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 **RESPONDENTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Respondents The Robare Group, Ltd. ("TRG" or "the Firm"), Mark L. Robare, and Jack L. Jones, Jr. (collectively, "Respondents"), by and through their attorneys and in accordance with the Court's Order dated February 13, 2015, hereby submit their Proposed Findings of Fact and Conclusions of Law.[1]

I. PROPOSED FINDINGS OF FACT

A. Background

The Robare Group

1. TRG is an investment adviser located in Houston, Texas, and a Texas limited partnership. TRG was formed in 2000 and currently is registered as an investment adviser with the United States Securities and Exchange Commission ("Commission"). Robare Asset Management, Inc. ("RAM") is the managing general partner of TRG. As of August 26, 2013, TRG served as investment adviser to approximately 350 separately managed discretionary accounts and had approximately $150 million in assets under management. Stipulations of Fact filed February 2, 2015 ("2.2.15 Stipulations"); Stipulation No. 1.

2. TRG offers portfolio management services, primarily to retail and other high net worth individuals. TRG offers approximately seven to ten different model portfolios, comprised exclusively of No Transaction Fee ("NTF") mutual funds. Tr. 306:10-16.

3. An NTF mutual fund is one which does not charge any form of commission to investors for purchasing the shares in that mutual fund. 2.2.15 Stipulations; Stipulation No. 13.

[1] Citations to the Transcript of Proceedings are indicated with the abbreviation "Tr."
Citations to the Respondents' Exhibits are indicated with the abbreviation "RX" followed by the exhibit number.
Citations to the Division's Exhibits are abbreviated "DX" followed by the exhibit number.

4. TRG uses NTF mutual funds in its investment portfolios because they do not charge a transaction fee on the purchase transaction, making the investment cheaper for their advisory clients. Tr. 307:11-308:10.

5. From its inception, TRG has used Fidelity for execution, custody, and clearing services for its investment advisory clients. All the mutual funds in which TRG invests its advisory clients' money are offered on Fidelity's platform. 2.2.15 Stipulations; Stipulation No. 4.

6. In 2003, TRG registered as an independent investment adviser with the Commission; prior to that, it had been a state-registered investment advisor since 2001. 2.2.15 Stipulations; Stipulation No. 5.

7. As of 2002, TRG had approximately 150 households as clients. Tr. 301:25-302:3.

8. TRG currently has approximately 300 households as clients. Tr. 301:12-24; Tr. 663:14-16.

9. Currently, seven people work at TRG, including Mr. Jones and Mr. Robare. Tr. 370:12-17.

10. TRG's typical advisory client is someone who has retired from an executive or management position with one of the major oil or energy companies located in Houston. Approximately 85% are retired. The remaining 15% are within five years of retiring. Tr. 302:4-18.

11. TRG's typical advisory client is "highly educated," from "a very sophisticated industry," and possessed prior experience working with an investment advisor or broker. Tr. 302:19-303:20. In summary, TRG's typical customer is "sophisticated, educated, experienced." TR. 303:17-20.

12. The average size of a TRG customer account is between $500,000 and $800,000. Tr. 332:5-9.

13. TRG's primary source of clients is through referrals from existing happy clients. Tr. 303:21- 24; Tr. 661:19-23.

14. TRG's client retention rate is over 97%, measured year-to-year. That percentage was calculated after the Order Instituting Proceedings in this matter was issued by the Commission and circulated to TRG's customers. Tr. 303:25-304:4.

Mark Robare

15. Mark Robare, age 62, resides in Cypress, Texas. Mr. Robare is the founder and a limited partner of TRG. He is the president of RAM. He owns 83% of TRG, either directly or through his ownership in RAM. Mr. Robare is also a person associated with TRG and is registered with the State of Texas as an investment adviser representative for TRG. Mr. Robare has served as TRG's Chief Compliance Officer since 2003. 2.2.15 Stipulations; Stipulation No. 2.

16. The instant dispute is the only disclosure on Mr. Robare's Form U-4. Mr. Robare has not been the subject of any inquiry by any other regulator. Tr. 292:5-13; RX-110.

Jack Jones

17. Mr. Jones, age 43, is a resident of Spring, Texas, and is Mr. Robare's son-in-law. Mr. Jones is a limited partner of TRG and owns approximately 17% of TRG, either directly or through his ownership in RAM. Mr. Jones is a person associated with TRG and is registered with the State of Texas as an investment adviser representative for TRG. Since 1994, Mr. Jones has been a registered representative associated with broker-dealers registered with the Commission. 2.2.15 Stipulations; Stipulation No. 3.

18. The instant dispute is the only disclosure on Mr. Jones's Form U-4. Mr. Jones has not been the subject of any inquiry by any other regulator. Tr. 660:7-9; RX-109.

