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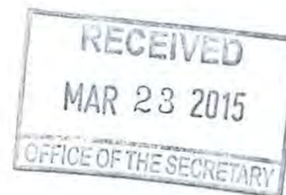

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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 POST-HEARING BRIEF**

Dated: March 20, 2015.

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DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF

The Division of Enforcement ("Division") submits this Post-Hearing Brief and respectfully shows the following:

I.
INTRODUCTION

This case is simple: the primary disputed question for the Court is whether Respondents disclosed to their advisory clients, to whom they owed a fiduciary duty, the existence of the Fidelity Arrangement.[1] The evidence amply establishes they did not. Respondents failed to disclose the Fidelity Arrangement, on Form ADVs or otherwise, from its inception in April 2004 through December 2011. Then, between December 2011 and August 2013, Respondents continued to mislead advisory clients by inaccurately and inadequately disclosing the Fidelity Arrangement.

Respondents agree they knew, in 2004 and after, that the Fidelity Arrangement created a conflict of interest. While they claim they disclosed that conflict at all times they admit they could have disclosed the conflict more specifically but chose not to until December 2011. [Tr. 789:15 – 794:7.] This key concession establishes Respondents' *scienter* – they *knew* they were required to disclose an admitted conflict and intentionally, or at least with severe recklessness, opted *not* to disclose it as clearly and specifically as they could have.

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[1] The Division will utilize herein the same short-hand definitions of party names and other relevant, frequently used terms from prior briefing. Hence, "Fidelity Arrangement" refers to The Robare Group's ("TRG") receipt of fees from Fidelity Investments ("Fidelity"), pursuant their Investment Adviser Commission Schedule and Servicing Fee Agreement ("2004 Agreement") and their replacement Investment Adviser Custodial Support Services Agreement ("2012 Agreement"), in which Fidelity paid TRG fees for custodial support services, based on the volume of advisory client assets that TRG referred to and placed in non-Fidelity no-transaction fee ("NTF") mutual funds purchased on Fidelity's online trading platform.

Respondents premise their defense on the claim that the fee paid by Fidelity is a commission paid by Robare and Jones's broker-dealer and which they were required to receive from a broker-dealer. Specifically, they contend that the fee is a commission, which, they readily acknowledge, registered investment advisers ("RIAs") are not permitted to receive. This claim is a *post hoc* attempt to contort the nature of the Fidelity Arrangement and the plain terms of its underlying contracts to step into existing language in TRG's Form ADVs filed between 2005 and 2011. In reality, the evidence shows that Fidelity paid, and continues to pay, asset-based fees to Respondents in connection with their RIA business —their discretionary placement of advisory clients' assets into non-Fidelity NTF mutual funds.

Tellingly, Respondents presented no evidence at the hearing describing how or why they crafted the particular language they claim discloses the Fidelity Arrangement at Item 13, and later Item 14, of their Form ADVs. Rather, Robare and Jones provided self-serving, unsubstantiated, and undocumented testimony in which they generally claimed they consulted with, and relied on the advice of, third-party consultants and the Commission in arriving at their supposed disclosures. Yet even Robare and Jones do not claim that they inquired of those third parties – or themselves – whether they were fully and fairly disclosing the admitted conflict of interest and discharging their fiduciary obligations.

II.
STATEMENT OF FACTS

A. The Respondents

TRG has operated as a registered investment adviser in Houston, Texas, since 2003. TRG is a Texas limited partnership. [Stipulation of Fact (hereinafter "Stip.") 1.]

Robare, a Texas resident, founded TRG, is its majority limited partner, and serves as its Chief Compliance Officer. [Stip. 2.] He is also president of Robare Asset Management, Inc.

("RAM"), TRG's managing general partner. [*Id.*] Robare owns approximately 83% of TRG, directly or through his ownership in RAM. [*Id.*] Robare is registered with the State of Texas as an investment adviser representative and is associated with TRG. [*Id.*] In addition, Robare has been a registered representative associated with various Commission-registered broker dealers since 1987. [Resp. Ex. 110, at 6 of 13.]

Jones, a Texas resident, is Robare's son-in-law and a limited partner of TRG. [Stip. 3.] He owns 17% of TRG, either directly or through his ownership in RAM. [*Id.*] Like Robare, Jones is registered with the State of Texas as an investment adviser representative and is associated with TRG. [*Id.*] Jones has been a registered representative associated with Commission-registered broker-dealers since 1994. [*Id.*]

TRG offers investment portfolio management services, primarily to retail clients and high net-worth individuals. [Stip. 4.] As of August 26, 2013, TRG served as an investment adviser to approximately 350 separately managed discretionary accounts[2] and had approximately $150 million in assets under management. [Stip. 1.] From TRG's inception as an independent registered investment advisory firm in 2003, it has used Fidelity for execution, custody, and clearing services for TRG's advisory clients. [Stips. 4, 5.]

TRG offers advisory clients seven different model portfolios, largely comprised of mutual fund investments available through Fidelity's online investment platform. [Stip. 4.] As an RIA, TRG manages its clients' assets on a discretionary basis. [Tr. 417:3-9.] TRG invests a significant portion of its advisory clients' assets in non-Fidelity NTF mutual funds offered on Fidelity's platform. [*Id.*]

[2] Robare testified that TRG has "just under 300 households" as clients, on its IA side. [Tr. 301:23-24.]

Robare and Jones also provide brokerage services to clients. [Tr. 425:14 - 426:10.] Approximately half of TRG's business is brokerage business and half is investment advisory business. [Tr. 425:9-19.] TRG is not a registered broker-dealer; it executes brokerage transactions through Triad Advisors, Inc. ("Triad"), a Commission-registered broker-dealer. [Tr. 420:8-25; Stip. 8.] Robare and Jones, individually, are registered-representatives of Triad. [Stip. 7.]

B. Sequence of Events

1. Robare and Jones registered TRG as an independent investment adviser in 2003.

Robare and Jones created TRG as a limited partnership in 2000 while they were employed as investment advisers and registered representatives at Allmerica Financial ("Allmerica"). [Tr. 293:19 - 294:1.] At the end of 2002 and into early 2003, Robare and Jones left Allmerica and registered TRG as an independent advisory firm with the Commission. [Tr. 297:2-17.]

Robare and Jones became familiar with Fidelity's investment platform during their tenure at Allmerica, as Allmerica used that platform as well as Fidelity's custody and clearing services for its advisory clients. [Tr. 297:20-25; 299:5-11; 736:17-21.] Because of their experience and familiarity with Fidelity, Robare and Jones elected to use Fidelity's platform, and custody and clearing services, for TRG and memorialized their agreement with Fidelity in early 2003. [Tr. 38:10 – 39:9; 737:7-11; DOE Ex. 6.]

Around the same time, Robare and Jones individually associated as registered representatives with Triad to provide brokerage services to TRG's clients. [Stips. 7, 9.]

