

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2379/ March 4, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16047

In the Matter of

THE ROBARE GROUP LTD.,
MARK L. ROBARE, and
JACK L. JONES JR.

ORDER

The hearing in this administrative proceeding was held from February 9, 2015, through February 11, 2015. In advance of the hearing, Respondents objected to the admission of Division of Enforcement Exhibit 84, arguing that the exhibit lacks a proper foundation, is misleading, and is irrelevant. Resp. Objections at 2-3.

In response, the Division said that Exhibit 84 is a chart that compares costs of non-Fidelity no-transaction-fee mutual funds and transaction-fee mutual funds. Division Response at 3. It further explained that the exhibit was prepared by John Farinacci, a Commission employee on the Division's witness list. *Id.* The Division anticipated that Mr. Farinacci would "testify as a fact witness at the hearing based on personal knowledge he gained during his 15 years of employment with Fidelity." *Id.* The Division added that the exhibit would "be used for demonstrative purposes" in rebuttal. *Id.*

In an order issued February 2, 2015, I held that Respondents' objection was premature and overruled it "without prejudice to renewal when and if the Division offers Exhibit 84 into evidence." *Robare Group Ltd.*, Admin. Proc. Ruling Release No. 2271, 2015 SEC LEXIS 373, at *9.

At the beginning of the hearing in this matter, the Division announced that it was "withdrawing [its] objections to the Respondents' exhibits and would like to . . . move for the admission of all the unobjected exhibits on both sides." Transcript (Tr.) 6. Respondents' counsel joined the motion as to exhibits to which they had not objected. Tr. 6. Division counsel then confirmed that Respondents' objection to Exhibit 84 remained pending. Tr. 6 ("Since we've withdrawn our objections, I believe the only remaining objections are to our Exhibits 84, 85, 51 and 54, I think."). During the hearing the Division did not offer Exhibit 84 into evidence or call Mr. Farinacci to testify. Near the end of the hearing, after the close of the evidentiary portion of the hearing, Respondents' counsel noted that they maintained their objection to

Exhibit 84. Tr. 934. Division counsel responded that the Division was “still offering those documents” into evidence. Tr. 935.

After the hearing, the parties proposed to present written argument regarding the admission of Exhibit 84. I accepted the parties’ proposal and directed them to file letter briefs by February 26, 2015. *Robare Group Ltd.*, Admin. Proc. Rulings Release No. 2327, 2015 SEC LEXIS 579, at * 1 (Feb. 19, 2015). The parties timely filed their letter briefs on February 26, 2015.

In their letter brief, Respondents maintain their objection and note that even though they filed a written objection to Exhibit 84 before the hearing took place, the Division did not attempt to lay a foundation for its admission, thereby preventing Respondents from questioning Mr. Farinacci about the exhibit or his credibility. Resp. Letter at 1-2. They also continue to maintain that Exhibit 84 is irrelevant and misleading. *Id.* at 2.

For its part, the Division now relies on a scheduling order I issued in October. Div. Letter at 1. In that order, I noted that “unless genuine authentication or reliability issues exist, it is generally unnecessary for a party to lay a foundation for the admission of an exhibit or to call a document custodian as a witness.” *Robare Group Ltd.*, Admin. Proc. Rulings Release No. 1895, 2014 SEC LEXIS 3784, at *5-6 (Oct. 7, 2014). Running with this language, the Division asserts that there is no genuine issue as to the authenticity or reliability of Exhibit 84. Div. Letter at 1. It thus says it did not need to call Mr. Farinacci. *Id.* The Division also suggests that Respondents could have called Mr. Farinacci to testify if they had concerns about Exhibit 84. *Id.* The Division further says Exhibit 84 is relevant because Respondents opened the door to discussion of their investment strategy. *Id.* at 2. Finally, the Division says I determined the relevance of this line of inquiry during the hearing. *Id.*

For the reasons discussed below, I SUSTAIN Respondents’ objection.

Discussion

When I overruled Respondents’ objection on February 2, 2015, I did so “without prejudice to renewal *when and if* the Division offers Exhibit 84 into evidence.” *Robare Group Ltd.*, 2015 SEC LEXIS 373 at *9 (emphasis added). This ruling put the Division on notice that I would address the admissibility of Exhibit 84 during the hearing, *if* the Division offered it. The order likewise put Respondents on notice that they should be prepared to muster arguments against the admission of Exhibit 84. Knowing these facts and knowing that Respondents maintained their objections to Exhibit 84, however, the Division never offered it into evidence and did not call Mr. Farinacci. Admitting the exhibit now would permit the Division to avoid its responsibility to demonstrate the admissibility of Exhibit 84 and would nullify the opportunity Respondents would otherwise have had to explore the reliability of Exhibit 84 and the credibility of its maker.

As noted, the Division says Respondents could have called Mr. Farinacci to testify to explore the reliability of Exhibit 84. Div. Letter at 1. This statement has things backwards. First, it is not clear why Respondents would have anticipated the need to call Mr. Farinacci to

attack an exhibit they did not know would be presented. If the Division offered the exhibit through Mr. Farinacci, Respondents would have the opportunity to question him. If the Division did not offer the exhibit, there would be no need to address it.

Second, Exhibit 84 is the Division's exhibit. It is true that if there is no objection, it is not necessary to go through the effort of laying a foundation for an exhibit. But Respondents did object to Exhibit 84. As the proponent of the exhibit, it was the Division's burden in the first instance to demonstrate that the exhibit was admissible. Given my February 2, 2015 ruling regarding Exhibit 84, Respondents would have had every reason to expect that if the Division wanted me to consider Exhibit 84, the Division would offer it into evidence.

Moreover, if it thought the scheduling order made Exhibit 84 admissible, the Division should have made that argument in response to Respondents' written objection, thereby giving Respondents a chance to address it. Instead, it responded to Respondents' objection by announcing that if it decided to offer Exhibit 84, it would call Mr. Farinacci. It did not mention the scheduling order. In this circumstance, raising this new argument when Respondents cannot respond could be seen as sandbagging.

Finally, my observation in the October 7, 2014 scheduling order did not give the parties license to ignore their opponents' objections or prevent parties from objecting to the admissibility of evidence. Respondents raised objections. In consequence, the Division was bound to meet the objections or withdraw the proffered exhibits. Because it took neither course, I decline to admit Exhibit 84.

James E. Grimes
Administrative Law Judge