B. The 2004 Tri-Party Contract with Fidelity and Triad

19. TRG and Fidelity entered into a contract on February 25, 2003, titled "Investment Advisor Representation and Indemnification Letter," pursuant to which Fidelity would provide execution, custody, and clearing services for TRG's advisory clients and access for TRG to Fidelity's mutual fund trading platform. 2.2.15 Stipulations; Stipulation No. 6.

20. In February 2003, Robare and Jones became registered representatives with Triad Advisers, Inc. ("Triad"). 2.2.15 Stipulations; Stipulation No. 7.

21. Triad is a Commission-registered securities broker-dealer headquartered in Norcross, Georgia. 2.2.15 Stipulations; Stipulation No. 8.

22. Mr. Robare and Triad entered into an agreement dated October 29, 2002 (the "Commission Agreement") that detailed the manner in which Triad would compensate him. 2.2.15 Stipulations; Stipulation No. 9; RX-16.

23. Specifically, the Commission Agreement provided that for commissions that Mr. Robare earned, Triad would retain 10% and Mr. Robare would receive the remaining 90%. The Commission Agreement also provided that Mr. Robare would receive 100% of his advisory fees. Tr. 614:4-19; RX-16 p. 1

24. The Commission Agreement specifically defined Mr. Robare's "commission business" to include "mutual funds, variable insurance, 12b-1 and other trails." RX-16 p. 1.

25. In early 2004, Mark Mettelman, the president/(then CEO) of Triad, told Mr. Robare at a meeting about a program Fidelity was offering pursuant to which Fidelity would pay investment advisers for investing their advisory customers' money in certain mutual funds purchased on Fidelity's platform. 2.2.15 Stipulations; Stipulation No. 10; Tr. 310:9-11; Tr. 312:7-313:4.

26. Following the meeting with Mr. Mettelman, TRG contacted Fidelity to inquire about the program. Tr. 314:10-21.

27. Messrs. Robare and Jones had two principal concerns about the proposed program: (1) whether the Firm's participation in the program would result in a higher expense to their clients, versus not participating, and (2) whether it would require them to make any changes to how they comprised their investment portfolios. Tr. 314:10-316:11; Tr. 522:23-523:12; Tr. 666:24-668:9.

28. Messrs. Robare and Jones only agreed to participate in the program because they learned it would not result in higher expenses to their customers, and would not require them to change the manner in which they selected the mutual funds in their customers' portfolios.

29. Had Messrs. Robare and Jones learned that there was some expectation by Fidelity that they needed to select particular mutual funds in their customers' portfolios, they would not have entered into the agreement. Tr. 316:7-11.

30. On April 19, 2004, Mr. Robare signed the contract to participate in this program on behalf of TRG. Fidelity drafted the agreement, which was titled "Investment Advisor Commission Schedule and Servicing Fee Agreement" ("2004 Agreement"). The other parties to the 2004 Agreement were Triad and Fidelity (through its entities Fidelity Brokerage Services ("FBS") and National Financial Services ("NFS")). Mark Mettelman signed the contract on April 16, 2004, on behalf of Triad, and the Fidelity representative signed on May 3, 2004. The contract states that it was "made and entered into" on February 5, 2004. 2.2.15 Stipulations; Stipulation No. 11; RX-1; Tr. 317:17-18; Tr. 318:19-319:22.

31. By its terms, the 2004 Agreement provided for a "servicing fee revenue program," in which TRG would "refer clients to Fidelity" and Fidelity would pay revenues, ranging from 2 to 12 basis points, based on the volume of certain mutual funds that TRG purchased on Fidelity's platform on behalf of TRG's advisory customers. 2.2.15 Stipulations; Stipulation No. 12.

32. More specifically, the 2004 Agreement provided that TRG would earn payments from Fidelity based on the amount of money invested in "eligible NTF mutual funds." RX-1; Tr. 333:14-16.

33. The term "eligible NTF mutual funds" was not defined in the 2004 Agreement. But, the agreement provided that Fidelity retail mutual funds were expressly excluded from the program, and Messrs. Jones and Robare understood that they would not receive any payments for investing their clients' money in Fidelity retail mutual funds. RX. 1; Tr. 332:15-333:10; Tr. 341:25-342:9; Tr. 671:2-4; Tr. 668:24-669:12.

34. Neither Mr. Robare nor Mr. Jones knew, at the time they signed the 2004 Agreement in 2004 – or anytime thereafter – which non-Fidelity NTF mutual funds were "eligible" under the agreement. Tr. 669:3-7; Tr. 670:24-672:1. Fidelity's representative, Timothy Fahey, acknowledged that eight years after signing the 2004 Agreement, Mr. Robare and Mr. Jones still did not know which mutual funds would result in them receiving a payment under that agreement. Tr. 180:9-181:1.

35. Triad was not made a party to the 2004 Agreement at Respondents' request or direction. Tr. 53:8-10; Tr. 141:3-14; Tr. 176:4-177:2; Tr. 317:14-25.