2. *TRG entered into the first servicing fee agreement with Fidelity in 2004 and the evidence establishes that the agreement contemplated payment of an asset-based fee, not a commission.*

In early 2004, Triad's president informed Respondents that Fidelity had a "revenue sharing arrangement" to help its adviser-clients with their business. [Tr. 312:2 – 313-4.] Respondents contacted Fidelity to discuss entering into such an arrangement. [Tr. 312:7 – 313:4; 428:8 – 429:3; Stip. 10.] Respondents learned that in fact, Fidelity did – and does – have a program whereby it pays servicing fees to RIAs in connection with (1) the placement of advisory client assets into non-Fidelity NTF mutual funds; and (2) the provision of certain services to those end clients. [Tr. 33:12-23; 34:18 – 35:21.] Fidelity's fee program was initially called the "servicing fee program" and is now called the "custodial support services program."[3] [Tr. 32:24 – 33:11.] Fidelity has never advertised this program to its RIA customers; advisers must ask for it. [Tr. 99:1 – 100:1.] As a result, only about 40 of Fidelity's roughly 2,700 RIA customers have agreements to receive these fees. [Tr. 32:20-23; 37:4-10.] The parties agree that Respondents asked to join Fidelity's fee program, Fidelity agreed, and they – along with Triad – executed the 2004 Agreement titled "Investment Adviser Commission Schedule and Servicing Fee Agreement" in or around April 2004, although it was effective February 5, 2004. [Tr. 47:3-20; DOE Ex. 9.]

The 2004 Agreement provided, in a section plainly titled "Servicing Fee Revenue," that Fidelity would pay basis points to TRG for all of TRG's investor assets invested in non-Fidelity

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[3] The Agreement has also been variously referred to throughout this case as the "SFA," the "CSSA," the "servicing fee agreement," the "custodial support services agreement," and the "Fidelity agreement." [Tr. 32:24 – 33:8.]

NTF mutual funds.[4] [DOE Ex. 9.] As is still the case today, Fidelity only paid TRG the fee when TRG placed its clients – over whose accounts Respondents' had discretion – in non-Fidelity NTF mutual funds. [Tr. 49:8-18.] Moreover, as TRG's client-asset volumes reached certain targets, the basis points paid to TRG increased. [Tr. 48:6 – 49:7; DOE 9, at 1.] Thus, as Robare himself acknowledged, the obvious effect of the Fidelity Arrangement is its "tendency to slant our portfolios to maximize CSSA revenue." [Tr. 335:14-21.] Because Respondents were incentivized, consciously or unconsciously, to place their advisory clients' assets into non-Fidelity NTF mutual funds, the Fidelity Arrangement created a conflict of interest they admit they were required to disclose. [Stip. 20; Tr. 719:10 – 720:24.] Indeed, the 2004 Agreement expressly addressed Respondents' duty to disclose the Fidelity Arrangement:

> TRG shall be responsible for reviewing and determining whether additional disclosure is necessary in the Form ADV or Form B/D, respectively, or otherwise with respect to the terms and conditions of this Agreement and obtain any necessary consents.

[DOE Ex. 9, at 2; Tr. 52:2-19.]

The parties agree that Fidelity drafted the 2004 Agreement, that Triad was a party to it, and that Triad kept 10% of Fidelity's payments and the remaining 90% passed through to TRG. [Stips. 11, 18, 19.] Further, the record makes clear that Triad was only included in the 2004 Agreement as an "administrative choice," made at Triad's request.[5] [Tr. 141:15 – 142:15; 195:18 – 196:3; DOE Ex. 34, p. 5 ("Triad advised that any compensation Fidelity paid to Robare under

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[4] The 2004 Agreement states that "TRG will in those situations where it deems it appropriate and in the best interests of its clients, *refer* clients to Fidelity. The following schedule details the fee payments between TRG and Fidelity with respect to such asset management fee based accounts…." [DOE Ex. 9 (emphasis added).]

[5] Fidelity does not know why Triad was included in the 2004 Agreement. [Tr. 53:8-10; 141:11-14.]

the CSSA must be paid through Triad, not directly to Robare".)] Hence Respondents' claim that the Fidelity fees were commissions required to be paid through their broker-dealer, and that they were presented a tri-party agreement as a *fait accompli* is disingenuous and unsupported by the evidence. And even if that claim had any basis, it does nothing to change the nature of the fee TRG received.

Rather, the claim that Triad's inclusion in 2004 Agreement proves that Fidelity's fees were commissions relies on a tautology – that the fee was a commission because it was routed through the broker-dealer, and that it was routed through their broker-dealer because it was a commission. [Tr. 429:4 – 433:22.] This claim makes even less sense when one considers the substance of the Fidelity Arrangement. And the claim fails upon the crucial fact that the basis upon which Fidelity pays the fee to TRG remains unchanged under the 2012 Agreement even though Triad was omitted as a party.[6]

The best evidence of what Fidelity paid TRG under the Fidelity Arrangement came from Fidelity itself. The Division presented two witnesses from Fidelity whose testimonies were clear and uncontroverted – Melissa Morganti-Zizza and Tim Fahey. Ms. Morganti-Zizza has been employed with Fidelity for more than 25 years and serves as Fidelity's Senior Vice President in charge of business management within Institutional Wealth Services ("IWS"), the Fidelity division that supports investment advisors like TRG. [Tr. 25:8 – 26-6.] She established several key points including:

[6] Ultimately, Triad's participation in the 2004 Agreement, and omission from the 2012 Agreement, are irrelevant to Respondents' fiduciary duty to disclose the admitted conflict created by the Fidelity Arrangement. The effect of Triad's participation is a red herring posited by Respondents to further their claim that Fidelity's fees were always commissions, so they can back into the existing language in TRG's Form ADVs, where they disclosed other, unrelated sales commissions-related conflicts. [*See* discussion *infra* at Section II.C.]

- Fidelity's platform offers Fidelity and non-Fidelity mutual funds, and only two types of non-Fidelity mutual funds are available, TF (transaction fee) and NTF. [Tr. 29:9 – 30:2.]

- The purpose of the servicing fee was (and is) to compensate TRG for placing end-customers into non-Fidelity NTF mutual funds and providing certain administrative services to those customers. [Tr. 33:12 – 34:8; 35:8 – 36:6.]

- Payments made under the Fidelity Arrangement were for TRG's benefit. [Tr. 53:18-20.]

- Including Triad as a third-party to the SFA was unique. [Tr. 53:21-24.]

- The Fidelity Arrangement fees are not commissions. [Tr. 36:16-19.]

- The Fidelity Arrangement fees are not selling compensation. [Tr. 36:20-22.]

- The Fidelity Arrangement fees are not 12b-1 fees.[7] [Tr. 31:14-15; 63:25 – 64:3; Tr. 91:19-21.

- The Fidelity Arrangement fees were not paid in connection with any distribution or marketing by TRG. [Tr. 63:8-10.]

- Fidelity's relationship with TRG is strictly in connection with TRG's investment advisory business. [Tr. 54:16-18.]

- The CSSA that replaced the SFA continued paying basis points for placement of advisory clients' assets into non-Fidelity NTF mutual funds. [Tr. 58:2-7.]

