelder to finalize the offering documents, the cost had dropped even further, and the current advertising factor was 0.62. (By the end of March, it had dipped all the way to 0.35!)

Thus, using the up-to-the-minute mid-March figures, Blue Ocean and Mr. Winkelmann included the following discussion in the offering documents (emphasis supplied):

The key business driver for Blue Ocean Portfolios is the client acquisition cost. *Currently*, Blue Ocean Portfolios

is spending approximately \$15,000 per month on advertising which generates leads for the sales staff to follow up on. This \$15,000 advertising spend is converting to approximately \$2.42 million in new assets that are generating \$24,200 in new annual recurring revenue. So each \$10,000 in new recurring revenue is currently costing Blue Ocean Portfolios \$6,200 in advertising – a 62/100 ratio or an “advertising conversion factor” of .62.

Once again, the numbers included in this section were entirely accurate and representative of the Firm’s *current* advertising efficacy. The numbers are neither incorrect nor misleading.

Respondents’ pre-hearing brief states that the advertising factor was calculated using the “up-to-the-minute mid-March figures” as corroborated by the February 2012 and March 2012 month end reports. The Division’s Proposed Finding of Fact number 113 should be stricken.

114. DIVISION’S PROPOSED FACT: BOP additionally represented in the second offering memorandum: “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.” (RX-002, BO 9412). *Winkelmann agreed that BOP did not disclose to second round investors that in the first offering memorandum, BOP had represented that the key driver to its business was keeping the advertising ratio below 0.4.*

RESPONSE: The third sentence of proposed fact 114 (in italics above) should be stricken. The sentence does not contain any facts supported by the testimony the Division cites. Instead, it is a legal argument which, per the Court’s October 18, 2016 order, should be stricken.

115. DIVISION’S PROPOSED FACT: The second offering memoranda contained a table showing how long it would take for investors to be paid back, depending on the percentage of monthly receipts paid by BOP. (RX-002, BO 9401). That table reflected that if the payment percentage was kept at the minimum 0.25%, it would take 128 months for investors to be repaid, while they would be repaid in 44 months if BOP paid them 1.50% of monthly receipts. (*Id.*). Below the table, the second offering memorandum stated: “Once recurring sustainable profitability is achieved, larger and larger portions of the cash receipts will be used to pay back the Royalty Unit holders.” (*Id.*). Later in the memorandum, BOP represents: “Investors should expect the minimum of (0.25%) of total revenue initially. Once Blue Ocean Portfolio achieves profitability, the current plan (although not required) is to pay at least 50% of the profits, which we expect will exceed 0.25% of revenue...” (RX-002, BO 9411).

COUNTERSTATEMENT OF FACT: 128 months is 10.67 years.

116. DIVISION'S PROPOSED FACT: Another table in the second offering memorandum showed payback timeframes based on the advertising factor (ranging from 0.50 to 0.90) and the monthly payment percentage of BOP's revenues (ranging from 0.25% to 1.50%). (RX-002, BO 9412). Payout times based on the minimum payment percentage ranged from 108 to 132 months, while payout times based on a 1.50% ranged from 39 to 46 months. (*Id.*). Winkelmann agreed that an investor would be unable to calculate their payout time for advertising ratios greater than 0.9.

COUNTERSTATEMENT OF FACT: 108 months is 9 years.

COUNTERSTATEMENT OF FACT: 132 months is 11 years.

COUNTERSTATEMENT OF FACT: 39 months is 3.25 years.

COUNTERSTATEMENT OF FACT: 46 months is 3.8 years

117. Undisputed.

118. DIVISION'S PROPOSED FACT: The second offering memorandum represents that "the concept of capitalizing the business with a Royalty method would appear to be the most compelling way for the Investors, owners, and employees to align their interests" and that BOP "creates value for its clients by eliminating conflicts of interest..." (RX-002, BO 9401, 9404). The memorandum further represents: "The expansion capital in the form of Royalty Units is the optimal way to fund growth...and align all interests for the highest potential return at the least risk." (RX-002, BO 9417). *The second memorandum does not disclose that Winkelmann or Binkholder would receive any compensation increases, or otherwise disclose any conflict of interest.* (RX-002).

RESPONSE: The first two sentences of Proposed Finding of Fact 118 are not in dispute. The final sentence of Proposed Finding of Fact 118 misstates the evidence, contains legal conclusions, and contains argument by the Division.

Whether a conflict of interest exists between Mr. Winkelmann and his clients as a result of the fact he earned compensation for running the company is an issue to be determined by the Court. Indeed, a central issue in this dispute is whether that conflict exists, given that investors were paid out of revenues earned and not out of profits (meaning expenses like manager salaries had no impact on the investors). Similarly, whether Mr. Winkelmann's compensation was or was not disclosed is a legal issue to be determined by the Court. The proposed language should be stricken on those grounds alone.

Beyond that, the citation offered in support of the statement (i.e., the entirety of the second round offering memorandum) does not support or evidence the offered statement. Accordingly, the final sentence of Proposed Finding of Fact 118 should be stricken.

119. Undisputed.

120. Undisputed.

121. Undisputed.

122. DIVISION'S PROPOSED FACT: On August 1, 2012, Winkelmann emailed his advisory client Mark Funfsinn, and asked if Funfsinn would like to review the upcoming third round royalty unit offering. (Ex. 167). Winkelmann wrote: "Similar units issued last year have paid back the outside investors \$4,961.95 so far." (*Id.*). Winkelmann conceded that this statement was false, and that first round investors had only been repaid \$2,671.98 at the time of his email to Mr. Funfsinn. Winkelmann could also not explain why he had falsely represented the amount first round investors had been repaid.

RESPONSE: The third and fourth sentences of proposed fact 122 should be stricken as they contain legal conclusions, argument, and are not supported by the cited testimony (or any evidence presented in this case).

With regard to the third sentence, Mr. Winkelmann testified that the statement to Mr. Funfsinn was a mistake, made in error. Categorizing his testimony as a "concession" of "falsity" misstates his testimony.

Further, the use of "falsely" or "falsely represented" in both the third and the final sentence transforms an otherwise factual statement to an argument and/or legal conclusion. Both sentences should be stricken in compliance with the Court's October 18, 2016 Order.

CITATION:

Testimony Cited by Division in Support
682:3 Q And you say, "Similar units issued last 682:4 year have paid back the outside investors 682:5 \$4,961.95." 682:6 That's what you tell him, right? 682:7 A That's what it says, yes. 682:8 Q And that was false? 682:9 A Yes, I later learned that there was some 682:10 error that was pulled off some point of data, which 682:11 I unfortunately, Judge, I cannot recollect where I 682:12 got that from because it's a mystery why it would 682:13 be so precise, but I can't find where it came from. 682:14 Obviously it was an error. 682:15 Q Okay. Because, and I think we're all in 682:16 agreement the number is wrong, because in reality a 682:17 similar unit issued at the start of the first 682:18 offering would have only paid back \$2,671.98 at the 682:19 time of your email to Mr. Mark, correct? 682:20 A That's correct. So I thought maybe this 682:21 was a dupe or a 2X mistake, but I cannot find where 682:22 that mistake came from.

123. DIVISION'S PROPOSED FACT: On August 9, 2012, Jennifer Elbert (Juris) emailed Winkelmann about the third round royalty unit offering materials. (Ex. 169). Elbert

wrote: "Exhibits should all be updated to reflect round 3 figures and/or updated versions of documents. The executive summary is saved in there as well. The only thing that needs to be updated on that is the 'factor' number used throughout the document. It references .62 and .51. The Acquisition Cost photo you have included shows .64 as the factor for May and .51 for June. We just need to be consistent on whatever number we use in the document." (Ex. 169).

RESPONSE: The statement contained in proposed fact 123 is correct, but incomplete. If it is accepted, the following counter-fact should be accepted as well to make the statement complete and not misleading.

COUNTERSTATEMENT OF FACT: The final third round offering memorandum shows a consistent disclosure of a current advertising factor of 0.67. (RX-003)

COUNTERSTATEMENT OF FACT: The final third round offering memorandum does not reference either a 0.62 or a 0.51 current advertising factor. (RX-003)

124. DIVISION'S PROPOSED FACT: On August 24, 2012, Winkelmann wrote identical emails that were sent to each of the royalty unit investors. (Ex. 172). Those emails depicted BOP's growing assets under management, and apprised investors of the upcoming third round royalty unit offering: "Please let me know right away if you are interested in participating in this [third] round as we have *many* prospective investors and will give preference to the current royalty holders." (Ex. 172) (emphasis added). *In reality BOP would only be able to issue third round royalty units to four investors.*

RESPONSE: The final sentence of proposed fact 124 is argumentative and should be stricken.

125. Undisputed..

126. DIVISION'S PROPOSED FACT: In the third round offering memorandum, dated September 1, 2012, BOP represents: "The key driver to the Blue Ocean Portfolios 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, Blue Ocean Portfolios spends \$0.67 in advertising to buy \$1.00 in new recurring annual revenue." (RX-003, BO 7487). Winkelmann testified that the factor would be different depending on the current month used to calculate the factor.

COUNTERSTATEMENT OF FACT: The 0.67 factor, disclosed in the round three offering memorandum, was expressly described as the "current" factor at the time of the offering.

127. DIVISION'S PROPOSED FACT: Winkelmann testified that the methodology used to calculate the advertising ratio was different in the first and third memoranda. He agreed that the third memorandum does not disclose any change in methodology. The third memorandum also failed to disclose that the advertising ratio could differ based on the particular "snapshot" in time used to calculate the factor.

RESPONSE: Proposed fact 127 misstates Mr. Winkelmann's testimony and is argumentative and should be stricken in its entirety. Mr. Winkelmann did not testify that there was a "change in methodology." The testimony offered by the Division in support of this fact confirms the same.

The remainder of proposed fact 127 contains legal conclusions and legal argument in concluding there was both a (1) disclosure obligation and (2) disclosure failure. The proposed fact should be stricken in its entirety.