36. Under the terms of the 2004 Agreement, amounts that TRG earned under the agreement were to be paid by Fidelity directly to Triad. 2.2.15 Stipulations; Stipulation No. 18; RX-1; Tr. 330:20-331:3.

37. Through April 2013, Fidelity in fact made the payments due to TRG under the 2004 Agreement directly to Triad.

38. Through April 2013, pursuant to the terms of the Commission Agreement, the OSJ Agreement, and the Registered Representative Agreements, Triad retained 10% of the payments it received from Fidelity under the 2004 Agreement and remitted the remaining 90% to TRG. 2.2.15 Stipulations; Stipulation No. 19; RX-17, RX-17, RX-18, RX-19.

39. By its terms, the 2004 Agreement anticipated that TRG would continue to invest some of its customers' money in Fidelity mutual funds, even though such investments would not result in TRG receiving any payment under the agreement. RX-1. Mr. Robare shared that anticipation. Tr. 333:17-334:12.

40. After the 2004 Agreement was executed, TRG continued to invest its clients' money in Fidelity mutual funds, and those investments did not generate any payments to TRG. Tr. 333:17-334:12.

41. In 2007 and 2008, the percentage of Fidelity mutual funds in TRG's advisory client portfolios actually increased, as TRG reacted to the financial crisis and moved its clients away from actively managed mutual funds into Fidelity index mutual funds. Tr. 337:15-340:3.

42. Other mutual fund companies besides Fidelity also offered their own index mutual funds. Had TRG invested in those index mutual funds, it would have received a payment from Fidelity under the 2004 Agreement. But, TRG elected to use Fidelity index mutual funds, despite the fact those funds would not result in TRG receiving a payment under the 2004 Agreement, because Fidelity index mutual funds had lower expenses than the other index mutual funds, and that was beneficial to TRG's clients. (Id.)

43. Neither Mr. Robare nor Mr. Jones ever based any client investment decision, either in whole or in part, on their potential or actual receipt of any payment from Fidelity. Tr. 343:7-25; Tr. 415:1-6; Tr. 671:19-672:4; Tr. 752:3-9.

44. By its terms, the 2004 Agreement provided that the mutual fund companies, which made payments to Fidelity (which Fidelity, in turn, shared with Triad and TRG), could, at

any time, cease making those payments. In that event, Fidelity, which had no control over that potential development, would stop making payments to Triad and TRG. RX-1; Tr. 82:25-83:20; Tr. 355:7-22; Tr. 470:2-9.

C. The 2012 Agreement with Fidelity

45. On May 23, 2013, Mr. Robare signed a new agreement with Fidelity on behalf of TRG, titled "Investment Advisor Custodial Support Services Agreement" ("2012 Agreement"). The 2012 Agreement's stated effective date was November 21, 2012, although it was signed by all parties in 2013. 2.2.15 Stipulations; Stipulation No. 21.

46. After the 2012 Agreement was signed, the 2004 Agreement was terminated. 2.2.15 Stipulations; Stipulation No. 22.

47. Triad is not, and never was, a party to the 2012 Agreement. 2.2.15 Stipulations; Stipulation No. 23. But, that was not the result of anything Robare did; rather, Triad was simply not included as a party in the agreement when Fidelity presented it to Robare for execution. In fact, Robare did not negotiate the terms of the 2012 Agreement, and never asked that Triad be removed from the agreement. Tr. 171:10-172:9; Tr. 173:2-15; 195:8-196:22. A Fidelity representative testified that she had no idea why Triad was not included as a party to the 2012 Agreement. Tr. 90:22-91:3.

48. Under the 2012 Agreement, which is still in effect, the servicing fee revenue program continued as before under the 2004 Agreement, except that Fidelity has made payments and continues to make payments directly to TRG instead of through Triad. 2.2.15 Stipulations; Stipulation Nos. 24 and 27.

49. As with the 2004 Agreement, the 2012 Agreement provided that the mutual fund companies, which made payments to Fidelity (which Fidelity, in turn, shared with TRG), could, at any time, cease making those payments. RX-2 p. 3.

D. Form ADV

50. Form ADV is the uniform form used by investment advisers to register with the Commission and the states. 2.2.15 Stipulations; Stipulation No. 37; Tr. 265:12-16.

51. Form ADV has two primary functions. Part I is used for registration for the Commission and for the Commission's risk assessment program. Part II is intended to be a disclosure document for clients or prospective clients. Tr. 265:16-24.

52. Section 206 of the Investment Advisors Act of 1940 requires that investment advisors disclose material conflicts of interest.

53. This was echoed by Melissa Harke, a witness for the Division:

> And also, there's guidance about how you shouldn't do what I essentially would say is putting the entire kitchen sink of your potential legal possible pie in the sky type problems into your

> Form ADV. It should be conflicts of interest that you have or reasonably have, and it should describe the business that you have or you reasonably expect to have. It shouldn't be every single thing you can think of.