- Under the SFA and CSSA, TRG was required to disclose the conflict of interest created by the Fidelity Arrangement. [Tr. 58:-11; DOE Ex. 9; DOE Ex. 33.]

- While the underlying contract changed, the substance of Fidelity Arrangement has not changed since at least 2010 – it is basis points paid on assets placed under management by TRG in non-Fidelity NTF mutual funds. [Tr. 37:22 – 38:9.]

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[7] A 12b-1 fee is "[a]n annual marketing or distribution fee on a mutual fund. The 12b-1 fee is considered an operational expense and, as such, is included in a fund's expense ratio. It is generally between 0.25-1% (the maximum allowed) of a fund's net assets. The fee gets its name from a section in the Investment Company Act of 1940." *See* *http://www.investopedia.com /terms/1/12b-1fees.asp.*

Ms. Morganti-Zizza's testimony was clear that the fees paid to TRG arose from TRG's role as an investment adviser, were not sales commissions, and had nothing to do with brokerage transactions.

3. *Fidelity admonished TRG in December 2011 that its Form ADV failed to disclose the 2004 Agreement.*

On December 1, 2011, Respondents' relationship manager at Fidelity, Tim Fahey, telephoned Jones and told him that, after reviewing TRG's Form ADV, Fidelity observed that TRG failed to disclose the Fidelity Arrangement. [Tr. 112:15 – 113:4; 122:7-11.] Fahey followed that call with a confirming email the next day. [Tr. 115:11 – 116:7; DOE Ex. 41.] Fidelity imposed a deadline for TRG to update its Form ADV to disclose the Fidelity Arrangement. [Tr. 120:21-24; DOE Ex. 43.] Fahey testified that he informed Respondents that Fidelity would terminate its fee payments if TRG failed to disclose the Fidelity Arrangement on Form ADV. [Tr. 121:10 - 122:1.][8]

Tellingly, neither Jones nor Robare ever questioned, disputed, or objected to Fidelity's assessment that TRG's Form ADV failed to disclose the Fidelity Arrangement. [Tr. 122:18 – 123:7.] Nor did Respondents bring to Fidelity's attention any other document in which they claimed to have disclosed the Fidelity Arrangement. [Tr. 123:8-11.][9]

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[8] Other emails confirm that Robare and Jones knew Fidelity would stop the payments if Respondents did not update their Form ADV. [DOE Exs. 46, 47.] In fact, Jones urged their consultant to file the updated Form ADV immediately, so that Fidelity would not hold up TRG's compensation. [DOE Ex. 46.]

[9] Further evidence of Jones's response, upon being told that Fidelity believed that TRG had made no disclosure at all, can be found in the contemporaneous notes Fahey made of his communications with TRG in Fidelity's customer relationship management database. [DOE Ex. 36; Tr. 123:12 – 124:9; 126:5 – 127:12.]

On December 9, 2011, Fahey emailed Jones again to advise that Respondents' disclosure deadline had been accelerated to December 16th. [DOE Ex. 43.] Fahey's email reiterated TRG's obligation to disclose the 2004 Agreement on Form ADV and its failure to do so, stating:

> We recently looked at your firm's ADV and did not find this disclosure information. Please update your ADV on or before December 16, 2011 to ensure that the CSSA payments continue without interruption.

[*Id.*]

Fidelity provided Respondents sample language for disclosing the fee arrangement. [DOE Ex. 41.] On December 11, 2011, Jones sent Fahey proposed language for TRG's disclosure that largely ignored Fidelity's detailed sample language. [*Compare* DOE Ex. 41, at 2, *with* DOE Ex. 44, at 1.] Fahey responded that Fidelity "can't approve/disapprove" TRG's language, but indicated that the proposed language would be acceptable to Fidelity. [DOE Ex. 45, at 1.] But Fahey's testimony made clear that while Fidelity considered TRG's language sufficient to satisfy Fidelity's own requirement that the arrangement be disclosed, Fidelity did *not* approve the proposed disclosure in connection with TRG's regulatory or fiduciary obligations.[10] [Tr. 130:8 – 132:11.]

4. *TRG and Fidelity renewed their fee arrangement in the 2012 Agreement that omitted Triad.*

In November 2012, Fahey informed Respondents that Fidelity was updating its forms and asked TRG to sign a new contract related to the servicing fees, the 2012 Agreement titled

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[10] With good reason, Respondents do not claim they relied on Fidelity's approval when they first disclosed the Fidelity Arrangement in December 2011, albeit inadequately, because, for instance, they did not ask Fidelity for legal advice in connection with the Fidelity Arrangement. [Tr. 117:21 – 118:1.]

"Investment Advisor Custodial Support Services Agreement".[11] [Tr. 139:1-10; DOE Ex. 33.] While the contract was new, the underlying program of paying servicing fees to RIAs, and the basis for those payments, did not change. [Tr. 37:19 – 38:9; 56:11-14.]

Like the 2004 Agreement, the 2012 Agreement entitled TRG to fees when it invested its advisory clients' assets in non-Fidelity NTF mutual funds. [DOE Ex. 33.] Fidelity still expected TRG to provide the same services to its end customers, as before. [Tr. 56:11-14; 57:11 – 58:1; DOE Ex. 33, at 7 of 11.] The basis points and escalating volume targets remained the same. [Tr. 58:2-7; DOE Exs. 9, 33.] TRG remained contractually obligated to disclose the Fidelity Arrangement. [Tr. 58:8 – 60:18; DOE Ex. 9, 33.] Of course, the 2012 Agreement continued to present a known conflict of interest Respondents were required to disclose. [Stip. 30.] The only significant change in the 2012 Agreement was the omission of Triad as a party. [Stip. 23; DOE Ex. 33; Tr. 141:15 – 142:15.]

Between November 2012 and May 2013, Respondents asked Fahey why Fidelity's fees were being routed through Triad. Fidelity could find no justification for Triad's involvement, and Respondents chose to have the payments paid to them directly. According to Fahey:

> Q: Did Robare or anybody at TRG indicate to you that they would prefer to be – that they would prefer to have Triad not be a party to this new contract?
>
> A: At some point, I was asked why the payments are going through Triad, I believe, by Mark in an email, though I can't remember specifically. And through my inquiries, through Fidelity's organization, through LRC and finance, [I] was able to confirm that it was an administrative choice. That we didn't require any payment to a third party of any kind so that we said, we'll change

[11] The 2004 Agreement remained in effect until late spring of 2013. [*See* Stips. 21, 22.] While Robare did not sign the 2012 Agreement until May 23, 2013, and Fidelity executed it even later in July 2013, the effective date of the CSSA is November 21, 2012.

it to direct payment to make it more convenient and easier for the client.

. . .

Q: Was that a request that The Robare Group made to be paid directly?

A: I think it was a response to my question, which is we've uncovered no reason that we are paying this through Triad, would you like us to pay directly to you. And their response was yes.

Q: And do you recall who specifically responded yes?

