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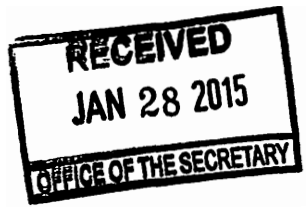
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16047



In the Matter of

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

Respondents.

DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENTS' OBJECTIONS TO DIVISION'S WITNESSES AND EXHIBITS

The Division of Enforcement ("Division") submits this Response to Respondents' Objections to the Division's Exhibits and Witnesses:

1. **DOE Exhibit 85:** Respondents object to the relevance of DOE Exhibit 85, a collection of disclosures made by Brinker Capital, Inc. ("Brinker Capital"), including the fee payments contracts between Brinker Capital and Fidelity that were the same as, or substantially similar to, the Fee Agreements between Fidelity and Respondent The Robare Group, Ltd. ("TRG") made the basis of this action. The evidence will also show that, unlike TRG, Brinker Capital was forthcoming in its Forms ADV and Brochures, disclosing its own agreement with Fidelity and the fees it received in connection therewith.

These exhibits will not be used, as Respondents contend, as part of the Division's case in chief, the vast majority of which Respondents have already admitted to, including, notably, the fact that the Fidelity Arrangement presented at least a potential conflict of interest. *E.g.*, Respondents' Answer, at 2. Instead, they will be used to rebut defenses or excuses raised by Respondents, including that TRG's disclosures were "in-line" with disclosures made by other firms during the same time period, and that regulatory guidance on completing Form ADV Part

II and Part 2A was internally inconsistent and unclear. *See* Resp. Ex. 119, Expert Report of Miriam Lefkowitz, at 3, 4.[1] These are two of the opinions Respondents' expert witness will offer, if her report (which the Division objected to) is accepted. If her testimony is admitted, then Respondents will have opened the door to comparing their disclosures to others. Brinker Capital's disclosures are relevant and probative because they demonstrate that understanding how to complete the Form ADV, in light of making a disclosure about the custodial support fees, was possible and accomplished by at least one other registered investment advisor.

Respondents also argue that the documents contained in the Division's Exhibit 85 will not help the Division meet its burden of proof, which they describe as follows:

> Determining whether the [Division] has met its burden of proof on these allegations requires an analysis of two things: (1) the applicable rules and standards articulated by the SEC to its member Firms with regard to such disclosures and (2) evidence surrounding the Robare Group's preparation and submission of those disclosures.

Respondents' Objections to the Commission's Exhibit and Witness Lists ("Respondents' Objections"), at 2. The Division need not prove – or even address – these supposed elements in order to meet its burden of proof herein. Rather, the Division need only show by a preponderance of the evidence that Respondents' Fidelity Arrangement and receipt of payments under the Fee Agreements constituted an actual or potential conflict of interest that they were required, but failed, to disclose. The Division's burden does not depend on "an analysis" of "rules and standards" promulgated by the Commission, or on "an analysis" of Robare Group's "preparation and submission" of the disclosures. Such

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[1] Respondents attached their expert's report to their "Respondents' Response to the Division's Motion *In Limine*," filed January 26, 2015.

analyses are irrelevant to the Division's burden and only confuse the limited questions of law and fact that remain unanswered in this case.

2. **DOE Exhibit 84:** Respondents object to DOE Exhibit 84 on the grounds of lack of foundation, misleading, and irrelevance. DOE Ex. 84 is a chart demonstrating that the non-Fidelity no-transaction-fee ("NTF") mutual funds underpinning the Fee Agreements could cost an investor more money than an investment in a transaction-fee (TF") mutual fund, given the fact that NTF mutual funds generally have higher expense ratios. This exhibit was prepared by John Farinacci, an SEC employee on the Division's witness list. Mr. Farinacci will testify as a fact witness at the hearing based on personal knowledge he gained during his 15 years of employment with Fidelity.[2] This exhibit will be used for demonstrative purposes and not as part of the Division's case in chief. Rather, the Division designated this exhibit in order to rebut, if warranted, Respondents' argument (albeit irrelevant under the governing law) that their advisory clients were not harmed by Respondents' heavy reliance on NTF mutual funds in their investment models.

Respondents and the Division agree that that the suitability of the investments made for Respondents' clients is not an issue in this case. Thus, so long as Respondents do not present evidence about how beneficial – or not harmful – the NTF funds were for their clients, or how much money their clients saved by investing in NTF instead of TF mutual funds, the Division will have no need to introduce Exhibit 84. But if Defendants "open the door" to discussing how

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[2] Respondents do not object to Mr. Farinacci testifying as a fact witness in these proceedings. Their objections to the Division's reservation of right to elicit limited expert testimony from Mr. Farinacci in response to the expert testimony of Ms. Lefkowitz is discussed later herein.

their clients were better off in NTF funds, then the Division will seek to introduce Ex. 84 and other contradictory evidence.

3. **DOE Exhibits 51 and 54:** Respondents object to DOE Exhibits 51 and 54 on the ground that they contain privileged communications between the Respondents and their attorney. This objection is wholly without merit. These exhibits are two emails conversations, produced by a third party, Renaissance Regulatory Services, Inc. ("RRS"), to the Division. The emails include correspondence exchanged between Respondent Jack Jones and Respondents' attorney Alan Wolper. The Division agrees that the communications would have been privileged, but Respondents waived the privilege when they forwarded the privileged communications to Renaissance, a non-party and non-attorney. Thus, the objection to these two exhibits should be overruled.

4. **Contingent Expert Witness:** Respondents object to the contingent expert witness designation for Mr. Farinacci. In an effort to be transparent and complete, the Division designated Mr. Farinacci as possibly providing expert testimony, only in rebuttal to what Respondents' not-yet-designated expert might say. Because the Division did not receive Respondents' expert's report until January 14, 2015, the Division did not know what kind of rebuttal testimony might be needed.[3] Thus, the Division had no idea what expert opinions Respondents might offer and which might need rebutting.

Now that the Division has reviewed Respondents' expert's report, it contends that Ms. Lefkowitz's testimony is inadmissible for the reasons enunciated in the Division's Motion in

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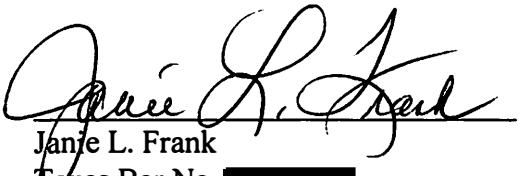
[3] In an earlier phone call between counsel, the Division attempted to learn what Respondents' expert might testify about in advance of the Witness List filing deadline. Respondents' counsel declined to preview their expert's opinions before the filing deadline. Thus, the Division was unable to make a more complete witness statement for Mr. Farinacci due to a lack of information.

Limine filed herein on January 20, 2015. Ms. Lefkowitz lacks the requisite qualifications to testify as an expert in this case, and she offers unreliable opinions that will not aid the Court in determining the law and facts herein. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."). Now that the Division has reviewed Ms. Lefkowitz's report, the Division does not believe it will need to ask Mr. Farinacci to provide any expert testimony.

Dated: January 27, 2015.

Respectfully submitted,



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