Tr. 271:25-272:7. *See also* Tr. 829:19-830:13.

54. Commission Rule 204-3 was amended effective October 12, 2010. RX-124. It is colloquially known as the "brochure rule," and it describes the mechanism by which the disclosures required by Section 206 are to be made.

55. The Rule 204-3 2010 Amendments included, for the first time, a set of general instructions for Part 2 of Form ADV. DX-90.

56. Those instructions expressly provide that only material conflicts of interest be disclosed. DX-90; Tr. 277:21-279:1.

57. Disclosures should be tailored to the particular client or prospective client to whom the disclosures are directed. According to Ms. Harke,

> [T]he point is to make it digestible or understandable by the client to whom you're delivering your brochure, and in that regard, to the extent that you need to do different brochures to satisfy different lines of your business or different types of clients, say, you have offshore or onshore clients, the types of disclosures you would therefore prepare might be different.

Tr. 271:16-24. *See also* Tr. 273:19-25 ("The point is to make meaningful disclosure and to bear in mind the financial sophistication of the clients to whom you're reaching."); Tr. 829:11-18; Tr. 830:14-23.

58. Disclosures required by §206 and Rule 204-3 need not be made only in Form ADV. They can be made in other documents, as well. Tr. 265:1-7; Tr. 270:19-271:2; Tr. 835:3-836:16. In fact, while the 2004 and 2012 Agreements between Fidelity and TRG required TRG to ensure its disclosures were accurate, Fidelity did not care if those disclosures were made in Form ADV "or some other document." Tr. 77:112-19.

59. TRG filed, or was deemed to have filed, a Form ADV, Part II, and Schedule F, with the Commission, on or about each of the following dates: March 8, 2005; August 18, 2005; January 6, 2006; January 30, 2008; and April 24, 2008. 2.2.15 Stipulations; Stipulation No. 31.

60. The Commission amended Form ADV in 2010 and required most Commission-registered investment advisers to begin using, in early 2011, a separate client disclosure brochure that met the requirements of the new Part 2A. 2.2.15 Stipulations; Stipulation No. 32.

61. TRG filed a Form ADV, Part 2A and a Disclosure Brochure with the Commission on or about each of the following dates: March 31, 2011; December 20, 2011; March 30, 2012; April 12, 2013; June 2, 2013; and August 26, 2013. 2.2.15 Stipulations; Stipulation No. 33.

62. Robare reviewed all Forms ADV Part II, Schedules F, Forms ADV Part 2A, and Disclosure Brochures before they were filed or were deemed filed. He was aware of the disclosures made in all of the Forms ADV Part II, Schedules F, Forms ADV Part 2A, and Disclosure Brochures and approved them. 2.2.15 Stipulations; Stipulation No. 34.

63. Jones reviewed all Forms ADV Part II, Schedules F, Forms ADV Part 2A, and Disclosure Brochures before they were filed or were deemed filed. He signed all of the Form ADVs on behalf of TRG from August 18, 2005, forward. He was aware of the disclosures made in all of the Forms ADV Part II, Schedules F, Forms ADV Part 2A, and Disclosure Brochures and approved them. 2.2.15 Stipulations; Stipulation No. 35.

E. 2008 Commission Examination of TRG

64. In 2008, the Commission conducted a Risk Assessment Verification Examination of TRG. Tr. 209:1-12; RX-93, RX-95.

65. The Commission examiner who conducted the examination was a former Branch Chief, and, according to her former supervisor, she was "very experienced" and "very detailed." Tr. 217:8-13. Mr. Robare agreed with that characterization. Tr. 411:1-18.

66. In connection with the 2008 exam, the Commission examiner requested a copy of TRG's Form ADV Part II. RX-96; Tr. 235: 14-23; RX-93.

67. In response, TRG provided the Commission examiner with a copy of its Form ADV. Tr. 236:2-7; Tr. 13-14; RX-94.

68. The Commission examiner reviewed TRG's Form ADV Part II during the exam. Tr. 18:3-219:3; Tr. 240:25-242:5.

69. The 2008 examination by the Commission of TRG resulted in a "no further action letter." RX-95.

70. A no further action letter is issued by the Commission when the examination team does not find any violations of law. Tr. 226:22-227:4.

71. The 2008 no further action letter does not note any issues regarding the Firm's Form ADV. RX-94; Tr. 247:12-14.

72. There is no "better possible result" than the no further action letter that TRG received from the Commission following the 2008 exam. Tr. 258:12-17.

73. During the examination, no one from the Commission made any comment about or raised any concerns with the language in the Firm's Form ADV. Tr. 409:15-410:1.

74. Given the disposition of the Commission's 2008 exam of TRG, especially in light the fact that they knew the examiner reviewed their Form ADV Part II, both Mr. Robare and Mr. Jones concluded that their disclosures were adequate. Tr. 410:13-25; Tr. 680:16-25.