A: I don't, but I believe it was Mark.

[Tr. 141:15 – 142:15; *see also* 195:8 – 196:22.]

In May 2013, Fahey told Jones that Fidelity would terminate the fees unless TRG executed the 2012 Agreement. [Resp. Ex. 92, at 5.] Respondents executed the 2012 Agreement on May 23, 2013. [Resp. Ex 92, at 3-5.] In fact, Fidelity began paying TRG directly in May 2013 and continues to do so now. [DOE Ex. 35; Tr. 761:19 – 762:4.] This is critical: if the fees Fidelity paid TRG were *required* to be paid through Triad because they were commissions, or 12b-1 fees, the 2012 Agreement is unenforceable – which no party contends. Rather, the record is clear that since 2004, Fidelity has paid TRG the *same* fee for the *same* placement of assets into the *same* mutual funds, and the only substantive change over time has been the omission of Triad as a party.

Respondents have been unable to explain away this key fact: if the fees were commissions because they were required to be paid through a broker-dealer between April 2004 and April 2013, they ceased to be commissions when no longer paid through a broker-dealer beginning in May 2013.[12] It must be the case that Respondents are now either illegally receiving

[12] Robare continued to insist that the fees were still "commissions", even when Triad was no longer serving as the pass-through agent. [Tr. 434:17 – 435:20.]

commissions in connection with their advisory work, *or* they never were receiving commissions, but rather the asset-based fees Fidelity has long-described the payments to be—which means Respondents never disclosed the fees. Jones's testimony on this core issue is illuminating:

> Q: And you believed it was a commission because of the presence of Triad in the 2004 contract?
>
> A: Among other things.
>
> ...
>
> Q: So my question is: You characterized these payments as a commission because of and only because of Triad's connection as a party to the contract between the 2004 and 2012 agreement?
>
> A: No. We additionally believed they were 12b-1 fees that were required to be paid through a broker-dealer in the manner that you described we ultimately received the payment.
>
> Q: And you agree that as a registered investment adviser, you are prohibited from receiving 12b-1 fees from Fidelity, correct?
>
> A: That's my understanding directly, yes.
>
> Q: And the only way that you could conceivably receive a 12b-1 fee from Fidelity is that it would have to be routed through Triad and paid to you?
>
> A: That was our understanding, yes.
>
> ...
>
> Q: But you know you were not permitted to receive 12b-1 fees as a registered investment adviser, correct?
>
> A: We understood that was the reason that Triad was part of the tri-party relationship.
>
> Q: And today, The Robare Group is not allowed to receive 12b-1 fees from Fidelity, correct?
>
> A: That's as we understand it, yes.
>
> Q: And today, The Robare Group continues to receive fees from Fidelity in connection with the Fidelity Arrangement, doesn't it?

A: Yes.

Q: And those are not 12b-1 fees that you are paid today, are they?

A: We don't know. They're either - -

Q: I'm sorry. Go ahead.

A: They're either 12b-1 or distribution fees.

...

Q: My question is: Do you believe your firm may currently be receiving 12b-1 fees in connection with its advisory business?

A: I'm not sure.

...

Q: But this is an important issue, so I want to make sure that we are understanding each other, because I don't want to misunderstand you here. Is it your position that The Robare Group may currently be receiving 12b-1 fees in connection with its advisory business?

A: We don't know. I don't know.

[Tr. 757:13 – 761:9.] Robare offered the same circular testimony when he claimed Fidelity's fees were obviously commissions insofar as they were paid through Triad. [Tr. 429:4-17; 431:25 – 434:15.]

As stated earlier, it is clear that Respondents' re-labeling of Fidelity's fees as commissions or 12b-1 payments was done to take advantage of the fact that their Form ADVs during the relevant period happened to disclose the possibility of commissions, albeit in the brokerage-transaction context.

C. Respondents' Form ADV's Between 2004 and 2013 failed to disclose, or inadequately disclosed, the Fidelity Arrangement.

Respondents agree the Fidelity Arrangement always presented a conflict of interest that they knew they were required to disclose. [Stips. 11, 12, 14, 18, 20-22, 24, 26-30; Tr. 368:5-17; 442:7 – 443:2; 720:5-24; 727:13 – 729:6.] Respondents also admit they received in excess of $400,000 in fees under the Fidelity Arrangement. [Tr. 501:13 – 502:25; DOE Ex. 35]. Despite these acknowledgements, Respondents intentionally, or at least recklessly, (1) failed to disclose the Fidelity Arrangement between 2005 and December 2011 on Form ADV, or otherwise; and (2) inadequately and misleadingly disclosed it between December 2011 and the end of 2013.

1. Form ADV's Purpose and 2010 Amendment

Advisers Act Section 206, Advisers Act Rule 204-3, and Form ADV, *inter alia*, require investment advisers to disclose conflicts of interest. [Tr. 264:9-22.] Form ADV is a two-part form by which investment advisers register with the Commission. Part 1 of Form ADV is a registration document; Part 2 is a disclosure document intended to inform advisory clients or prospective clients about the investment adviser, the nature of its business, and its conflicts of interest. [Tr. 265:12-24; 268:22 – 270:3.]

In 2010, the Commission amended the format of Form ADV, but not advisers' obligations to disclose conflicts of interest. [Stip. 32;.Tr. 268:9-21; 270:4-12.] The parties agree that before and after the 2010 amendment, Respondents were required to disclose their conflicts of interest, as their requirement to do so is statutory. [Tr. 270:4 – 271:2; 720:5-24.]

Respondents claim they disclosed the Fidelity Arrangement at (1) Item 13A of Form ADV prior to the 2010 amendments and Schedule F thereto; and (2) Item 14 of Form ADV after

the amendment and the pertinent part of the disclosure brochures therewith.[13] [DOE Ex. 2 at 6, 8; DOE Ex. 10 at 6, 17; DOE Ex. 12 at 6, 10; DOE Ex. 13 at 6, 17; DOE Ex. 14 at 6, 20; Resp. Ex. 9, at 14.]

2. *Respondents' Item 13A disclosure before the 2004 Agreement*

In TRG's Form ADV dated January 2, 2003, TRG answered "yes" to Item 13A and stated in Part II, on Schedule F, that "Mark Robare ... & Jack Jones sell securities and insurance products for sales commissions." [DOE Ex. 2.] The Fidelity Arrangement did not yet exist. [Tr. 452:25 - 453:14.]

3. *March 2005 Form ADV*

After TRG entered the 2004 Agreement with Fidelity, TRG updated its Form ADV on March 7, 2005. Even though it had been receiving the Fidelity fees for months, Respondents made *no change* from their prior Form ADV. Robare and Jones both testified that they believed the prior language nevertheless covered the new fees from Fidelity because such fees were "commissions."[14] [Tr. 455:11-23; 778:6 – 779:10.]