128. DIVISION'S PROPOSED FACT: Later in the third memorandum, BOP represents: "The key business driver for Blue Ocean Portfolios is the client acquisition cost. Currently, Blue Ocean Portfolios is spending approximately \$15,000 per month on advertising which generates leads for the sales staff to follow up on. This \$15,000 advertising spend is converting to approximately \$2.8 million in new assets that are generating \$31,000 in new annual recurring revenue. So each \$10,000 in new recurring revenue is currently costing Blue Ocean Portfolios \$6,700 in advertising - a 67 /100 ratio or an 'advertising conversion factor' of 0.67." (RX-003, BO 7495). *Winkelmann agreed that this section contained inconsistencies, given that \$15,000 divided by \$31,000 equals 0.48, as opposed to .67.*

RESPONSE: Misstates the testimony. Mr. Winkelmann did not "agree that this section contained inconsistencies." The final sentence of proposed fact 128 should be stricken.

CITATION:

Testimony offered by the Division in Support:
703:1 Q What's 15,000 divided by 31,000?
703:2 A Let me do that again. 15,000 divided by
703:3 31,000. .48.
703:4 Q .48. Factor of .48?
703:5 A Uh-huh.
703:6 Q And so the next sentence reads, "So each
703:7 \$10,000 in new recurring revenue is currently
703:8 costing Blue Ocean Portfolios \$67,000 in
703:9 advertising, a 67/100 ratio or an advertising
703:10 conversion factor of .67."
703:11 Do you see that?
703:12 A Yes.
703:13 Q And we all agree .67 does not equal .48?
703:14 A Obviously the offering memorandum is
703:15 understating the advertising efficacy from the
703:16 previous lines.
703:17 Q And this is less than a month where
703:18 Ms. -- after Ms. Elbert, your advertising factor
703:19 person, sends you an email saying, "Look out.
703:20 There are inconsistencies in the memo regarding the
703:21 advertising factor."

Testimony offered by the Division in Support:

703:22 Do you see that?

703:23 A Yes.

129. DIVISION'S PROPOSED FACT: Unlike the first two offerings, where the minimum monthly payout percentage was 0.25%, for the third round offering the minimum percentage was 0.1%. (RX-003, BO 7488). The third offering memorandum contained a chart showing the payback times ranging from 133 months for the minimum payout percentage, to 22 months for a 0.85% payout percentage. (*Id.*). Beneath that chart, the third memorandum represented: "Once recurring, sustainable profitability is achieved, larger and larger portions of the cash receipts will be used to pay back the Royalty Unit holders." (*Id.*).

COUNTERSTATEMENT OF FACT: 133 months equals 11.08 years.

COUNTERSTATEMENT OF FACT: The third round offering memorandum defined "recurring sustainable profitability" as \$124M in AUM. (RX-003 p. 4, 16)

COUNTERSTATEMENT OF FACT: The third round offering memorandum stated (RX-003 p. 16):

Under the planned expenses and advertising assumptions, Blue Ocean Portfolios will produce a positive cash flow at approximately \$124 million in AUM. It is the objective of Blue Ocean Portfolios to achieve this threshold within 24 months. Any unforeseen event that slows down or prevents this threshold will result in lower returns for the investors[.]

COUNTERSTATEMENT OF FACT: The third round offering memorandum stated that "larger and larger portions of cash receipts" in addition to the minimum payments would be made once the Company achieved "recurring sustainable profitability."

COUNTERSTATEMENT OF FACT: BOP never reached \$124M in AUM.

COUNTERSTATEMENT OF FACT: BOP never achieved "recurring sustainable profitability."

130. DIVISION'S PROPOSED FACT: The third round memoranda represents: "Blue Ocean Portfolios is planning to use the proceeds of the Royalty Offering to expand into the Chicago market, increase its advertising reach, syndicate its sponsorship of *The Financial Coach Show* radio program...and pay for general and administrative expenses. Proceeds could also be used to fund other revenue-producing activities that are directly or indirectly related to Blue Ocean Portfolios' business activities. Any of these activities would need to result in the potential for recurring revenues inuring to Blue Ocean Portfolios and to investor returns." (RX-003, BO 7488-89). *The third memorandum does not disclose that proceeds would be used to support compensation increases for Winkelmann or Binkholder.*

RESPONSE: The final sentence of proposed fact 130 misstates the testimony. The following testimony cited by the Division expressly mentions use for the payment of expenses.

CITATION:

Testimony offered by the Division in Support:	
699:25	Q And what you're telling investors there
700:1	is that if Blue Ocean is going to deploy the
700:2	proceeds of offering three, any of those
700:3	deployments of proceeds would need to result in the
700:4	potential for the recurring revenues going up,
700:5	right?
700:6	A Yes.
700:7	Q No mention of the proceeds of this
700:8	offering increasing your compensation or Mr.
700:9	Binkholder's compensation, correct?
700:10	A No.
700:11	Q Incorrect?
700:12	A No mention, correct. I'm sorry.
700:13	Q And raising your compensation, that
700:14	doesn't lead to increased payouts for investors,
700:15	correct?
700:16	A No.
700:17	Q Incorrect?
700:18	A The investors -- the investors' payback
700:19	is tied to the cash receipts of the company, not to
700:20	my compensation.
700:21	Q Right, but you said -- you just agreed
700:22	with me if you're going to employ the proceeds of
700:23	this offering it needs to result in investor
700:24	payments going up. You just agreed with me.
700:25	A Yes, I agree with that.
701:1	Q Paying you, that doesn't lead to investor
701:2	payments going up, correct?

131. Undisputed.

132. Undisputed.

133. Undisputed.

134. **DIVISION'S PROPOSED FACT:** The third memorandum represented: "Investors should expect a low (0.10%) rate of total revenue per unit initially. Once Blue Ocean Portfolio achieves profitability, the plan is to pay at least 50% of the profits to the Royalty Unit

holders until their 2.25x payback is achieved. Investors should expect the bulk of their return in years 3-5.” (RX-003, BO 7498).

RESPONSE: Incomplete and misleading as written.

COUNTERSTATEMENT OF FACT: The representation that “investors should expect the bulk of their return in years 3-5” was premised on Blue Ocean Portfolio achieving profitability. (RX-003, BO 7498).

COUNTERSTATEMENT OF FACT: The third round offering memorandum stated (RX-003 p. 16):

Under the planned expenses and advertising assumptions, Blue Ocean Portfolios will produce a positive cash flow at approximately \$124 million in AUM. It is the objective of Blue Ocean Portfolios to achieve this threshold within 24 months. Any unforeseen event that slows down or prevents this threshold will result in lower returns for the investors[.]

COUNTERSTATEMENT OF FACT: The third round offering memorandum stated that “larger and larger portions of cash receipts” in addition to the minimum payments would be made once the Company achieved “recurring sustainable profitability.”

COUNTERSTATEMENT OF FACT: BOP never reached \$124M in AUM.

COUNTERSTATEMENT OF FACT: BOP never achieved profitability.

135. Undisputed.

136. **DIVISION’S PROPOSED FACT:** On October 2, 2012, Winkelmann sent separate emails to each royalty unit investor, and asked them if they were interested in investing in the third round royalty units. (See, e.g. Ex. 197, p. 2; Ex. 198, p. 2; Ex. 199, p. 2 (“Please let me know if you would be interested in seeing the round 3 offering or if you know of anyone interested in participating in our growth going forward - the units are \$25,000 each.”). In those emails, Winkelmann *falsely* stated that BOP had raised \$325,000 in the third offering. (Ex. 197, p. 2; Ex. 198, p. 1; Ex. 199, p. 2 (“...our 3rd round of financing is currently being placed. So far we have brought in \$325,000 of the \$650,000 that we have planned.”). In reality, BOP had only raised \$250,000 at the time of Winkelmann’s email, and would only raise \$275,000 for the entire third round. (Ex. 455).

RESPONSE: The Division’s characterization of Mr. Winkelmann’s statements as “false” is argumentative, contains a legal conclusion, and misstates his testimony. Mr. Winkelmann testified that, at the time he made the statements, he believed that he had raised \$325,000. The word “falsely” should be stricken.

COUNTERSTATEMENT OF FACT: Mr. Winkelmann testified that, at the time he sent the October 2, 2012 email, he believed that he had raised \$325,000.

CITATION:

<p>Tr. 709:9-710:6 (Winkelmann).</p>	<p>Q So Exhibit 198, that's an email from you to Mr. Buckowitz dated October 2nd, 2012.</p> <p>A Correct.</p> <p style="text-align: center;">***</p> <p>Q: And you tell him you brought in \$325,000 off that offering so far?</p> <p>A Yes.</p>
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137. DIVISION'S PROPOSED FACT: On October 9, 2012, Winkelmann wrote a letter to William Jennings, which he sent to Mr. Jennings along with the third round offering materials. (Ex. 203). In that letter, Winkelmann falsely represented that BOP had raised \$400,000 in the third offering. (Ex. 203 ("It would be great if you would like to participate. If not, that is OK as well. We have raised \$400,000 out of the \$650,000 so far.")). In reality, BOP had only raised \$250,000 at the time of Winkelmann's email, and would only raise \$275,000 for the entire third round. (Ex. 455).

RESPONSE: The Division's characterization of Mr. Winkelmann's statements as "false" is argumentative, contains a legal conclusion, and misstates his testimony. Mr. Winkelmann testified that, at the time he made the statements, he believed that he had raised \$325,000. The word "falsely" should be stricken.

COUNTERSTATEMENT OF FACT: Mr. Winkelmann testified that, at the time he sent the October 9, 2012 email, he believed that he had raised \$400,000.

CITATION:

<p>Tr. 713:20-714:20 (Winkelmann).</p>	<p>Q And you actually did meet with Mr. Jennings on October 9th, 2012, is that correct, or you spoke with him?</p> <p>A I think he came by the office because I remember I was having a lot of trouble communicating with my voice. That's the best of my recollection today.</p> <p>Q But you actually did send out this letter -- a signed version of this letter when you sent him an offering memorandum for the third round offering?</p> <p>A Yes.</p> <p>Q Okay. And so you write to Mr. Jennings, "It would be great if you would participate. If not, that's okay as well. We have raised \$400,000 out of the \$650,000 so far."</p> <p>Do you see that?</p>
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	<p>A Yes.</p> <p>Q And that \$400,000 figure, that's \$75,000 higher than the number you had represented in those October 2nd, 2012 emails?</p> <p>A Yes, it's higher.</p> <p>Q And, again, the third round offering only raised \$275,000, correct?</p> <p>A That's how much was in the bank when we learned about Bryan Binkholder, yes.</p>
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138. Undisputed.