F. Commission Payments

75. From 2004 through April 2013, Fidelity made the payments under the 2004 Agreement to Triad. Triad retained 10% of the amount paid, and paid the remaining 90% to Mr. Robare pursuant to his Commission Agreement. RX-16; RX-29-35.

76. Triad considered these payments to be commissions. They were included on the periodic commission statements that Triad provided to Mr. Robare; they were subject to Triad's 10% cut (which only applied to commissions, not to advisory fees); and, until 2010, they were described by Triad on those commission statements as "Fidelity 12b-1" (RX-29 p. 3, RX-30 p. 3; RX-31 p. 2; RX-32 p. 2; RX-33 p. 15; Tr. 614:4-19) or "Direct Fees." RX-34 and RX-35.

77. Triad's characterizations of the payments as "Fidelity 12b-1" or "Direct fees," respectively, as reflected on the commission statements, originated from Fidelity. Triad simply "transposed" Fidelity's description of the payments it made to Triad onto its commission statements when it forwarded 90% of those payments to Mr. Robare. Tr. 619:5-17.

78. Mr. Robare considers 12b-1 fees and trail commissions to be "virtually the same thing." Tr. 376:8-15.

79. The payments that Mr. Robare received from Triad pursuant to the 2004 Agreement originated with mutual fund companies whose particular mutual funds TRG purchased on behalf of its advisory clients. Tr. 30:25-31:13; Tr. 186:9-21; Tr. 349:12-350:12; Tr. 518:12-520:7; Tr. 685:15-17; RX-95.

80. The mutual fund companies made the payments to Fidelity, which, according to Fidelity representative Melissa Morganti Zizza, Fidelity then "shared" with Triad and TRG. Tr. 33:13-18; Tr. 36:24-37:1. Mr. Robare echoed that understanding. Tr. 518:12-520:7.

81. Ms. Morganti Zizza's testimony comports with an email that Fidelity representative Fahey sent to Mr. Jones on May 8, 2013 (RX-92), in which he stated:

> Fidelity receives a very small portion management fee from the mutual fund companies for distribution through Fidelity's platform, primarily for operational and distribution expense. Under a CSSA agreement, we share a portion of that fee (for certain funds) with certain advisors to cover a portion of related fund distribution expenses.

82. It was up to the mutual fund companies to characterize the nature of the payments, namely, whether it was classified as a commission, 12b-1 fee, distribution expense, or a servicing fee. Tr. 30:25-31:13; Tr. 33:13-18; Tr. 36:24-37:1; Tr. 71:22-73:6; Tr. 186:9-21; Tr. 187:17-25; Tr. 308:14-17; Tr. 352:23-353:5; Tr. 346:2-3; Tr. 349:24-350:12; Tr. 435:7-12. This was described in the prospectus for each mutual fund. Tr. 685:13-19.

83. Prospectuses are provided "automatically" to customers who invest in mutual funds. Tr. 353:16-354:4.

84. Mr. Robare reviewed the prospectus for "every one" of the mutual funds in which he invested his advisory clients' money. Tr. 308:14-17; Tr. 352:23-353:5; Tr. 436:2-3.

85. On the other hand, no witness propounded by the Division looked at the prospectuses. As a result, no Division witness, including the Fidelity representatives, knew how the mutual fund prospectuses characterized the payments made to Fidelity (which Fidelity then shared with Triad and Robare). Tr. 71:22-73:6 (Morganti Zizza); Tr. 187:17-25 (Fahey).

86. According to Mr. Robare, the payments made under the 2004 Agreement and 2012 Agreement were "sourced from 12b-1 commissions." Tr. 435:7-20. But, Mr. Robare also acknowledged that while the prospectus would reveal whether the particular mutual fund would pay 12b-1 fees, he could not tell if those fees would actually be paid to Fidelity. As a result, even though he read the prospectuses, Mr. Robare still did not know whether an investment in a particular mutual fund would result in him receiving a payment under the 2004 Agreement or 2012 Agreement. Tr. 537:4-17.

87. Triad advised Robare that any compensation Fidelity paid the Robare Group had to go through Triad. Tr. 633:14-18.

88. Mr. Robare and Mr. Jones considered the payments they received from Triad under the 2004 Agreement to be commissions. Tr. 372:25-373:16. According to Mr. Robare, his Commission Agreement with Triad covered all commissions that flowed through Triad, not only commissions on brokerage accounts. Tr. 427:15-25.

89. The payments that TRG received under the 2004 Agreement and 2012 Agreement, combined, constituted only 2.5% of the Firm's gross revenues. Tr. 413:18-414:6; Tr. 504:9-18. The Commission offered no evidence to the contrary.

90. The payments made under the 2004 Agreement and 2012 Agreement had no financial impact on Respondents' customers. Tr. 83:21-84:10; Tr. 186:22-187:2.