4. *August 18, 2005 Form ADV*

Respondents next updated TRG's form on August 18, 2005, and changed the disclosure in Schedule F to state:

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13 Item 13A became Item 14 of Form ADV when the form was amended in 2010. In pertinent part, these forms require advisers to answer whether they receive cash or some economic benefit from a non-client in connection with giving advice to clients and, if they do, to describe that conflict of interest. [*E.g.*, DOE Ex. 10, at 6; DOE Ex. 90, at 93 of 110.]

14 Jones contradicted himself on this point. On direct, he stated that after the 2004 Agreement was signed, Respondents updated TRG's Form ADV August 18, 2005, implying that was the first time they updated their Form ADV after signing the 2004 Agreement. [Tr. 673:20 – 674:24; 677:7-12.] On cross, when he was questioned about the intervening March 2005 Form ADV, he claimed the language there, which was identical to the pre-2004 Agreement, already covered the Fidelity Arrangement. [Tr. 778:6-14.]

> 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-dealer. ... These other arrangements may create a conflict of interest.

[DOE Ex. 10, at 17 of 17.]

That disclosure failed to state or even to suggest that:

- Fidelity was paying TRG a fee;
- The fee Fidelity was paying was for TRG's placement of its clients' assets into NTF mutual funds on Fidelity's investment platform;
- The fee Fidelity was paying might incentivize TRG to place its clients' assets in those mutual funds;
- Such incentive was a potential conflict of interest;[15]
- Fidelity was paying Respondents compensation for actions taken as investment advisers, not for actions as "registered representatives", for decisions made for exercising discretionary authority of advisory assets, not in the "facilitation" of transactions being executed "through such broker-dealer." [Tr. 457:20-22.]

Nevertheless, Robare and Jones both claim this language disclosed the Fidelity Arrangement. [Tr. 677:7-21; *see* Tr. 457:3 – 460:14.] The Fidelity fees have always been paid as a result of Respondents' investment advisory actions, and they have no relation to Robare's or Jones's registered representative relationships with Triad. [Tr. 433:17-22; 459:24 – 460:17; 780:7 – 781:25.] The evidence shows that Triad had nothing to do with the transactions on which the Fidelity fees are paid:

- That Triad did not approve the transactions TRG made in the managed accounts [Tr. 535:25 – 536:4];

[15] Robare admitted that he owed a fiduciary duty to his clients and he wanted them to have the "fullest information possible." [Tr. 442:7-12.] Jones admitted that TRG was required to make a "meaningful disclosure" and its clients should be able to "understand its plain terms." [Tr. 728:1 - 729:19.]

- That Triad did not select the mutual funds for TRG [Tr. 536:5-8];
- That Triad did not process the transactions once TRG decided which mutual funds to purchase [Tr. 536:9-13];
- That Triad did not have the ability to place TRG's advisory clients' funds into the NTF funds and did not have any ability to invest TRG's advisory clients' assets [Tr. 755:25 – 726:24];
- That Triad did not provide investment advice to TRG's advisory clients [Tr. 757:1-3];
- That Triad did not participate in any way in the "facilitation" of the actual securities transactions of placing the TRG advisory clients' funds into the eligible mutual funds [Tr. 807:3 – 808:3].

If it truly was intended to encompass the Fidelity payments (as discussed above, the evidence shows it actually had nothing to do with those fees), TRG's August 2005 Form ADV is completely misleading, causing a reader to think the compensation mentioned relates to Respondents' broker-dealer relationship and activities. And it omits the basis on which Fidelity is in fact paying TRG—the discretionary placement of client assets into NTF mutual funds on Fidelity's platform. Respondents intentionally, or at least recklessly, failed to disclose the Fidelity Arrangement in the August 2005 Form ADV.

5. January 2006, January 2008, and April 2008 Form ADV's

TRG updated its Form ADV three more times after August 18, 2005-- on January 6, 2006 [DOE Ex. 13], January 30, 2008 [Resp. Ex. 9], and April 24 2008 [DOE Ex. 14]. [Stip. No. 31.] Once again, Respondents made no changes to the prior language that they claim disclosed the Fidelity Arrangement and attendant conflicts. Such Form ADVs are, therefore, defective for the same reasons as the August 18, 2005 Form ADV. [DOE Ex. 10.]

6. *March 31, 2011 Form ADV Disclosure Brochure*

On March 31, 2011, Respondents filed TRG's first post-amendment Form ADV Disclosure Brochure.[16] [DOE Ex. 23.] In response to Item 14, they stated as follows:

> 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.

[DOE Ex. 23, p. 22.] With the exception of identifying Triad as the broker-dealer, the first sentence is again identical to the August 18, 2005 Form ADV and is equally deficient. And while Respondents added three new sentences, they continued to fail to identify Fidelity, the fees paid by Fidelity, or the fact that the fees and the Fidelity Arrangement as a whole presented a conflict of interest. In fact, the additional text further obscured the existence of the Fidelity Arrangement and reinforced the idea that any payments Respondents "may" have received were for brokerage-related services. In addition to the deficiencies of the August 2005 Form ADV listed above, the March 2011 Form ADV included new deficiencies:

- It suggested that the referenced "fee arrangements" "shall be more fully disclosed," implying that a fuller disclosure was owed and would be made in the future.
- It suggested that TRG was receiving "compensation" for actions for "the placement of client funds into investment companies," suggesting it was acting as an investment adviser, but then identified the compensation as including 12b-1 fees.

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[16] By this date, the Disclosure Brochure portion of Form ADV was being filed with the Commission, as opposed to being "deemed filed" but in the possession of the investment adviser. [Tr. 451:1-16.]

- It stated that the "compensation" for the placement of assets may take the form of "front-end sales charges or redemption fees."
- It stated that the prospectus for the investment company would give explicit details as to the method and form of the compensation that TRG was purportedly disclosing.

In fact, as the testimony showed:

- The "fee arrangements" were never "fully disclosed" by Respondents elsewhere, at any time.
- TRG, acting as an investment adviser, is not allowed to receive 12b-1 fees. [Tr. 466:9-16.]
- TRG, as an investment adviser, or even otherwise, does not receive front-end sales charges or redemption fees. [Tr. 466:17-20.]
- The prospectuses for investment companies do not provide "explicit detail" about the "method and form of compensation" that TRG is receiving from Fidelity because the prospectuses do not even state that Fidelity is receiving a 12b-1 fee, much less TRG. [Tr. 726:1-11.]

For all of these reasons, the March 2011 Form ADV failed to disclose the Fidelity Arrangement.

7. December 20, 2011 Form ADV Disclosure Brochure

Respondents presented no evidence that they intended to amend TRG's Form ADV to disclose – or improve their purported disclosure of – the Fidelity Arrangement before December 2011. Rather, the evidence establishes that but for Fidelity's December 2011 directive to TRG to disclose their arrangement or forego future fees, Respondents would not have altered their disclosures on Form ADV or otherwise. [*See* DOE Exs. 41, 43-47.]

Thus in December 2011, on threat that their fees would be cut off, Respondents disclosed the following:

> We do not receive any economic benefit from a non-client for providing investment advice or other advisory services to our clients....

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 sales 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 account to us.