139. Undisputed.

140. **DIVISION'S PROPOSED FACT:** In addition to inquiring about the status of his royalty unit investment, Mr. Mahoney inquired about finding another person to buy his royalty units. In response to Mahoney's inquiry, Winkelmann wrote: "I want to emphasize that there is no market for the royalty units that you purchased in your IRA. However if you would like I would attempt to find a buyer for your existing units - of course there would be no guarantee that I could find a buyer or that the terms would be favorable to you. I have no way of knowing what the offer would be and would only be in a position to convey to you the terms of any offer- if and only if an offer would surface." (Ex. 210, BO 3578).

COUNTERSTATEMENT OF FACT: Mr. Mahoney did not respond to Mr. Winkelmann's offer to find a buyer for his Royalty Unit.

CITATION:

<p>Tr. 724:2-725:2 (Winkelmann).</p>	<p>Q You just said he asked you if he could find one. You knew there were potential buyers out there, right? You just testified that Mr. -- Mr. Swift -- Mr. Bryan Swift had said, "Sign me up for two hundred" -- "for \$200,000," but the money hadn't been put in the bank yet.</p> <p>So you knew Mr. Swift, who you owed fiduciary duties to, was looking to buy but hadn't bought yet. And then in this email, Exhibit 210, you see right along the same time period, your kin, your client asking you to find another buyer for him. And you don't do it.</p> <p>You don't do it because if you -- if you sell Mr. Mahoney's unit to Mr. Swift or Ms. Gamache you don't get any money, but if you sell Mr. Swift or Mr. Gamache these round four Royalty Units you get paid, right?</p> <p>A I don't know how to address the hypothetical you set up.</p>
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	<p>Mr. Mahoney never asked me to find him a buyer. I sent him -- I addressed his concern. I laid it out. Let me know if you want me to -- best efforts, I'll try to find him a buyer.</p> <p>Q But you didn't use any best efforts to find him a buyer?</p> <p>A He didn't ask me to.</p>
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141. DIVISION'S PROPOSED FACT: *Even though Mr. 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 Mr. Mahoney had inquired about selling his royalty unit.*

RESPONSE: The italicized language above contains the Division's argument and should be stricken.

142. DIVISION'S PROPOSED FACT: On December 12, 2012, Winkelmann sent an email to Bryan Swift attaching BOP's financial projections for 2013. (Ex. 211). *Those projections showed BOP running out of money by February 2013. (Ex. 211, BO 54). Winkelmann wrote in his email: "I need to come up with a deal – I am hesitate to go back to some of the investor/clients with this bad news – need to be careful not to start any rumors." (Ex. 211, BO 52). Winkelmann testified that he did not want to inform the royalty unit investors, including his advisory clients, that BOP would soon be out of money.*

RESPONSE: Proposed fact 142 misstates the testimony, is incomplete and is misleading as written. The 2013 financial projections showed that BOP would run out of money if no changes were made and the business continued its advertising spending at the current rate. Mr. Winkelmann testified that just because the projection showed the company would run out of cash, that did not mean that would actually occur. The projection allowed the company to see it months in advance and make changes to avoid the same.

COUNTERSTATEMENT OF FACT: Mr. Winkelmann testified that BOP was able to see a cash deficit coming three or four months out and could make adjustments.

COUNTERSTATEMENT OF FACT: Mr. Winkelmann testified that "what actually happened" in the face of these projections was that the Firm made significant reductions to expenses.

CITATION:

<p>Tr. 729:8- 731:16</p> <p>Q What does it mean to have any cash in parentheses?</p> <p>A Negative forecasting -- we're forecasting a negative cash balance.</p> <p>Q That's no money, right?</p> <p>A Correct.</p>

Q Okay. So go back to the email to Mr. Swift, please.

JUDGE PATIL: Excuse me for a minute. How long would you have been able -- 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. This is in the wake of this round three, this extraordinary situation around round three. This wasn't planned.

I mean, all the -- it's kind of like a wishbone offense. Everything is moving and then all of a sudden this bomb drops on us from Binkholder. We had to suspend our capitalization plan and we're trying to figure out, okay, what do we do now because all these actions are being deployed.

JUDGE PATIL: Right. But I think I'm asking this because the email to Mr. Bryan Swift seemed to indicate you needed to fashion some sort of deal. And was that -- did you mean a deal to be able to maintain operations without a negative cash balance?

THE WITNESS: Yeah. Obviously, that's what it implied. Of course.

JUDGE PATIL: And how long would you have been able to continue operations with negative cash balances like those reflected on that --

THE WITNESS: Well, I think that shows that this is what we're projecting. We're going to be out of cash in February and this is December.

What is that? Two months. Saying, "Bryan, what do you think? We have to" -- "you have a deal, maybe you have some idea for me."

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 -- or sorry, I'm not trying to characterize it. I'm just saying these large deficits, 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.

143. Undisputed.

144. Undisputed.

145. Undisputed.

146. **DIVISION'S PROPOSED FACT:** On January 28, 2013, Winkelmann wrote Morgan an email with the subject: "Round 4." (Ex. 229). Winkelmann wrote: "Does the calendar and regs allow to shoot to raise \$500,000 over the next two [months]? 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].” (Ex. 229). Winkelmann testified that he needed to raise money quickly, because BOP had various business expenses to pay and was one month away from being out of money.

RESPONSE: Proposed fact 146 is incomplete and misleading as written. The fact should be corrected to read:

CORRECTED STATEMENT OF FACT: On January 28, 2013, Winkelmann wrote Morgan an email with the subject: “Round 4.” (Ex. 229). Winkelmann wrote: “Does the calendar and regs allow to shoot to raise \$500,000 over the next two [months]? 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].” (Ex. 229). Winkelmann testified that he needed to raise money quickly, because BOP had various business expenses to pay and was one month away from being out of money if the current operations continued without change or modification.

CITATION:

Tr. 1476:10-17

Q: And then Exhibit 83, please. And can you just blow up the first paragraph there? And this is a December 20th, 2011 e-mail where you tell Mr. Binkholder that the company is on pace to run out of money in April or May 2012?

A: Oh, yeah, if we -- we kept the spending the way we did and we would run out under the current business plan.

Tr. 1479:12-24

Q Right. And the financial situation of Blue Ocean at the time was so bad that you couldn't say I need to wait and heal up and get my head in the game. You said we need to do an offering now so we can bring in some money and keep the company going?

A Keep the business plan going.

Q That's right. That's right.

A To fund the advertising. The company, all we had to do was cut expenses, you know, and stop advertising, the company was fine. You know, it was viable as it is today. It's still viable with no advertising.

COUNTERSTATEMENT OF FACT: The Round 4 Offering memorandum contained the following disclosure regarding the Firm's finances (RX-004 p. 5.):

Blue Ocean Portfolios is currently experiencing a shortage of cash and...[i]f Blue Ocean Portfolios fails to raise at least \$50,000 prior to March 1, 2013, then there may not be enough money to meet

payroll and the next quarterly fee revenues...will not be received until the first week of April.

147. Undisputed.

148. Undisputed.

149. DIVISION'S PROPOSED FACT: The fourth round offering memorandum, dated February 15, 2013, represented: "The key indicator on the advertising efficacy is to determine how much advertising is needed to generate one additional dollar in new recurring revenue; for the 2012 the factor was 0.89%. Or in other words, Blue Ocean Portfolios spent \$0.89 in advertising to 'buy' \$1.00 in new recurring annual revenue. In 2012 Blue Ocean Portfolios Invested approximately \$307,000 in advertising and the AUM increased approximately \$35 million from \$57 million to \$92 million. Resulting recurring revenues increased by approximately \$262,000 to approximately \$725,000 annually." (RX-004, BO 9134). *This paragraph contained conflicting information because \$307,000 divided by \$262,000 results in an advertising ratio of 1.17, not 0.89.*

RESPONSE: The final sentence of proposed fact 149 should be stricken as it is not a fact but legal conclusions and legal argument.

150. DIVISION'S PROPOSED FACT: In a later section, the fourth round memorandum represented: "The key business driver for Blue Ocean Portfolios is the client acquisition cost. Currently, Blue Ocean Portfolios is spending approximately \$10,000 per month on advertising which generates leads for the sales staff to follow up on. This \$10,000 advertising spend is converting to approximately \$2.8 million in new assets that are generating \$31,000 in new annual recurring revenue. So each \$10,000 in new recurring revenue is currently costing Blue Ocean Portfolios \$6,700 in advertising- an 89/100 ratio or an 'advertising conversion factor' of 0.89." (RX-004, BO 9141). *This paragraph also contained conflicting information, in that \$10,000 divided by \$31,000 results in an advertising ratio of 0.32; while \$6,700 divided by \$10,000 results in a ratio of 0.67. The fourth memorandum does not disclose any discrepancies existing. (RX-004).*

RESPONSE: The final two sentences of proposed fact 149 should be stricken as it is not a fact but legal conclusions and legal argument.

151. Undisputed.

152. DIVISION'S PROPOSED FACT: The fourth offering memorandum represented: "Investors should expect the bulk of their returns in years 3-5." (RX-004, BO 9144). The memorandum contained a chart showing "months to payback" based on a .90 advertising ratio and a range of monthly payout percentages ranging from 0.05% to 0.30%. (RX-004, BO 9134). The chart showed that if BOP kept payments to the minimum 0.05%, investors would be repaid in 176 months. (*Id.*). The chart further reflected that if investors were to be paid back in five years, BOP would need to pay at least four times the minimum monthly percentage. (*Id.*). The memorandum contained another chart showing "Months to Payback" based on advertising ratios ranging from 0.50 to 1.30 and monthly payout percentages ranging from 0.05% to 0.30%. (RX-004, BO 9145). According to that chart, if an investor was going to

be paid back in five years, BOP would need to quadruple the minimum monthly payout percentage and keep the advertising ratio at 0.5 or better.

COUNTERSTATEMENT OF FACT: 176 months is 14.67 years.

COUNTERSTATEMENT OF FACT: The fourth round offering offered investors a minimum monthly payment of 0.05% of all future cash receipts of the company. (RX-004 p. 13, BO9143).