G. Customer Disclosures

1. General Information Disclosure Brochure

91. Each prospective customer of TRG received and executed a General Information Disclosure Brochure at the time they opened their account with the Firm. RX-97; Tr. 361:24-362:25; Tr. 664:12-665:3.

92. Respondents were advised by a third-party compliance consultant to use a disclosure brochure in addition to Form ADV, and they heeded that advice. Tr. 363:14-364:1.

93. That disclosure brochure stated:

> Additionally, we may select and monitor other money managers on your behalf. When we do so, the other money managers pay us a portion of the fees generated by the referred clients. Clients do not pay us directly for this service. Mark Robare and Carol Hearn and Jack Jones are also stockbrokers and insurance agents who may earn sales commissions when they purchase securities and/or insurance products through The Robare Group, Ltd. **You should be aware that a conflict may exist between your interests and those of the Robare Group, Ltd....**

RX-97, 98, 99. Emphasis supplied.

94. Messrs. Robare and Jones reviewed their disclosure brochure with their clients during the account opening process. Tr. 365:25-366:3; Tr. 664:12-665:3.

2. Fidelity's Customer Agreement

95. TRG's clients also opened brokerage accounts directly with Fidelity. (Tr. 297:19–298:15; Tr. 299:5-11; Tr. 357:13-20).

96. Fidelity's customer agreement also included a disclosure that Robare may receive compensation from Fidelity, and that the compensation may create a conflict of interest (RX-76, 77, 78, 79):

> **How Fidelity Supports Your Advisor**
>
> Fidelity provides your investment advisor with a range of services and other benefits to help them conduct their business and serve you...
>
> In limited circumstances, we may also make direct payments to your advisor. For example, we may reimburse your advisor for reasonable travel expenses incurred when reviewing our business and practices. **We also may pay your advisor for performing certain back-office, administrative, custodial support and clerical services for us in connection with client accounts for which we act as custodian. These payments may create an incentive for your advisor to favor certain types of investments over others.**

97. Respondents were aware that Fidelity made this disclosure, provided a copy of Fidelity's agreement to its clients, and discussed it with them. Tr. 356:13-25; 357:21-358:5; 359:20-22; 362:20-25.

98. Respondents considered the disclosures in the Fidelity Customer Agreement to be among the universe of disclosures that they made to their customers and prospective customers. Tr. 359:1-360:17.

3. Forms ADV

99. Prior to the execution of the 2004 Commission Agreement, TRG's Form ADV Part II No. 13-A provided:

> Mark Robare, Carol Hearn & Jack Jones may sell securities and insurance products for sales commissions.

100. In June 2005, TRG retained Capital Markets Compliance ("CMC") to help it review and update its Form ADV. (RX-101; RX-102; Tr. 507:10-13).

101. Following the execution of the 2004 Agreement and retention of CMC, in August 2005, TRG updated its Form ADV Part II No. 13-A to read (RX-6):

> Certain investment adviser representatives of ROBARE, when acting as registered representatives of a broker-dealer, may receive selling compensation from such broker-dealer as a result of the facilitation of certain securities transactions on Client's behalf through such broker-dealers.

102. Following the 2010 amendment of Form ADV, the Firm filed an updated Form ADV in March 2011. Item 14A provided (RX-11):

> Certain of our IARs, when acting as registered representatives of Triad may receive selling compensation from Triad as a result of the facilitation of certain securities transactions on your behalf through Triad. Such fee arrangements shall be fully disclosed to clients. In connection with the placement of client funds into investment companies, compensation may take the form of front-end sales charges, redemption fees and 12(b)-1 fees or a combination thereof. The prospectus for the investment company will give explicit detail as to the method and form of compensation.

103. Item 5 of the March 2011 ADV provided, in relevant part (RX-11. p. 9):

> A conflict of interest may exist between us. You are under no obligation to act on our IAR's recommendations. If you elect to act on any of the recommendations, you are under no obligation to effect the transactions through our associated person when such person is employed as an agent of Triad, a licensed broker dealer.

104. Item 11 of the March 2011 ADV provided, in relevant part (RX-11 p. 18).

> If you so chooses, they may implement investment advisory recommendations by utilizing the IAR's status as registered representatives of Triad. As registered representatives, our associated persons can sell securities to you for commissions. This could present a potential conflict of interest as the associated persons could receive fees for advisory services and/or commissions for brokerage transactions if you choose to implement recommendations of our associated persons in their capacities as registered representatives of Triad.

105. In December 2011, TRG filed an updated Form ADV. Item 14A provided (RX-13):

> Certain of our IARs, when acting as registered representatives of Triad may receive selling compensation from Triad as a result of the facilitation of certain securities transactions on your behalf through Triad. Such fee arrangements shall be fully disclosed to clients. In connection with the placement of client funds into investment companies, compensation may take the form of front-end sales charges, redemption fees and 12(b)-1 fees or a combination thereof. The prospectus for the investment company will give explicit detail as to the method and form of compensation.
>
> Additionally, we may receive additional compensation in the form of custodial support services from Fidelity based on revenue from the sale of funds through Fidelity. Fidelity has agreed to pay us a fee on specified assets, namely no transaction fee mutual fund assets in custody with Fidelity. This additional compensation does not represent additional fees from your accounts to us.