[DOE Ex. 25, at 27 of 31 (page 23).]

Even though Respondents satisfied Fidelity's threshold requirement to make *some* reference to the Fidelity Arrangement, TRG's disclosure was woefully deficient and misleading. The first sentence, new to this Disclosure Brochure, denied the very statement that is the reason for providing an explanation in Item 14. Stating that TRG did not receive any economic benefit from a non-client for providing investment advice or other advisory services to clients contradicted the "Yes" answer TRG provided to Question 13A over the previous six years. This first sentence is false and misleading.

The second paragraph is identical to the disclosure in the March 30, 2011 Form ADV, and is thus misleading and incomplete for all the reasons stated above.

The third paragraph is new. For the first time, and only under the threat of losing the payments, Respondents identified Fidelity as providing payments based on "revenue from the sale of funds through Fidelity," as opposed to sales of securities through Triad, Robare's and Jones's broker-dealer. It also states that the fees are based on NTF funds in custody with Fidelity. But it fails to make clear that the fees were paid for TRG's placement of *the clients' assets* into

particular funds, which "could have a tendency to slant" TRG's investment advice [Tr. 335:14-18], and that TRG's receipt of such fees is an actual or potential conflict of interest.[17] This language is hardly the "full and fair" disclosure required by the Supreme Court.[18] *Capital Gains*, 375 U.S. 180, 194 (1963)("courts have imposed on a fiduciary an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts'").

Finally, the third paragraph states that TRG "may" receive additional compensation. The use of the word "may" related to the receipt of the compensation connotes uncertainty.[19] But when the compensation has in fact been paid, for years, such a disclosure is inaccurate and misleading. *See In re Larry Grossman*, 2014 SEC LEXIS 4979, at * 92-93 (Dec. 23, 2014) (Initial Decision) (disclosure that an IA may receive incentive and performance-based

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[17] This disclosure is also misleading because it is only a partial disclosure of the fees. Partial disclosures violate the law if the information omitted would have provided a different picture. *See Lormand v. US Unwired, Inc.*, 565 F.3d 228, 249 (5th Cir. 2009) (under Rule 10b-5, the duty to speak the full truth arises when a defendant undertakes a duty to say anything).

[18] This disclosure is not even in keeping with the standard that Respondents claimed to have. In admitting that he owed a fiduciary duty to his clients, Robare testified that he wanted his clients to have the "fullest information possible." [Tr. 442:7-12.] Jones also admitted that TRG was required to make a "meaningful disclosure" and its clients should be able to "understand its plain terms." [Tr. 728:1 - 729:19.]

[19] Jones testified that Respondents used "may" because the 2004 Agreement stated that mutual funds could terminate *their* payment of fees to Fidelity and, hence, Fidelity could terminate the fees at any time. [Tr. 782:14 – 784:17.] In their Answer, Respondents gave a different excuse: there they claimed that, because not all customer accounts include NTF funds, some accounts would not generate fee payments. Thus, "it was not a fact certain that Respondents would receive any compensation from Custodian as a result of transactions made on a prospective client's behalf…" [Answer, at 9.] This conflicts with Robare's and Jones's testimony that they used NTF funds "exclusively" in their portfolios. [Tr. 306:10 – 307:3; 670:1-3.] Thus, it *was* a fact certain that all their advisory clients would generate the fees for TRG. Finally, even if certain advisory clients' accounts did not trigger Fidelity fees, the record is clear that TRG was obligated to tailor alternate or multiple disclosures to address the varying needs and concerns of its clients. [Tr. 271:3 – 272:22.] For these reasons, the word "may" in this context is completely misleading – it implies an uncertainty where none existed. [Tr. 470:21 – 471:11.]

compensation from certain investment companies was inaccurate and misleading because it actually was receiving this compensation; IA did not notify its clients who invested in particular funds that it had received fees due to the clients' investing in those funds). Respondents' use of the word "may" was therefore misleading: By December 2011, Respondents had been receiving the "additional compensation in the form of custodial support services from Fidelity" for seven years. There was no uncertainty in their receipt of these fees. [Tr. 469:23 – Tr. 470:2.]

8. Subsequent Disclosures

After TRG's December 20, 2011 Form ADV revision, made at Fidelity's behest, Respondents updated TRG's Form ADV four more times through the end of 2013: on March 30, 2012 [DOE Ex. 26]; April 12, 2013 [DOE Ex. 28]; June 2, 2013[20] [DOE Ex. 29]; and August 26, 2013 [DOE Ex. 31]. [Stip. 33.] In each of these documents, Respondents intentionally continued to falsely claim (1) that they did not receive an economic benefit related to their advisory services; and (2) that TRG "may" receive additional compensation in connection with the (3) vaguely-characterized and incompletely described Fidelity Arrangement. [*Id.*] Each of these brochures carried forward the same defects identified in earlier Form ADVs. For the same reasons, these Form ADVs were also materially false and misleading and violated the law.[21] [Tr. 470:10-15.]

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[20] This Disclosure Brochure states "April 2013" on the its cover, but it was filed June 7, 2013. [Tr. 473:7 – 474:2.]

[21] Interestingly, in the April 12, 2013 Disclosure Brochure [DOE Ex. 28], Respondents added language about the scenario that mutual fund issuers may sponsor and pay for client luncheons that Robare hosts, and that "These arrangements may give rise to conflicts of interest, or perceived conflicts of interest, with the firm's clients in connection with Robare's recommendation of certain mutual funds." [DOE Ex. 28, at 22 of 26.] But such arrangements provided substantially less value to Respondents—and therefore less incentive to slant their client services—than the thousands of dollars paid by Fidelity when Respondents placed their clients' assets in eligible mutual funds. Yet Respondents included the language suggesting a

9. *TRG did not disclose its conflict of interest with Fidelity in other documents.*

Respondents claim they augmented the Form ADV disclosures of the Fidelity Arrangement with disclosures in other documents, including their client agreement and their in-house disclosure document. [Tr. 361:15 - 363:13; 775:15 – 777:9; Resp. Exs. 97, 98, 99.] But those documents only generically address conflicts and are devoid of any reference to Fidelity, the Fidelity Arrangement, or the fees Fidelity pays TRG for placing advisory clients' assets into NTF mutual funds.[22]

Respondents also argue that Fidelity itself disclosed the Fidelity Arrangement in certain of its Brokerage Account Client Agreements ("Fidelity Client Agreements").[23] [Resp. Exs. 76-79; Tr. 358:20 – 360:17.] In fact, a portion of *certain* Fidelity Client Agreements, titled "How We Support Your Adviser," mentions Fidelity's servicing fee arrangement and states, "In limited circumstances, we may also make direct payments to your advisor;"... "[t]hese payments may create an incentive for your advisor to favor certain types of investments over others;" and

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possible incentive and conflict of interest *only* in connection with the luncheons, not the Fidelity Arrangement. The June 2, 2013 Disclosure Brochure added language that "similar to the luncheons and events described above, "the Fidelity Arrangement may give rise to conflicts of interest." Nevertheless, the June 2, 2013 and August 26, 2013 Disclosure Brochures still retained the other defects from the previous brochures.