COUNTERSTATEMENT OF FACT: The chart contained on page 13 of the fourth round offering memorandum (RX-004 p. 13) showed the months required to payback based on royalty rates ranging from the mandatory monthly minimum amount (0.05%) to 0.30%). Immediately following this chart, the memorandum disclosed:

Once recurring, sustainable positive cash flow is achieved, larger and larger portions of the cash receipts will be used to pay back the Royalty Unit holders.

COUNTERSTATEMENT OF FACT: With regard to when the Company expected to be cash flow positive, the fourth round offering memorandum stated (RX-004 p. 16):

Under the planned expenses and advertising assumptions, Blue Ocean Portfolios will produce a positive cash flow at approximately \$124 million in AUM. It is the objective of Blue Ocean Portfolios to achieve this threshold within 24 months. Any unforeseen event that slows down or prevents this threshold will result in lower returns for the investors[.]

COUNTERSTATEMENT OF FACT: BOP never reached \$124M in AUM. (RX-001 p. 5 (current AUM as of the Round 1 offering was \$40 million);RX-002 p. 3 (current AUM was \$65 million) RX-003 p. 5 (current AUM is \$85 million); RX-004 p. 3 (current AUM is \$98 million)).

153. Undisputed.

154. Undisputed.

155. DIVISION'S PROPOSED FACT: The fourth offering memorandum disclosed the Binkholder investment adviser bar order and the grand jury's investigation of Binkholder. (RX-004, BO 9146). In disclosing Binkholder's bar order, the memorandum stated: "The Order was based in part of findings that Mr. Binkholder did not disclose to investors...potential conflicts of interest." (*Id.*). *The fourth round memorandum does not disclose any conflicts attendant to the royalty unit offering or that Winkelmann would use investor proceeds to raise his compensation.* (RX-004).

RESPONSE: The final sentence of proposed fact 155 should be stricken as it is not a fact but legal conclusions and legal argument.

156. Undisputed.

157. Undisputed.

158. Undisputed.

159. Undisputed.

160. **DIVISION'S PROPOSED FACT** Winkelmann admitted that he made money as a result of BOP issuing royalty units.

RESPONSE: Misleading as written; misstates the testimony.

CORRECTED STATEMENT OF FACT: Mr. Winkelmann testified that he made money as the company became more successful.

Testimony Cited by Division in Support:
1484:16 Q Right. So in fact, you did make more 1484:17 money by issuing royalty units to your advisory 1484:18 clients than you would have had those clients 1484:19 invested in some other type of product, correct? 1484:20 A <i>Whatever the source of the money that 1484:21 came in through these subscriptions, of course the 1484:22 company expanded. It's quite evident. And as a 1484:23 result, I made more money as the company became 1484:24 more successful.</i>

161. **DIVISION'S PROPOSED FACT:** In addition to compensating Winkelmann through direct payments and payments to Glen Abbey Partners, BOP made payments, for Winkelmann's benefit, to Longrow Insurance Agency, one of Winkelmann's other companies. Between August 2011 and March 2012, BOP paid Longrow *at least* \$41,000 in "management fees." (Ex. 457).

RESPONSE: Misstates the testimony and evidence. The testimony set forth by the Division in support refers to \$40,000 in fees. Exhibit 457 shows \$41,000. There is no evidence in the record that it is greater than that amount, making the phrase "at least" argumentative and misleading. The phrase should be stricken.

162. **DIVISION'S PROPOSED FACT:** Winkelmann admitted that the payments to Longrow were to compensate him for his services to BOP.

RESPONSE: Misstates the testimony and evidence. Misleading. The very testimony offered by the Division in support of this fact shows that Mr. Winkelmann testified that some of the payments were to compensate him. He testified that other payments were for Blue Ocean's use of Longrow's data and email servers.

CORRECTED STATEMENT OF FACT: Mr. Winkelmann testified that some of the payments were to compensate him for his services to BOP. Other payments were to compensate Longrow for use of its data and email servers.

CITATION:

Testimony Cited by Division in Support:
<p>1486:1 Q Okay. And do you remember how you 1486:2 testified yesterday -- well, let's look at Exhibit 1486:3 RX89. Can you blow that up? And you testified 1486:4 with Mr. Wolper that the \$27,000, that was a 1486:5 payment in lieu of salary. Do you remember that? 1486:6 A Yes. 1486:7 Q And then -- but you said for the 1486:8 remainder \$2,000 a month, that was for shared 1486:9 office servers? 1486:10 A Yeah, that was paid to Longrow Insurance 1486:11 Agency for some servers, some equipment, use of 1486:12 the office. 1486:13 Q That's the same \$2,000 that you just 1486:14 testified you were getting in compensation? 1486:15 A Yeah. Well, where did the money go? I 1486:16 was the only officer of Longrow Insurance Agency. 1486:17 Of course I took that money.</p>

163. DIVISION'S PROPOSED FACT: Winkelmann testified during the investigation that the only work Longrow did on BOP's behalf was to host three meetings with prospective BOP clients.

RESPONSE: Incomplete and misleading as stated.

COUNTERSTATEMENT OF FACT: Mr. Winkelmann testified at hearing

CITATION:

Testimony Cited by Division in Support:	Testimony in Support of COUNTERSTATEMENT of Fact:
<p>775:3 Q And the only work Longrow ever did on 775:4 Blue Ocean Portfolios' behalf was to host three 775:5 meetings for prospective Blue Ocean Portfolios 775:6 clients? 775:7 A That's not true.</p>	<p>Q And the only work Longrow ever did on Blue Ocean Portfolios' behalf was to host three meetings for prospective Blue Ocean Portfolios clients? A That's not true. Q Can we pull up your investigative testimony, please, page 54, line 17</p>

Testimony Cited by Division in Support:	Testimony in Support of COUNTERSTATEMENT of Fact:
<p>775:8 Q Can we pull up your investigative 775:9 testimony, please, page 54, line 17 through 22. 775:10 And when you testified back in February 775:11 of 2015, you were asked: 775:12 "Other than the meetings with three 775:13 prospective clients that you identified, what other 775:14 work did Longrow Insurance Agency do on behalf of 775:15 Blue Ocean Portfolios, LLC, to be entitled to 775:16 management fees paid by Blue Ocean Portfolios, 775:17 LLC?" 775:18 "Answer: None that I know of." 775:19 Am I reading that correctly? 775:20 A That's what it says. 775:21 Q And at the time you made those 775:22 statements -- that statement you were under oath? 775:23 A Correct.</p>	<p>through 22. And when you testified back in February of 2015, you were asked: "Other than the meetings with three prospective clients that you identified, what other work did Longrow Insurance Agency do on behalf of Blue Ocean Portfolios, LLC, to be entitled to management fees paid by Blue Ocean Portfolios, LLC?" "Answer: None that I know of." Am I reading that correctly? A That's what it says. Q And at the time you made those statements -- that statement you were under oath? A Correct. JUDGE PATIL: I'm sorry. As you sit here today is that not correct testimony? THE WITNESS: Well, it's not inclusive because the Longrow Insurance Agency provided the mail and file servers and I think another piece of -- a couple PCs to Blue Ocean staff to utilize. JUDGE PATIL: What do you mean by the mail and file servers? THE WITNESS: Our computer servers were owned by Longrow, and when we were putting together Blue Ocean Portfolios back in 2009, Longrow just -- I donated that to the cause. These are expensive, high-end, you know, high- capacity servers. Tr. 775:3-776:12</p>

164. DIVISION'S PROPOSED FACT: In addition to the payments to Longrow, between October 2011 and September 2012, BOP paid more than \$46,000 to another one of Winkelmann's companies, Blue Ocean ATM. (Ex. 457)

RESPONSE: Misstates the testimony and evidence. Argumentative.

CORRECTED STATEMENT OF FACT: Between October 2011 and September 2012, BOP *loaned* more than \$46,000 to another one of Winkelmann’s companies, Blue Ocean ATM. (Ex. 457)

CITATION:

Tr. 777:16-21 (Winkelmann).	Q Okay. And Exhibit 457, please. Do you also see how there are \$40,000-plus payments made to Blue Ocean ATM? A Those are loans. Q Those are loans? A Correct.
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165. DIVISION’S PROPOSED FACT: In July 2012, Winkelmann caused BOP to pay \$50,000 to the plaintiffs in a lawsuit against Winkelmann, BOP, and certain other of Winkelmann’s companies. (Ex. 126). The settlement in that lawsuit obligated Winkelmann, as opposed to BOP, to pay \$50,000 to the plaintiffs. (Ex. 170, § 3.1(c) (“James [Winkelmann] shall pay \$50,000 to Plaintiffs...”). Winkelmann never reimbursed BOP for the \$50,000.

RESPONSE: Incomplete and misleading as stated.

COUNTERSTATEMENT OF FACT: BOP was a respondent in the lawsuit reflected in DX-126.

COUNTERSTATEMENT OF FACT: Pursuant to the settlement agreement, plaintiffs forever released any and all claims asserted against all defendants, including BOP. (DX-170 §6).

166. DIVISION’S PROPOSED FACT: Winkelmann agreed that the money BOP used to pay Winkelmann’s \$50,000 settlement obligation could have been used to pay the royalty unit investors.

RESPONSE: Proposed finding of fact 166 should be stricken as it is argumentative, contains a legal conclusion, and is misleading. The Division is attempting to argue its unsupported theory that any funds possessed by BOP had to be – or should have been – paid to Royalty Unit holders. This was not what the offering memoranda stated. Instead, investors were entitled only to a minimum payment of a set percentage from the Company’s cash receipts - not its operating capital. Further, the offering documents explicitly stated that discretionary additional payments, above and beyond those required, would be made once the company achieved profitability – something that would occur when its AUM reached \$124M. Blue Ocean Portfolio’s AUM never achieved this metric. Thus, proposed fact 166 should be stricken.

167. DIVISION'S PROPOSED FACT: Winkelmann never disclosed to the royalty unit investors that Winkelmann used \$50,000 in BOP funds to settle his personal debt.

RESPONSE: Proposed fact 167 misstates contains legal argument and legal conclusions including (1) that the \$50,000 settlement for the lawsuit in which both BOP and Mr. Winkelmann were defendants was a "personal debt" of Mr. Winkelmann; and (2) that this was a potential disclosure item given the royalty unit structure (payment from cash receipts not profits). Proposed fact 167 should be stricken.