106. In the December 2011 Form ADV, Items 5 and 11 remained unchanged from the March 2011 version. RX-13.

H. Consultants and Supervision

107. TRG never filed a Form ADV without first obtaining the help of a consultant. Tr. 368:9-23; Tr. 370:2-5. First, they retained National Regulatory Services, then Capital Markets Compliance ("CMC"), then Renaissance Regulatory Services ("RRS"). Tr. 369:1-370:1. NRS was engaged before the 2004 Agreement. Tr. 507:20-22.

108. Respondents relied on the advice they received from their consultants in making their disclosures on Form ADV and otherwise. Tr. 406:14-23. In fact, Schedule F to TRG's Form ADV increased in length from four to 15 pages due to input from CMC. Tr. 529:5-15.

109. At all times relevant, Messrs. Robare and Jones were registered representatives of Triad. RX-18.

110. Per Robare's agreement with Triad, Triad agreed to, and did, supervise TRG's investment advisory business. RX-17; Tr. 389:9-392:21; Tr. 600:17-25; Tr. 602:18-603:14. In return, Robare agreed to pay Triad $1,500 quarterly. RX-17; Tr. 389:20-24.

111. Triad also conducted annual audits of TRG, as part of its supervisory obligations. Tr. 393:4-395:9. As part of the annual audit, TRG provided Triad with a copy of its current Form ADV. Tr. 393:8-21; Tr. 606:5-608:2.

112. If Triad discovered that there was an issue with the Form ADV or the disclosures on that form during these audits, its practice was to bring those issues to the attention of the firm. Tr. 608:3-17.

113. Triad was a party to the 2004 Agreement (RX-1), and was at all times aware of the 2004 Agreement. Tr. 615:17-20.

114. Triad never raised any issues or indicated there were any problems with TRG's Form ADV. RX-22, 23, 24, 25, 26, and 27; Tr. 395:13-21; Tr. 612:18-613:1.

115. In fact, Triad reviewed and approved the disclosures contained on TRG's Form ADV. Tr. 630:7-17.

116. Triad represented that TRG it was in "full compliance with its disclosure requirements" each year from 2005 through 2015. Tr. 638:7-640:10. It is also fair to infer this from the fact that Triad never told TRG that it was not in compliance. TR. 646:22-647:3.

117. From November 2007 onward, TRG hired RRS to provide compliance consulting and support. RX-44, 45, and 46; Tr. 545:2-17.

118. As part of the services provided to TRG, RRS reviewed and updated the Firm's Form ADV from 2007 onward on an annual basis. RX-44, 45 and 46; Tr. 548:1-10; Tr. 553:18-20.

119. At the inception of RRS's relationship with TRG in 2007, it was RRS's business practice to ask about how the firm was compensated, and what its revenue, income sources, and compensation arrangements were. Tr. 549:6-12; Tr. 550:3-10; Tr. 555:4-21.

120. Bart McDonald of RRS testified he had no reason to believe he varied from this business practice when he entered into the 2007 agreement with TRG. Tr. 550:7-10. Mr. Robare testified that he discussed the 2004 Agreement with CMC (Tr. 509:4-10) and RRS. Tr. 507:23-508:2; Tr. 510:5-12. Mr. Jones provided the same testimony. Tr. 676:20-677:3.

121. In Mr. McDonald's view, Messrs. Robare and Jones were very cooperative with RRS, i.e., they were "very involved and proactive and interested in trying to get it right" (Tr. 557:7-10), they were "very forthcoming" (Tr. 559:8-12), and they were "full, frank and timely" in providing information to him. Tr. 587:8-11. That view was echoed by Ernest Strauss of Triad, who testified that Mr. Robare and Mr. Jones were "prompt" and "full" in their response to requests made of them for anything. Tr. 605:19-24. Mr. Strauss had no reason to believe that Respondents were ever "anything but fully candid with Triad." Tr. 605:25-606:4.

122. While Mr. McDonald could not recall specifically whether he actually saw the 2004 Agreement, it was not vital that he actually saw it (Tr. 584:1-20) or that there was necessarily a reason for him to see the contract itself. Tr. 580:19-581:5.

123. RRS reviewed and updated TRG's Form ADV on an annual basis. Tr. 548:1-10; Tr. 553:18-22; Tr. 587:23-25.

II. PROPOSED CONCLUSIONS OF LAW

1. The Division of Enforcement carries the burden of proving its claims by a preponderance of the evidence.

2. Section 206 of the Investment Advisors Act of 1940 (§206), Rule 204-3, and Form ADV set forth the disclosure obligations of investment advisors. (Tr. 264:5-14).