22 When asked to describe these brochures, Robare did not point to any specific language in them that allegedly disclosed the Fidelity arrangement. [Tr. 362:9-23.] After claiming several times that Resp. Exs. 97, 98, and 99 did disclose the Fidelity agreement [*E.g.*, Tr. 672:10-16; 678:9-12], Jones admitted that they did not disclose the Fidelity Arrangement. [Tr. 775:21 – 777:9.]

23 TRG's advisory clients must open brokerage accounts with Fidelity, which serves as custodian of the advisory assets for TRG acting as an investment adviser. [Tr. 27:21 – 28:23; 356:17-25.] This is the account that holds the advisory assets, which TRG has discretionary access to. [Tr. 417:3-9; 421:11 – 422:6; 738:2-21.]

"[y]our advisor may be influenced by this ...."[24] [*E.g.*, Resp. Ex. 79.] But Fidelity did not add this language until sometime between October 2004 and April 2005 – well after the Fidelity Arrangement was created. [*Compare* Resp. Ex 75, dated October 2004, which contains no such language, *with* Resp. Ex. 79, dated April 2005; Tr. 45:10 – 46:5.] And Respondents admit that in early 2003 nearly all of their advisory clients – approximately 150 accounts at the time – followed them from Allmerica to TRG and would have executed new Fidelity Client Agreements. [Tr. 422:19 – 424:13; 739:22 – 741:17.] There is no evidence that the Fidelity Client Agreement that existed when the Fidelity Arrangement was formed contained any statements about Fidelity's fee program. [DOE Ex. 75 (Client Agreement dated October 2004); Tr. 422:19 – 424:13; 737:12-16.] Hence, at least half of TRG's roster of clients during the relevant period never received Fidelity's statement about the Fidelity Arrangement and, of course, Respondents made no such disclosure themselves.[25] And yet, Respondents agree that TRG's clients were entitled to know if and when the advisory relationship with Fidelity changed. [Tr. 741:11-17; 742:5-11.]

Even assuming all of TRG's advisory clients received the Fidelity Client Agreement discussing payment of the custodial support fees – which the evidence does not support --

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[24] Unlike Respondents, Fidelity appropriately used the word "may" to describe the servicing fee program payments.. [*See, e.g.,* Resp. Ex. 76, at 8.] Only about 40 of Fidelity's 2,700 RIA clients participated in the servicing fee program; therefore, most end-customers who received the Fidelity Client Agreement when opening a Fidelity brokerage account did not have an adviser participating in Fidelity's fee program. Indeed, Respondents' silence in its own disclosure documents about the Fidelity Arrangement would lead investors to reasonably believe that TRG was *not* participating in Fidelity's service fee program.

[25] Robare testified that, once his clients opened a Fidelity Brokerage Account to be a TRG advisory client, he did not go back and provide those clients with Fidelity's updated versions of the agreement. [Tr.479:10-24; 480:18 - 481:3.] Thus, the 150 clients who opened their TRG advisory accounts in 2003, plus any new clients who opened TRG advisory accounts in 2004 and early 2005, never saw the language on which Respondents now rely.

Fidelity cannot discharge the fiduciary duties Respondents' owed their advisory clients. Respondents agree that the duty to make a full and fair disclosure of the conflict of interest posed by the Fidelity Arrangement was, and is, their responsibility alone. [Tr. 443:3-6 (a fiduciary cannot delegate his duty); 743:5-8 (Fidelity cannot discharge TRG's fiduciary duty).] Moreover, if Respondents did intend to rely on statements made by Fidelity in Fidelity's Client Agreements after the Fidelity Arrangement was formed, they could have included – or at the very least referred to – Fidelity's language in TRG's Form ADVs. But they did not.[26]

D. The Effects of Respondents' Wrongdoing

Altogether, and unbeknownst to their advisory clients, Respondents received in excess $400,000 from Fidelity pursuant to the 2004 and 2012 Agreements. [DOE Ex. 35.] In addition, hundreds of advisory clients were deprived of the explanation of a potential conflict of interest that their investment advisor was required to provide them in order to allow them to make informed investment decisions.

III. ARGUMENT AND AUTHORITIES

The evidence establishes Respondents' violations of Advisers Act Sections 206(1), 206(2), and 207. Sections 206(1) and (2) prohibit investment advisers from using instruments of interstate commerce to employ any device, scheme, or artifice to defraud, or to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or

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[26] Jones agreed that TRG's advisory clients should not be required to compare and contrast between various documents to understand what a particular disclosure means. [Tr. 799:11-14.] Thus, even TRG's clients who opened advisory accounts after April 2005 received, at best, only a meager reference to Fidelity's service fee program included on page 9 of a 16-page agreement authored by a party other than the client's trusted advisor. Such language, if it can amount to a disclosure, was not likely to have been obvious to, noticed by, or relied on by TRG's clients, particularly in light of TRG's own silence on the issue.

prospective client. 15 U.S.C. § 80b-6(1), (2). Section 207 prohibits investment advisers from willfully making untrue statements of material fact on Form ADV or reports filed with the Commission. 15 U.S.C. § 80b-7.

A. TRG and Robare willfully violated Section 206(1) of the Advisers Act.

To establish a violation of Section 206(1), the Division must show that TRG and Robare (1) are investment advisers; (2) who made materially false or misleading statements or omissions; (3) to clients or prospective clients;[27] and (4) did so at least recklessly or with *scienter*. *See* 15 U.S.C. § 80b-6(1); *see also SEC v. K.W. Brown and Co.*, 555 F. Supp. 2d 1275, 1308 (S.D. Fla. 2007); *SEC v. Blavin*, 557 F. Supp. 1304, 1315 (E.D. Mich. 1983), *aff'd*, 760 F.2d 706 (6th Cir. 1985). While Section 206(1) requires proof that TRG and Robare acted with *scienter*, the Division is not required to demonstrate any "proof of intent to injure" or "actual injury to clients." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. at 192.

1. TRG and Robare are investment advisers.

TRG is an investment adviser. [Stip.1.] Robare is also an investment adviser within the meaning of the Advisers Act, based on facts he admitted. An individual associated with an investment adviser can be charged as a primary violator under Section 206 of the Advisers Act, where the individual engages in activities sufficient to meet the broad definition of "investment adviser" in Section 202(a)(11) of the Advisers Act. 15 U.S.C. § 80b-2(a)(11); *See In re John J. Kenny*, 2003 WL 21078085, at *17 (May 14, 2003). This conclusion is further supported when the individual controls the adviser. *See In re Kenny*, 2003 WL 21078085, at *17. Robare, as TRG's founder and controlling owner, is actively engaged in TRG's business of providing

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[27] Respondents admit they provided TRG's Form ADVs to their clients. [Tr. 361:24 – 362:8; 363:14 – 364:1; 664:3-25; 665:24 – 666:4; Resp. Ex. 99, at 5 of 6 (Paragraph 16, where client acknowledges receipt of the Disclosure Brochure).]

securities recommendations and other advisory services to clients and is compensated for those services, and meets the definition of "investment adviser." [Tr. 514:14 – 515:18.]