168. Undisputed.

169. DIVISION'S PROPOSED FACT: In order to fill the machines, Winkelmann caused Blue Ocean ATM to borrow \$70,000 from a bank, with the collateral for the loan being the funds in BOP's bank account. Winkelmann had the discretion whether to use the BOP funds as collateral for Blue Ocean ATM *or to distribute those funds to the royalty unit investors.*

RESPONSE: Proposed finding of fact 169 should be stricken as it is argumentative, contains a legal conclusion, and is misleading. The Division is attempting to argue, once again, its unsupported theory that any funds possessed by BOP were owed to Royalty Unit holders. This was not what the offering memoranda stated. Funds advanced by investors were to fund BOP's advertising initiative, which expressly included funding "revenue-producing activities that are directly or indirectly related to Blue Ocean Portfolios' business activities. (RX-002 pp.6-7). Investors were not entitled to the Company's cash reserves or operating funds, but were instead promised a minimum payment of a set percentage from the Company's cash receipts. Further, the offering documents explicitly stated that discretionary additional payments, above and beyond those required, would be made once the company achieved profitability – something that would occur when its AUM reached \$124M. Blue Ocean Portfolio's AUM never achieved this metric. Thus, proposed fact 169 should be stricken.

170. Undisputed.

171. Undisputed.

172. Undisputed.

173. DIVISION'S PROPOSED FACT: The royalty unit offering materials did not disclose any potential conflict of interest, and Winkelmann never discussed conflicts or potential conflicts with the royalty unit investors.

RESPONSE: Proposed finding of fact 173 should be stricken as it is argumentative, contains a legal conclusion, and is misleading. The proposed "fact" presumes (1) the existence of a duty to disclose and (2) the existence of a conflict both legal conclusions left for the Court to determine.

174. Undisputed.

175. DIVISION'S PROPOSED FACT: Winkelmann never asked Greensfelder whether he owed fiduciary duties to his advisory clients in regards to the royalty unit offerings.

RESPONSE: Misstates the testimony. The testimony cited by the Division supports the proposed corrected statement of fact, below:

CORRECTED STATEMENT OF FACT: Winkelmann did not recall explicitly asking Greensfelder whether he owed fiduciary duties to his advisory clients in regards to the royalty unit offerings.

Testimony Cited by Division in Support:
1506:17 Q Let me submit it this way. Did you ever
1506:18 ask Mr. Morgan whether you owed fiduciary duties
1506:19 to your advisory clients in regards to the royalty
1506:20 unit offerings?
1506:21 A I don't remember an explicit question
1506:22 like that.

176. Undisputed.

177. Undisputed.

178. Undisputed.

179. Undisputed.

180. Undisputed.

181. Undisputed.

182. DIVISION'S PROPOSED FACT: Winkelmann did email the Greensfelder attorneys a copy of Binkholder's bar order, but not until January 21, 2013. (Ex. 220). Winkelmann agreed that this email was the only written record of Greensfelder being apprised of the Binkholder bar order.

RESPONSE: This fact is contradicted by the evidence. There are several emails between Mr. Winkelmann and his counsel pre-dating January 21, 2013 and showing Greensfelder's knowledge of the bar. The proposed fact should be stricken.

COUNTERSTATEMENTS OF FACT: On November 20, 2013, Michael Morgan emailed Mr. Winkelmann and another lawyer at Greensfelder, Mr. Greenberg, with a subject line: Bryan Binkholder. Mr. Morgan's email stated (RX-106 p. 1866):

So far as I can tell, the Missouri order against Binkholder was based on commingling investor funds among different entities (not

named in the order). There is no reference to the sale of unregistered securities.” A link to the order was included in Mr. Morgan’s email.

COUNTERSTATEMENT OF FACT: Mr. Morgan and Mr. Greenberg, another attorney at Greensfelder, were aware of the Binkholder bar at least by November 20, 2012, when they sent Mr. Winkelmann an email regarding the same. *Id.*

COUNTERSTATEMENT OF FACT: On November 20, 2012, Mr. Winkelmann emailed Greensfelder asking: “How should we deal with Binkholder?” (RX-106 p. 1855).

COUNTERSTATEMENT OF FACT: On November 26, 2012, Mr. Morgan wrote to Mr. Greenberg:

My guess is that [Binkholder’s] deals are not true Ponzi schemes – just promissory note deals that depend on his hitting numbers that are not realistic...Of course, if in fact this involves the Blue Ocean Rule 504 offerings, its possible the SEC read the docs and said there’s nothing there. Which as a matter of securities law, there isn’t. *I think I will give Jim a very short report about Richard’s conversation tomorrow over the phone and remind him that he needs to provide to us all written communications with investors...I have advised him to disassociate from Bryan and plan on making it permanent.* Also to cease any further effort on the current 504 offering until further notice. He knows that is the right course but he really hates cutting himself off from the capital raise since it funds the expansion of his advertising campaigns. He seems to think that having to throttle the growth curve will really piss off his investors.

COUNTERSTATEMENT OF FACT: On December 28, 2012, Mr. Winkelmann emailed Mr. Morgan, attaching a draft termination agreement for the Exclusive Marketing and Sponsorship Agreement. In the email, Mr. Winkelmann queried “What do you think about this?” (RX-106 pp. 1867-1868).

COUNTERSTATEMENT OF FACT: None of the emails exchanged with Greensfelder contain expressions of shock or surprise from Mr. Greenberg or Mr. Morgan regarding the Binkholder bar.

183. Undisputed.

184. **DIVISION’S PROPOSED FACT:** In May 2012, BOP altered this practice by paying the accrued amounts on quarterly basis. 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.

RESPONSE: Misstates the testimony. The testimony originally cited by the Division supports the following correction:

CORRECTED STATEMENT OF FACT: In May 2012, BOP altered this practice by paying the accrued amounts on quarterly basis. 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 *were owed to the investors.*

CITATION:

Testimony Cited by Division in Support:
785:3 Q And in May 2012, Blue Ocean altered this 785:4 process by paying the accrued amounts not on a 785:5 monthly basis but on a quarterly basis? 785:6 A That's correct because the bulk of the 785:7 revenue came in quarterly and the amounts that 785:8 we're dealing with between the quarters was so 785:9 small it just made a ridiculous administrative 785:10 burden. 786:3 Q And at the time between the time the cash 786:4 receipts came in to the time the investors get 786:5 their paycheck, the funds accrued to the Royalty 786:6 Unit holders belonged to the Royalty Unit holders, 786:7 correct? 786:8 A It was a payable on our books. It was 786:9 owed to the royalty holders. 786:10 Q But it belonged to the Royalty Unit 786:11 holders, right? 786:12 A <i>It was owed to them.</i>

- 185. Undisputed.
- 186. Undisputed.
- 187. Undisputed.
- 188. Undisputed.
- 189. Undisputed.
- 190. Undisputed.
- 191. Undisputed.
- 192. Undisputed.

193. Undisputed.

194. Undisputed.

195. DIVISION'S PROPOSED FACT: Winkelmann does not believe he has done anything wrong in regards to the royalty unit offerings.

RESPONSE: Misstates the testimony.

COUNTERSTATEMENT OF FACT: Mr. Winkelmann testified that he had not done anything "that would constitute this level of security and charges, resources, redirected from the business to address these proceedings."

CITATION:

827:7 Q But in terms of what you've done that are 827:8 at issue between you and the Division of 827:9 Enforcement, it's your position that you've done 827:10 nothing wrong? 827:11 A Nothing that would constitute this level 827:12 of scrutiny and charges, resources, redirected from 827:13 the business to address these proceedings.

196. Undisputed.

197. Undisputed.

198. DIVISION'S PROPOSED FACT: Winkelmann also testified that he believes the royalty unit investors have received everything they deserve, and have been made "whole" by BOP.

RESPONSE: Misstates the testimony.

CORRECTED STATEMENT OF FACT: Winkelmann also testified that he believes the royalty unit investors received everything they deserve and that they are "whole".

CITATION:

832:14 Q But you believe that Blue Ocean 832:15 Portfolios Royalty Unit investors have received 832:16 everything they deserve, yes or no? 832:17 A Yes, I believe that the investors are 832:18 whole.

199. Undisputed.

200. Undisputed.

- 201. Undisputed.
- 202. Undisputed.
- 203. Undisputed.
- 204. Undisputed.
- 205. Undisputed.
- 206. Undisputed.
- 207. Undisputed.
- 208. Undisputed.
- 209. Undisputed.
- 210. Undisputed.

211. DIVISION'S PROPOSED FACT: Collins's methodology was consistent with the methodology Winkelmann described during his investigative testimony, which Collins attended.

RESPONSE: Misstates the testimony.

CORRECTED STATEMENT OF FACT: Collins's testified he believed his methodology was consistent with the methodology Winkelmann described during his investigative testimony, which Collins attended.

CITATION:

73:24 Q Okay. And can you generally describe
73:25 the methodology that Mr. Winkelmann testified that
74:1 he used for calculating the factor that Blue Ocean
74:2 Portfolios disclosed to investors?
74:3 A I believe it was the same as what I used
74:4 in my calculations.
74:5 Q Okay. And, Byron, I would like you to
74:6 please pull up a portion of Mr. Winkelmann's
74:7 testimony, page 157, line 14 through 19. 14
74:8 through 19, please.
74:9 And the question asked was: "And how
74:10 would Blue Ocean Portfolios track its advertising
74:11 spend and its yield?"
74:12 "Answer: Well, we look at the total
74:13 amount of advertising spent for each period,
74:14 either quarter, per month, and relate that to the

74:15 new business that came on for that same period."
74:16 And were you present when Mr. Winkelmann
74:17 said that?
74:18 A Yes, I was.
75:22 Q And what did Mr. Winkelmann say in his
75:23 testimony about whether or not Blue Ocean
75:24 Portfolios used different methodologies to
75:25 calculate the factor that it disclosed to
76:1 investors?
76:2 A I don't believe he said different
76:3 methodologies were used.
76:4 Q And, Byron, can we please look at Mr.
76:5 Winkelmann's testimony, page 145, line 25 through
76:6 146, line 20.
76:7 And Mr. Winkelmann was asked: "Okay. So
76:8 I had asked you if there were multiple ways to
76:9 calculate the factor."
76:10 "Answer: Yes."
76:11 Q or "Question: Can you answer that
76:12 question?"
76:13 "Answer: Well, you could have a
76:14 one-month look back, you know, a three-month look
76:15 back, a one-year look back, a two-year look back."
76:16 "Question: Can you describe the
76:17 differences as part of the calculation or the
76:18 formula?"
76:19 "Answer: I would think the longer the
76:20 look back period is, the more reliable the number
76:21 would be for business planning purposes."
76:22 "Question: Is the formula that we just
76:23 talked about earlier, yield equals spending
76:24 divided by returns, is that the same formula for
76:25 each of the look back periods that you just
77:1 described or is there a different formula?"
77:2 "Answer: It's the same formula. The
77:3 same methodology. There would just be more data
77:4 as you look back in time."
77:5 "Question: So the reliability comes
77:6 from the amount of data, not a change in the
77:7 formula?"
77:8 "Answer: Correct."
77:9 And you were there when Mr. Winkelmann
77:10 said that?
77:11 A Yes, I was.