3. Section 206 makes it unlawful for an investment adviser, by use of the mails or any means of instrumentality of interstate commerce, to directly or indirectly:

> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(5 U.S.C.A. § 80b-6; Tr. 270:13-271:2).

4. Rule 203-4 requires delivery of disclosures, in brochure form, to each client or prospective client which contains the information required by Part 2 of Form ADV.

5. Form ADV Part 2 provides some information on what those disclosures should be. (*Id.*).

6. The standard for completing Form ADV were laid out in the General Instructions to Form ADV (CFR § 275.204-3; RX-124; Tr. 270:13-271:2).

7. The pre-amendment (pre-October 2010) General Instructions to Form ADV do not contain any instructions related to the items contained in Part 2A. (DX-86, 87, 88).

8. The pre-amendment (pre-October 2010) Forms ADV contained a specific set of instructions for completing Part 1A of the Form, but did not include a set of instructions for completing Part 2A (DX-86, 87, 88).

9. The post-amendment (post-October 2010) Forms ADV, as revised, did include "General Instructions for Part 2 of Form ADV". (DX – 90).

10. The General Instructions make clear that, not every potential conflict of interest was required to be disclosed. Instruction No. 3 mandated disclosure of "*material* conflicts of interest." (DX – 90; Tr. 829:19 – 830:13; Tr. 277:21 – 279:1; Tr. 279:17-24).

11. Instruction No. 4 mandated disclosure of "material facts." (DX – 90).

12. If the compensation TRG received from Fidelity pursuant to the 2004 and 2012 Agreements was not material, then any potential conflict of interest created thereby was also not material.

13. Only material compensation need be disclosed on Form ADV.

14. Only material conflicts need be disclosed on Form ADV.

15. The compensation TRG received from Fidelity amounted to only 2.5% of the Firm's annual revenue and therefore was not material.

16. Because the compensation TRG received from Fidelity was not material, any conflict created by the receipt of that compensation was not material.

17. Because the compensation TRG received from Fidelity was not material, it was not a required disclosure under §206 of the Investment Advisers Act or Form ADV.

18. Because any potential conflict created by the compensation TRG received from Fidelity was not material, it was not a required disclosure under §206 of the Investment Advisers Act or Form ADV.

19. Regardless of whether the disclosure was material, TRG disclosed the fact that it may receive compensation, through its broker-dealer, for certain securities transactions in 13A of its Form ADV. (RX-6).

20. Mutual funds are securities.

21. This disclosure disclosed the compensation TRG received, through Triad, from Fidelity, on certain NTF mutual fund transactions.

22. The Firm's subsequent ADV disclosures amended and revised the original disclosure, but continued to disclose the fact that the Firm was receiving this compensation. (RX-11 – RX-15).

23. The Firm's Forms ADV also disclosed that the Firm's receipt of this compensation could give rise to a conflict of interest. (RX-6 – RX-15).

24. Additional disclosures were made to the Firm's clients and prospective clients through TRG's General Information & Disclosure Brochure, Fidelity's Client Account Agreement, and the prospectuses issued by the NTF mutual funds themselves.

25. When assessing the adequacy of the Firm's disclosures, the Court must consider the entire universe of disclosures, instead of focusing on one particular section or sentence in Form ADV.

26. At all times relevant, Respondents acted in good faith and believing their disclosures to be accurate.

27. The Firm reasonably relied on the advice and counsel of its compliance consultants and its broker-dealer, all of whom reviewed its Form ADV and the disclosures contained therein.

28. The Firm reasonably inferred, as a result of its successful 2008 SEC examination, that there were no issues or deficiencies in its Form ADV.

29. The Firm did not breach any duty owed to its clients.

30. The Respondents did not willfully make any untrue statement of material fact in any registration application or report filed with the Commission.

31. The Respondents did not willfully omit any material fact in any registration application or report filed with the Commission.

32. At all relevant times, Mr. Jones believed the Firm's ADVs to be complete and accurate and, to the extent some wrongdoing occurred, he acted without knowledge of its existence.

33. To the extent the Division seeks civil penalties for conduct occurring on or before September 2009, those penalties are time barred pursuant to 28 U.S.C.A. §2462.

34. There are no grounds under the facts of this case for issuance of a cease and desist order.

35. There are no grounds under the facts of this case for an award of sanctions.

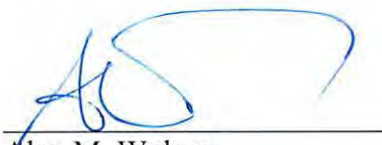
36. There are no grounds under the facts of this case for an award of disgorgement.

37. There are no grounds under the facts of this case for an award of civil penalties.

38. The Division of Enforcement has failed to carry its burden of proof in this case.

Respectfully submitted this 20th day of March, 2015.

ULMER & BERNE LLP



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