UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: **THE ROBARE GROUP, LTD., MARK L. ROBARE, AND JACK L. JONES, JR.,** **Respondents.**	ADMINISTRATIVE PROCEEDING File No. 3-16047 **Honorable James E. Grimes**

Respondents' Reply in Further Support of its Objections

Respondents submit this reply in further support of their Objections to the Division's Witness and Exhibit Lists.

1. DOE Exhibit 85

The Division's Response to Respondents' objections verifies that Respondents accurately interpreted the purpose of the document in question. Exhibit 85 consists of documents relating to the Forms ADV filed by Brinker Capital, Inc. (the "Brinker Firm"), a very large firm that, apparently, had a similar commission arrangement with Fidelity. The Division seeks to introduce the documents to show that other firms – very large ones, it seems – disclosed the arrangement differently than Robare Group.

There is no relevance to this document. First, the issue before the Court is strictly whether Robare disclosed the Fidelity arrangement in accordance with the applicable law, rules and guidance. This is not a popularity contest. The issue is not, "who disclosed it best." Robare either met or did not meet the applicable standard. Information as to what another firm did, or did not do, simply has no relevance.

Second, the Division's contention that these documents are introduced to rebut Respondents' expert's testimony (Ms. Lefkowitz) should be ignored because, sadly, it is both false and factually impossible. The Division received Ms. Lefkowitz's report from Respondents at the same time that it filed its exhibits, including Exhibit 85. It is, therefore, impossible for these documents to have been included in the exhibit books "in response to" Ms. Lefkowitz's Opinion.

Third, the specific filing by one particular firm is not evidence of an "industry standard." Nor is it rebuttal to testimony regarding an "industry standard." To the contrary, it is simply "cherry picking." That is, were the Division truly intending to rebut testimony as to an industry standard, it would introduce information evidencing wide spread interpretations, understandings and practices, not a single set of filings from a single firm. Clearly, these documents are nothing more than an attempt by the Division to create a new standard – a decade after the agreement was signed – showing how it would have preferred the 2005 (and onward) disclosures to look. Were there a true standard, however, to which Robare could be held, it would have existed in 2005. But, it did not.

Finally, even were there some relevance to the filings of another firm (which there is not), the theoretical firm would be one similar in size, business, and resources to Robare. Robare is a relatively small, independent RIA, which works directly with its 300 family-clients and roughly $150 million in assets. The Brinker Firm, by comparison, is a $10 *billion* firm, and appears to be a corporate RIA, making it an incredibly improper and unfair comparison.

For these reasons, Exhibit 85 is irrelevant and unduly prejudicial, and should be excluded from the record in this proceeding.

2. DOE Exhibit 84

DOE Exhibit 84 is likewise purportedly submitted as rebuttal evidence, should Respondents argue "that their clients were not harmed by Respondents' heavy reliance on NTF mutual funds." Yet, as the Division flat-out admits: "the suitability of the investments made for Respondents' clients is not an issue in this case." DOE Response p.3. The Staff seeks to reserve this exhibit lest Respondents "present evidence" that the NTF funds were "beneficial" to their clients, or how NTF funds were used to save clients' money. Respondents maintain their objections.

At issue in this case – as determined by the allegations in the Order Instituting Proceeding – is simply whether or not Respondents' Form ADV disclosures were proper. To understand the context of the disclosures, the Court will undoubtedly hear testimony as to Robare's business model and approach to investing – testimony which will necessary include a description of NTF mutual funds and why the Firm uses them. Whether Robare's decision to use NTF funds is good, bad, or otherwise, however, is wholly irrelevant to this dispute. There is simply nothing for the Division to "rebut." If the Commission wanted to debate the propriety of Robare's decision to employ NTF funds, rather than how well Robare disclosed how it was compensated for selling such funds, it needed to include that as a charge in the OIP. It did not.

The Staff's hope of meandering down an entirely irrelevant path of evidence, to inquire into whether the Firm's model portfolios focusing on NTF Funds were or were not the absolute best investment strategy for Robare's clients, should not be countenanced. It would necessitate a tremendous waste of the already limited time parameters put in place for this hearing.

In sum, Exhibit 84 is irrelevant and merely seeks to distract the Court from the actual allegations made by the Division against Robare. Respondents ask that this irrelevant evidence be excluded from the record.

3. Exhibits 51 and 54

The Division has agreed that the underlying communications are privileged, and argues that the privilege was waived when that communication was forwarded on to its compliance consultant (Renaissance). The Division's position runs contrary to the applicable authority, holding that the attorney client privilege is extended to consultants retained in assisting with the provision of legal advice. *See, e.g., Cottillion v. United Ref. Co.*, 279 F.R.D. 290, 305 (W.D. Pa. 2011); *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 476-77 (E.D. Pa. 2005) ("Presence of a third party, such as a consultant, does not destroy the attorney-client privilege where that party is the client's agent or possesses "a commonality of interest with the client...Plaintiff did not waive the privilege merely by revealing confidential communications to its own consultant. We will not order production of this document based upon the assertion that attorney-client privilege does not extend to third persons." (internal citations omitted); *Upjohn Co. v. United States*, 449 U.S. 383, 394-95 (1981) ("Information... was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas...'Consistent with the underlying purposes of the attorney–client privilege, these communications must be protected against compelled disclosure."); *In re Bieter Co.*, 16 F.3d 929, 939-40 (8th Cir. 1994) ("As discussed earlier, [the consultant's] duties were in many respects coterminous with the reason for the client's existence and with the scope of the transactions that led to this litigation. We have no difficulty finding that the subject matter of the communications fell within his duties

as a consultant to Bieter… We hold, then, that on the basis of the record before us, the privilege applies to communications made between [consultant] and [the law firm], and that the disclosure of otherwise privileged documents to [consultant] in the course of his confidential communications with counsel did not destroy the privilege.").

Here, as in *Beiter,* Renaissance was retained as a compliance consultant by Robare, which did not have its own internal compliance department, and was charged with working with Robare to draft disclosures compliant with the applicable legal standards. In the context of such a relationship and under the above authority, the privilege is extended to cover its communications with Robare and Robare's counsel.

Accordingly, the privileged documents should be excluded from the record.

4. The Division's Contingent Expert

The Division appears to state in its response that it no longer intends to offer expert testimony in this matter. While Respondents maintain their objections as previously set forth, it appears this issue is resolved, and no further action is required by the Court.

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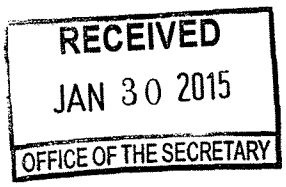

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Re: The Robare Group, Ltd., et al., Administrative Proceeding File No. 3-16047

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