212. Undisputed.

213. Undisputed.

214. Undisputed.

215. DIVISION'S PROPOSED FACT: Based on the 2010 data contained in BOP's P&L statement and the *2011 data contained in Exhibit 159*, Collins calculated BOP's advertising ratio for January 2010 to March 2011 to be 0.37, its ratio for January 2011 to March 2011 to be 0.44, and its ratio for March 2011 to be 0.37. (Ex. 440). *When compared to the most conservative of these numbers (0.37), the 0.22 ratio cited in the first offering memorandum was overstated by 67%.*

RESPONSE: The italicized statement is not a fact, it is argument. The term "overstated" implies that the Division's calculations were accurate and Mr. Winkelmann's were not. That is (1) a legal conclusion to be determined by the Court and (2) unsupported by the evidence. The italicized sentence should be stricken.

Further, proposed fact 215 is misleading and mischaracterizes the evidence in that it suggests that Mr. Collins' 2011 calculations were based on 2011 data. The evidence showed that was not the case. Exhibit 159 was created in 2012 based on data possessed at that time – long after the time period referenced (January 2011-March 2011). With regard to Exhibit 159, the proposed fact should explicitly recite that Mr. Collins' calculations were based on 2012 data that Mr. Winkelmann did not possess in January-March of 2011. Without such a recitation, the proposed fact is misleading and unsupported by the evidence, and should be stricken.

216. DIVISION'S PROPOSED FACT: Collins prepared summary exhibit 441, which compares the 0.78 advertising ratio for 2011 disclosed in the second, third, and fourth offering memoranda to Collins' calculations of the ratio using BOP's advertising and revenue data for 2011 contained in Exhibit 159. The 2011 total advertising spending amount on Exhibit 159 (\$230,957) is within \$1 dollar of the 2011 yearly advertising spending (\$230,958) contained on (a) Respondents' Exhibit RX-018, a BOP "2011 Advertising Analysis" spreadsheet, and (b) Exhibit 86, a chart breaking down BOP's advertising spending by month and category. (Compare Ex. 159 with RX-018 and Ex. 86).

RESPONSE: For the same reasons set forth in response to Proposed Fact 215, above, proposed fact 216 should be stricken because it suggests that Exhibit 159 contained 2011 data. Exhibit 159 contained 2012 data. The resultant calculations, based on that data, are incorrect and misleading as well. As a result, the proposed fact should be stricken in its entirety.

217. DIVISION'S PROPOSED FACT: In calculating BOP's advertising ratio for 2011, Collins used the same methodology Winkelmann described using in his investigative testimony.

RESPONSE: Misleading. Misstates the testimony. The evidence showed Mr. Collins believed he was replicating Mr. Winkelmann's methodology, but failed to do so.

CORRECTED STATEMENT OF FACT: Collins's testified *he believed that*, in calculating BOP's advertising ratio for 2011, Collins used the same methodology Winkelmann described using in his investigative testimony.

CITATION:

73:24 Q Okay. And can you generally describe
73:25 the methodology that Mr. Winkelmann testified that
74:1 he used for calculating the factor that Blue Ocean
74:2 Portfolios disclosed to investors?
74:3 A I believe it was the same as what I used
74:4 in my calculations.
74:5 Q Okay. And, Byron, I would like you to
74:6 please pull up a portion of Mr. Winkelmann's
74:7 testimony, page 157, line 14 through 19. 14
74:8 through 19, please.
74:9 And the question asked was: "And how
74:10 would Blue Ocean Portfolios track its advertising
74:11 spend and its yield?"
74:12 "Answer: Well, we look at the total
74:13 amount of advertising spent for each period,
74:14 either quarter, per month, and relate that to the
74:15 new business that came on for that same period."
74:16 And were you present when Mr. Winkelmann
74:17 said that?
74:18 A Yes, I was.
75:22 Q And what did Mr. Winkelmann say in his
75:23 testimony about whether or not Blue Ocean
75:24 Portfolios used different methodologies to
75:25 calculate the factor that it disclosed to
76:1 investors?
76:2 A I don't believe he said different
76:3 methodologies were used.
76:4 Q And, Byron, can we please look at Mr.
76:5 Winkelmann's testimony, page 145, line 25 through
76:6 146, line 20.
76:7 And Mr. Winkelmann was asked: "Okay. So
76:8 I had asked you if there were multiple ways to
76:9 calculate the factor."
76:10 "Answer: Yes."
76:11 Q or "Question: Can you answer that
76:12 question?"
76:13 "Answer: Well, you could have a
76:14 one-month look back, you know, a three-month look
76:15 back, a one-year look back, a two-year look back."
76:16 "Question: Can you describe the
76:17 differences as part of the calculation or the

76:18 formula?"
76:19 "Answer: I would think the longer the
76:20 look back period is, the more reliable the number
76:21 would be for business planning purposes."
76:22 "Question: Is the formula that we just
76:23 talked about earlier, yield equals spending
76:24 divided by returns, is that the same formula for
76:25 each of the look back periods that you just
77:1 described or is there a different formula?"
77:2 "Answer: It's the same formula. The
77:3 same methodology. There would just be more data
77:4 as you look back in time."
77:5 "Question: So the reliability comes
77:6 from the amount of data, not a change in the
77:7 formula?"
77:8 "Answer: Correct."
77:9 And you were there when Mr. Winkelmann
77:10 said that?
77:11 A Yes, I was.

218. DIVISION'S PROPOSED FACT: Based on the 2011 advertising spending and revenue data contained in Exhibit 159, Collins calculated BOP's 2011 advertising ratio to be 1.28. (Ex. 441). When compared to this figure, the 0.78 ratio in the second, third, and fourth offering memoranda was overstated by 64%. (Ex. 441).

RESPONSE: For the same reasons set forth in response to Proposed Fact 215 and 216 above, proposed fact 216 should be stricken because it suggests that Exhibit 159 contained 2011 data. Exhibit 159 contained 2012 data. Further, the term "overstated" implies that the Division's calculations were accurate and Mr. Winkelmann's were not. That is (1) a legal conclusion to be determined by the Court and (2) unsupported by the evidence. The proposed fact is misleading and unsupported by the evidence, and should be stricken.

219. DIVISION'S PROPOSED FACT: Collins also calculated BOP's advertising factor by including the payments BOP made to Binkholder in 2011 with the advertising spending contained in Exhibit 159. (Ex. 441). Collins determined that including the Binkholder payments results in a 2011 advertising factor of 1.46. *Compared to that figure, the 0.78 ratio cited in the second, third and fourth offering memorandum is overstated by 87%. (Ex. 441).*

RESPONSE: The italicized statement is not a fact, it is argument. The term "overstated" implies that the Division's calculations were accurate and Mr. Winkelmann's were not. Further, the statement implies that the payments to Mr. Binkholder should have been included in the Firm's advertising expense calculations. Each presumption is (1) a legal conclusion to be determined by the Court and (2) unsupported by the evidence. The italicized sentence should be stricken.

220. DIVISION'S PROPOSED FACT: Collins prepared summary exhibit 442, which compares the .62 "current" advertising ratio disclosed in the second offering memorandum to Collins's calculations of the ratio using advertising and revenue data (1) *from* March 2011 through February 2012, (2) *from* December 2011 through February 2012, and (3) *for* February 2012. (Ex. 442).

RESPONSE: Proposed fact 220 should be stricken for the same reason set forth in response to proposed facts 215-219. Mr. Collins calculations, contained in the summary exhibits did not use "advertising and revenue data from" the dates specified. The evidence showed that Mr. Collins' data came from a document or documents created on or after June 2012. The Division has admitted this fact (See Division's proposed finding of fact No. 244). The Firm did not have June 2012 data in 2011. The proposed fact should be stricken as unsupported and argumentative.

221. DIVISION'S PROPOSED FACT: Collins used the same methodology for Exhibit 442 that he did for Exhibits 440 and 441: BOP's advertising spending for a given period divided by its new recurring revenues generated during that period. In making these calculations, Collins used BOP's 2011 advertising and revenue data contained in Exhibit 159, and used the 2012 data contained in Exhibit 396, p. BO 5639.

RESPONSE: Proposed fact 221 should be stricken for the same reason set forth in response to proposed facts 215-220. Mr. Collins calculations, contained in the summary exhibits did not use "advertising and revenue data from" the dates specified. The evidence showed that Mr. Collins' data came from a document or documents created on or after June 2012. The Firm did not have June 2012 data in 2011. The proposed fact should be stricken as unsupported and argumentative.

222. DIVISION'S PROPOSED FACT: Based on Collins' calculations, BOP's advertising ratio was 0.82 for January 2012, 0.90 for February 2012, 0.96 for December 2011 through February 2012, and 1.28 for March 2011 through February 2012. (Ex. 442). *Using the most conservative of these numbers (0.90), the 0.62 ratio contained in the second offering memorandum was overstated by 46%. (Ex. 442). If payments to Binkholder had been included, using the most conservative ratio (1.16), the 0.62 ratio was overstated by 87%. (Ex. 442)*

RESPONSE: The italicized statement is not a fact, it is argument. The term "overstated" implies that the Division's calculations were accurate and Mr. Winkelmann's were not. That is (1) a legal conclusion to be determined by the Court and (2) unsupported by the evidence. The italicized sentence should be stricken.

223. DIVISION'S PROPOSED FACT: Collins prepared summary exhibit 443, which compares the .67 "current" advertising ratio disclosed in the third offering memorandum to Collins's calculations of the ratio *using advertising and revenue data* (1) *from* September 2011 through August 2012, (2) *from* June 2012 through August 2012, and (3) *for* August 2012. (Ex. 443).

RESPONSE: Proposed fact 223 should be stricken for the same reason set forth in response to proposed facts 215-221, above. Mr. Collins calculations, contained in the

summary exhibits did not use “advertising and revenue data from” the dates specified. The evidence showed that Mr. Collins’ data came from a document or documents created on or after June 2012. The Firm did not have June 2012 data in 2011. The proposed fact should be stricken as unsupported and argumentative.

224. DIVISION’S PROPOSED FACT: Collins used the same methodology for Exhibit 443 that he did for Exhibits 440, 441, and 442: BOP’s advertising spending for a given period divided by its new recurring revenues generated during that period. In making these calculations, Collins used BOP’s *2011 advertising and revenue data contained in Exhibit 159*, and used the 2012 data contained in Exhibit 396, p. BO 5639.

RESPONSE: Proposed fact 224 should be stricken for the same reason set forth in response to proposed facts 215-221 and 223, above. Mr. Collins calculations, contained in the summary exhibits did not use “advertising and revenue data from” the dates specified. The evidence showed that Mr. Collins’ data came from Exhibit 159 which was created on or after June 2012. Exhibit 159 did not contain BOP’s “2011 advertising and revenue data”. It included 2011 data as of June of 2012 – approximately 1.5 years later. The proposed fact should be stricken as unsupported and argumentative.

225. DIVISION’S PROPOSED FACT: Based on Collins’ calculations, BOP’s advertising ratio was 1.02 for August 2012, 0.77 for June 2012 through August 2012, and 1.02 for September 2011 through August 2012. (Ex. 443). *Using the most conservative of these numbers (0.77), the 0.67 ratio contained in the third offering memorandum was overstated by 14%. (Ex. 443). If payments to Binkholder had been included, using the most conservative ratio (1.19), the 0.67 ratio was overstated by 78%. (Ex. 443)*

RESPONSE: The italicized statements are not facts, they are argument. The term “overstated” implies that the Division’s calculations were accurate and Mr. Winkelmann’s were not. Further, the statement presumes that the Division had established some standard that required the payments to Binkholder to be included as advertising expenses. Each presumption (1) a legal conclusion to be determined by the Court and (2) unsupported by the evidence. The italicized sentence should be stricken.

226. Undisputed.

227. DIVISION’S PROPOSED FACT: Using the data on Exhibit 396, p. BO 5639, Collins divided BOP’s 2012 advertising spending by its new recurring revenue for that year, which calculates to an advertising ratio of 1.02. (Ex. 444). *Compared to this figure, the 0.89 ratio for 2012 in the fourth offering memorandum is overstated by 14%. (Ex. 444). If the 2012 BOP payments to Binkholder are included, the 0.89 ratio for 2012 is overstated by 51%. (Ex. 444).*

RESPONSE: The italicized statement is not a fact, it is argument. The term “overstated” implies that the Division’s calculations were accurate and Mr. Winkelmann’s were not. Further, the statement presumes that the Division had established some standard that required the payments to Binkholder to be included as

advertising expenses. Each presumption (1) a legal conclusion to be determined by the Court and (2) unsupported by the evidence. The italicized sentence should be stricken.

228. Undisputed.

229. Undisputed.

230. Undisputed.

231. Undisputed.

232. Undisputed.

233. Undisputed.

234. Undisputed.

235. Undisputed.

236. Undisputed.

237. Undisputed.

238. Undisputed.

239. Undisputed.

240. Undisputed.

241. DIVISION'S PROPOSED FACT: Juris also testified that the advertising ratios in RX-036 were calculated by assuming that BOP earned 1% management fees off its assets under management. *She agreed that this assumption was inconsistent with the disclosure in the first memorandum that BOP generated 0.8% fees of its AUM. Had BOP used a 0.8% assumption in RX-036, the February 2012 ratio would have been 0.84. (RX-036: \$14,804 February advertising expense divided by \$17,600 (\$17,600 = \$2.2 million AUM generated in February 2012 times 0.008)).*

RESPONSE: Misstates the evidence. First of all, the first round offering memorandum was distributed in March of 2011 (RX-001). RX-036 is a February 2012 monthly advertising report. The AUM fee assumption used in the February 2012 report had nothing to do with the calculations made almost a year earlier in the drafting of the March 2011 memorandum. The proposed fact is therefore misleading, to the extent it suggests an "inconsistency" between two unrelated documents.

Beyond that, the uncited "disclosure in the first offering memorandum" that the Division refers to is a chart that represents one of two five-year financial projections that are based on differing financial assumptions. The first chart (RX-001, p. 11) assumes an .8% fee. In terms of "disclosures", however, the Firm's then current fee structure is well disclosed. The offering memorandum provides (RX-001 p.5):

The revenue from AUM is recurring and valuable. Gross annual revenue from all retail account is 1% on the first \$500,000 of total account value, 0.75% on the next \$500,000 and 0.50% on amounts over \$1 million.

Accordingly, the italicized portions of proposed finding of fact 241 should be stricken as argumentative and unsupported by the evidence.

242. Undisputed.

243. Undisputed.

244. Undisputed.

245. Undisputed.

246. DIVISION'S PROPOSED FACT: *Juris testified that for Exhibit 159, in March 2011 BOP would have had access to the January 2011 advertising and revenue data contained on the exhibit.* She also testified that the entirety of the data on Exhibit 159 would have been available to Winkelmann when BOP was preparing the third offering memorandum.

RESPONSE: Misstates the testimony. Ms. Juris did not testify that the Firm would have had access to the January 2011 advertising data as contained in Exhibit 159 in March of 2011. The testimony cited by the Division does not support that statement in any respect and it should be stricken.

CITATION:

Testimony cited by Division in Support:

923:23 Q Okay. And in, you know, early to mid
923:24 March of 2011, would the January data have been
923:25 available to the firm in terms of new revenue and
924:1 advertising spend?
924:2 A Yes.

924:14 Q Sure. The question was, in early to mid
924:15 March of 2011, would the Blue Ocean, as far as you
924:16 know, have had access to the January numbers?
924:17 A Yes.

953:6 Q Right. But Exhibit 159 had the most
953:7 recent and best data that Blue Ocean had available
953:8 as of July 2012, right?
953:9 A This is what we were looking at in July
953:10 of 2012, yes.
953:11 Q Okay. So if Mr. Winkelmann wanted to,
953:12 he could have used the data on Exhibit 159 for the
953:13 third offering memorandum, correct?
953:14 A Yes.

247. DIVISION'S PROPOSED FACT: *By July 2012, BOP had revised its advertising spending report. (RX-54, p. 63 of PDF).* The July 2012 report was generated in early August 2012, and was available to BOP when the third round offering memorandum was being prepared.

RESPONSE: Misstates the evidence. Neither the cited testimony nor the cited exhibit show that the monthly advertising reports had been "revised. The testimony cited by the Division does not support that statement in any respect and it should be stricken.

CITATION:

Testimony cited by Division in Support:	
898:6	Can you go back to a full screen? And
898:7	go back to [RX-054], page 63.
898:8	Okay. Can you tell what month this
898:9	report is for?
898:10	A This report would have been for the July
898:11	of 2012.
898:12	Q And how can you tell this is for July?
898:13	A Because the last column happens to be
898:14	July 2012 data.
898:15	Q And when would this report have been
898:16	generated?
898:17	A We would have generated this in early
898:18	August.
913:16	Q Sorry. I think I meant -- I think I
913:17	missed an entire month of the year. So if it's --
913:18	if the memo is dated September 1st and the firm
913:19	was preparing the memo sometime in August, I
913:20	apologize, what reports would it have had
913:21	available to it?
913:22	A We would have had July reports
913:23	available.

248. Undisputed.

249. Undisputed.

250. DIVISION'S PROPOSED FACT: For the August 2012 advertising report, BOP listed 3 monthly factors (*using three different methodologies*) as well as trailing 6 and 9 month factors *for each of those methodologies* and a trailing 12 month factor for one methodology. (Ex. 176).

RESPONSE: Misstates the evidence. Neither the cited testimony nor the cited exhibit show that there are "three different methodologies". The testimony cited by the Division does not support that statement in any respect and it should be stricken.

CITATION:

Testimony cited by Division in Support:

965:9 Q And beyond Exhibit -- beyond the
965:10 spreadsheet such as Exhibit 159 and Exhibit 163,
965:11 Blue Ocean Portfolios would create other types of
965:12 reports that analyzed Blue Ocean's advertising
965:13 efficiency, right?
965:14 A I don't know specifically what other
965:15 reports, but we had data that we would -- could
965:16 calculate a factor from. But I don't know
965:17 specifically what you mean by "other reports."
965:18 Q Okay. Well, let's look at Exhibit 176.
965:19 Can you just blow up the top? Keep
965:20 going down, keep going down. Perfect.
965:21 And this is a type of report that Blue
965:22 Ocean Portfolios created on a monthly basis?
965:23 A Yes. This is part of the monthly
965:24 report.
965:25 Q Okay. And these reports allowed Blue
966:1 Ocean Portfolios to look at advertising factors in
966:2 a variety of ways, correct?
966:3 A Yes.
966:4 Q And so we see factor one on the top
966:5 portion of the chart, right?
966:6 A Yes.
966:7 Q And there's a factor two in the middle
966:8 portion.
966:9 A Yes.
966:10 Q And there's a factor three on the bottom
966:11 portion, right?
966:12 A Yes.
966:13 Q And then there's also the trailing six
966:14 month, right?
966:15 A Yes.
966:16 Q And the trailing nine month?
966:17 A Yes.
966:18 Q And the trailing 12 month?
966:19 A Yes.
966:20 Q And the trailing 12 month can be done --
966:21 or the trailing six months can be done for factor
966:22 one, two, or three, right?

Testimony cited by Division in Support:
<p>966:23 A Yes. 966:24 Q And the trailing nine months can be done 966:25 for factors, one, two, and three, right? 967:1 A Yes. 967:2 Q And the trailing 12 months could be done 967:3 for only factor number three, right? 967:4 A Yes.</p>

251. DIVISION'S PROPOSED FACT: *The July 2012 data contained in the August 2012 advertising report was the most up-to-date data BOP had available at the time the third offering memorandum was prepared. (Ex. 176). On that report, the three July monthly factors were 1.14 (Factor 1), 3.83 (Factor 2), and 0.73 (Factor 3). Winkelmann did not include any of these factors in the third offering memorandum; in which BOP represented that the advertising factor was 0.67. (RX-003 at BO7487 & 7495.)*

RESPONSE: Misstates the testimony and evidence. Ms. Juris testified that the July 2012 monthly report would have been the most recent monthly report available to the Firm. She further testified, however, that the Firm and Mr. Winkelmann had continuous access to the Firm's actual data and could calculate the factor at any time.

CITATION:

<p>Tr. 952:21-954:11 (Juris).</p>	<p>Q And so I'm guessing that the data that was in Exhibit 159 was the most up-to-date data Blue Ocean had as of July 2012, right?</p> <p>A The top January through October was pulled from financial, you know, reports that way of assets transferred in and then from November through June of 2012, those figures are pulling - - it just equals the figures from the master - - from that other spreadsheet. As those are changing, it's pulling those.</p> <p>Q Right. But Exhibit 159 had the most recent and best data that Blue Ocean had available as of July 2012, right?</p> <p>A This is what we were looking at in July of 2012, yes.</p> <p>Q Okay. So if Mr. Winkelmann wanted to, he could have used the data on Exhibit 159 for the third offering memorandum, correct?</p> <p>A Yes.</p> <p>Q Okay. And if he wanted to calculate the factor for 2011 as a whole, he would just add up the revenue -- I'm sorry. He would add up the advertising spend for January through</p>
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	<p>December 2011, right?</p> <p>A Uh-huh.</p> <p>Q And divide it by the annual revenue from the same period, right?</p> <p>A He can pull a factor that way, yes.</p> <p>Q And that would be using the most accurate data that Blue Ocean had at July 2012, right?</p> <p>A Yes. From this -- from this report. If he was going back and trying to calculate July or 2011 data, he could have gotten additional information --</p> <p>Q But --</p> <p>A -- from somewhere else.</p> <p>Q But this is the most up-to-date data -- you just said this is the most up-to-date data Blue Ocean had as of July 2012, right?</p> <p>A Yes. We were making those assumptions.</p>
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Further, the above proposed fact is misleading because it omits the fact that the July report also calculated a 6-month trailing factor of 0.71. The italicized sentences should be stricken.

COUNTERSTATEMENT OF FACT. The July 2012 monthly advertising report also calculated a 6-month trailing factor of 0.71 and a geometric mean factor of 0.69. (RX-54 p. 63).

252. Undisputed.

253. DIVISION'S PROPOSED FACT: *By the time of the December 2012 report, BOP had again revised the report to track additional data.* (RX-120). For December 2012, there was a separate report for BOP's St. Louis and the recently opened Chicago office. (RX-120, pp. 1-2).

RESPONSE: Misstates the evidence. Neither the cited testimony nor the cited exhibit show that "BOP had again revised the report." The italicized sentence should be stricken.

Testimony cited by Division in Support:

903:16 Q Okay. Alan, can you go to RX120.

903:17 Okay. Can you identify this document?

903:18 A This document is the December 2012

903:19 monthly report.

903:20 Q Okay. And was this document created and

903:21 maintained similar to those we've been looking at

903:22 this morning?

903:23 A Yes.

254. Undisputed.

255. Undisputed.

256. DIVISION'S PROPOSED FACT: The second page of RX-120 is a spreadsheet containing advertising expense and revenue data for BOP's Chicago office. (RX-120, p. 2). That spreadsheet shows that for September through December 2012, BOP's Chicago advertising expenses were \$69,660 and its new recurring revenues were only \$2,574, which results in a ratio of 27.06. (RX-120, p. 2). *Had BOP chose to include the Chicago office advertising expenses in its companywide advertising ratio calculations, the companywide ratio would have been higher than the St. Louis ratios. (RX-120, p. 2; RX-55, p. 2).*

RESPONSE: Misleading; misstates the evidence. The proposed fact suggests that the Firm should have included Chicago advertising expenses in its companywide advertising ratio calculations. No such obligation or standard was ever established. Further, the advertising factors contained in the offering memoranda expressly disclosed that they were for St. Louis only:

Advertising spend in other markets could be higher or lower. This conversion factor experience *will be different in the Chicago market.*

(RX-004 p. 11)(emphasis added). Accordingly, the italicized sentence should be stricken.

257. Undisputed.

258. Undisputed.

259. Undisputed.

260. Undisputed.

261. Undisputed.

262. Undisputed.

263. Undisputed.

264. Undisputed.

265. Undisputed.

266. DIVISION'S PROPOSED FACT: Prior to Grau's investment, Winkelmann did not tell Grau that BOP would use Grau's investment proceeds to increase Winkelmann's compensation. Grau would have wanted to know this when considering whether to invest, and it would have lowered Grau's interest in the royalty unit investment.

RESPONSE: Proposed finding of fact 266 misstates the evidence, is argumentative and contains legal conclusions. The "fact" presumes that (1) BOP used Grau's investment proceeds to "increase Winkelmann's compensation"; and (2) a legal obligation to disclose the same. The argumentative fact should be stricken.

267. Undisputed.

268. Undisputed.

269. Undisputed.

270. Undisputed.

271. Undisputed.

272. Undisputed.

273. Undisputed.

274. Undisputed.

275. Undisputed.

276. Undisputed.

277. Undisputed.

278. DIVISION'S PROPOSED FACT: Prior to investing in the royalty units, Buckowitz spoke with Winkelmann. After their discussion, Buckowitz felt like the royalty units were a good investment.

RESPONSE: Misleading; misstates the testimony.

CORRECTED STATEMENT OF FACT: Prior to investing in the royalty units, Buckowitz spoke with Winkelmann. After their discussion and after reading the offering document Buckowitz felt like the royalty units were a good investment.

CITATION:

Testimony cited by Division in Support:
348:4 Q And before you invested in the royalty
348:5 units, did you have the occasion to speak with Mr.
348:6 Winkelmann about the investment?
348:7 A Yes.
348:8 Q And after speaking with Mr. Winkelmann,
348:9 did you have an impression on whether to invest or
348:10 not to invest?
348:11 A Based on discussions with Mr. Winkelmann
348:12 and previous time Mr. Binkholder and reading the
348:13 document, I felt it was a good investment.

279. DIVISION’S PROPOSED FACT: Prior to Buckowitz’s royalty unit investment, Winkelmann never discussed with him any conflicts of interest, and did not disclose that Buckowitz’s investment proceeds could be used to increase Winkelmann’s compensation. Buckowitz would have wanted to know this before investing.

RESPONSE: Proposed finding of fact 279 misstates the evidence, is argumentative and contains legal conclusions. The “fact” presumes that (1) BOP used Mr. Buckowitz’ investment proceeds to “increase Winkelmann’s compensation”; and (2) a legal obligation to disclose the same. The argumentative fact should be stricken.

280. Undisputed.

281. Undisputed.

282. Undisputed.

283. Undisputed.

284. Undisputed.

285. Undisputed.

286. Undisputed.

287. Undisputed.

288. Undisputed.

289. Undisputed.

290. Undisputed.

291. Undisputed.

292. Undisputed.

293. Undisputed.

294. Undisputed.

295. DIVISION'S PROPOSED FACT: Winkelmann never told Swardson that BOP's 2011 advertising factor was greater than 1.0. Swardson would have wanted to know if the factor was greater than 1.0.

RESPONSE: Proposed finding of fact 295 misstates the evidence, is argumentative and contains a legal conclusion. The "fact" presumes that the advertising factor was greater than 1.0, a fact in dispute. Proposed fact 295 should be stricken.

296. Undisputed.

297. DIVISION'S PROPOSED FACT: On October 15, 2012, Swardson purchased one royalty unit for \$25,000. (Ex. 455; Ex. 347, BOP 9781, 9791). He funded the purchase by deducting the funds from his BOP-managed account. *Winkelmann never told Swardson that their interests would not always be aligned, and never mentioned that any conflicts of interest existed between Winkelmann and Swardson.*

RESPONSE: The italicized language is argumentative and contains a legal conclusion. The "fact" presumes (1) that a conflict existed and (2) that their interests were not, in fact, aligned. The argumentative language should be stricken.

298. DIVISION'S PROPOSED FACT: Knowing that Winkelmann would choose to increase his own compensation rather than increasing royalty unit payments to Swardson would have affected Swardson's decision to invest.

RESPONSE: Proposed finding of fact 198 misstates the evidence, is argumentative and contains legal conclusions. It should be stricken in its entirety.

299. Undisputed.

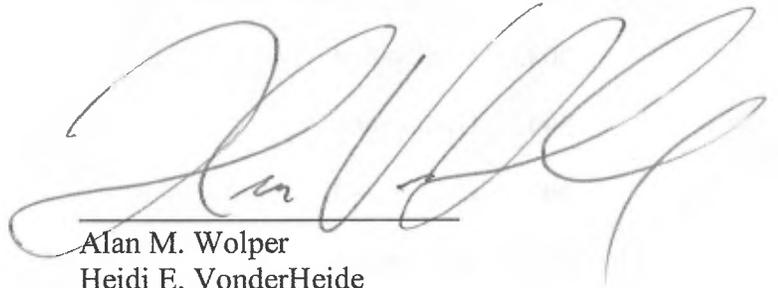
300. Undisputed.

301. Undisputed.

- 302. Undisputed.
- 303. Undisputed.
- 304. Undisputed.
- 305. Undisputed.
- 306. Undisputed.
- 307. Undisputed.
- 308. Undisputed.
- 309. Undisputed.
- 310. Undisputed.
- 311. Undisputed.
- 312. Undisputed.
- 313. Undisputed.
- 314. Undisputed.
- 315. Undisputed.
- 316. Undisputed.
- 317. Undisputed.
- 318. Undisputed.
- 319. Undisputed.

Dated: December 22, 2016

ULMER & BERNE LLP

A large, stylized handwritten signature in black ink, appearing to read 'Alan M. Wolper', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that December 22, 2016 I served a copy of the foregoing
RESPONDENTS' PROPOSED FINDINGS OF FACT, 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

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Heidi VonderHeide