2. *TRG and Robare misrepresented and omitted materials facts in their statements to clients and prospective clients.*

a. *Failure to disclose a potential conflict of interest is a material misrepresentation or omission.*

TRG and Robare agree they are fiduciaries. [Stip. 36; Tr. 308:19-22.] As such, they owe "an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' [their] clients." *Capital Gains*, 375 U.S. at 194. [Tr. 442:7-20; 442:24 - 443:2.]

Respondents admit that the Fidelity Arrangement created a potential conflict of interest. [Stips. 20, 30; Tr. 442:17 – 443:2.] As explained in the Division's Pre-Hearing Brief, the omission of actual or potential conflicts of interest is material as a matter of law under the Advisers Act. [Division's Pre-Hearing Brief, at 9-12, discussing *Capital Gains*, 375 U.S. at 191-92 and other authorities.] Consequently, Respondents were required to disclose the Fidelity Arrangement to their clients. Indeed, as the Supreme Court stated in *Capital Gains*, a conflict exists where a relationship "might incline a[n] investment adviser – *consciously or unconsciously* – to render advice which was not disinterested." *Capital Gains*, 375 U.S. at 191-92 (emphasis added).

Robare himself agreed that Respondents could have "a tendency to slant" their investment advice, and their exercise of discretion over advisory clients' assets, as a result of the Fidelity Arrangement. [Tr. 335:14-18.][28] Of course, Robare qualified this key concession by claiming, without proof, that he believes his advice was never *actually* slanted, but his claim

[28] Jones agreed with this statement. [Tr. 725:15-24.]

matters not: an adviser is required to disclose a conflict of interest *even if* he believes it will not result in harm. *See Capital Gains*, 375 U.S. at 194 (citing with approval and quoting *Ridgely v. Keene*, 134 App. Div. 647, 119 N.Y.S. 451 (N.Y. 1909), in which the New York court held that the defendant's "belief in the soundness of his advice is wholly immaterial" and his failure to disclose such was "a palpable fraud"); *Monetta Fin. Serv., Inc. v. SEC,* 390 F.3d 952, 955-56 (7th Cir. 2004).

Realizing the effect of their admission that the Fidelity Arrangement always posed a conflict of interest [Stips. 20, 30], and their further admission that Respondents always knew they were obligated to disclose the conflict [Tr. 441:24 – 443:2; 727:13 – 729:19], Respondents attempted at the hearing to establish that the Fidelity conflict was qualitatively and quantitatively immaterial.[29] But at its core, their argument ignores the well-settled law established in *Capital Gains* and its progeny, which amply establish that the failure to disclose an actual or potential conflict is *per se* material. *See Capital Gains*, 375 U.S. at 201; *Vernazza v. SEC,* 327 F.3d 851, 859 (9th Cir. 2003) ("It is indisputable that potential conflicts of interest are 'material' facts with respect to clients and the Commission"); *SEC v. Slocum, Gordon, & Co.*, 334 F. Supp. 2d 144, 182 (D.R.I. 2004) ("Potential conflicts of interest are always material"); *In re Stein,* 2003 WL 1125746, at *7 (Mar. 14, 2003) (Comm' Op.) ("for a fiduciary...the disclosure of potential conflicts of interest is fundamental to preserving the integrity of the relationship with the client").

[29] Respondents attempt to cozen the Court into assessing materiality as if they were charged with violating Section 10(b) of the Securities Exchange Act of 1934. Charges under Section 10(b) require proof of materiality of a wrongdoer's misrepresentations because, among other things, such wrongdoers are not fiduciaries who owe their clients the highest duty recognized under the law.

Melissa Roverts Harke provided clear, compelling, and uncontradicted testimony on this very issue:[30]

Q: Is the receipt of payment from a third party for the placement of advisory client assets under management and in particular mutual funds a material conflict of interest?

A: [Respondents' objection overruled] I would say it's absolutely a conflict of interest that would be material, and the release says in talking about the adoption of amendments to Form ADV that the plain questions of ADV call for those types of financial conflicts to be disclosed.

Q: And if an investment advisor says I agree and admit that this receipt of funds does, in fact, present a potential or actual conflict for my business, is that a conflict that must be disclosed on ADV?

A: Yes.

[Tr. 280:9 – 281:8.]

Notwithstanding Respondents' claims – or even Ms. Harke's clear recitation of the materiality threshold for conflicts – it is beyond reasonable dispute that the Fidelity conflict was, and remains, material. It was undisputed at the hearing that the Fidelity fee resulted in thousands of dollars paid monthly to Respondents—purely as a result of their discretionary decision to place advisory clients' assets in certain mutual funds. [Tr. 504:16-18; DOE Ex. 35.] And while Respondents counter that such compensation was immaterial because it amounted to about 2.5%

[30] Ms. Harke is a branch chief in the Office of Chief Counsel within the Commission's Division of Investment Management. [Tr. 260:18 – 261:24.] Her Office is responsible for providing legal guidance. [Tr. 261:25 – 262:12.] Prior to working in legal guidance, Harke worked in the Division of Investment Management's rulemaking group, and was there during the consideration of the 2010 amendments to Form ADV. [Tr. 262:13 – 263:22.] Through her work she is familiar with the rules and regulations governing RIAs. [Tr. 263:23 – 264:4.] Specifically, she testified that Form ADV has always required a plain English disclosure of conflicts. [Tr. 270:13 – 273:6.] And, importantly, Harke testified that the Division of Investment Management provides myriad public resources for RIAs and others to obtain guidance regarding their filing and disclosure obligations, including, but not limited to, public email addresses and a phone line for making inquiries directly to her group. [Tr. 265:25 – 267:20.]

of their revenues, in reality that figure constituted nearly a half million dollars to Respondents that they otherwise would not have received.[31]

Furthermore, the Fidelity fees were qualitatively material to Respondents, who specifically requested to participate in Fidelity's fee program. [Tr. 428:8 – 429:3; 745:5-13.] Likewise, Respondents only updated TRG's Form ADV in December 2011 once Fidelity threatened to terminate the fees. [DOE E. 46; Tr. 65:5-19; 467:16 – 468:19.] Moreover, Robare signed TRG's 2012 Agreement after learning Fidelity would terminate the fees unless a new contract was executed. [Resp. Ex. 92, at 3 of 9; Tr. 149:23 – 150:22.] And when Robare became concerned that one or more fee payments were missing, TRG contacted Fidelity to track down the payments. [Resp. Ex. 92, at 6-9, of 9; Tr. 768:12-15.] Ultimately, when Fidelity offered to send the fee payments directly to TRG, instead of through Triad, before the 2012 Agreement was signed, Respondents agreed. [Tr. 141:15 – 142:15; 147:10 – 148:25; 195:8 – 196:22.]

Ultimately, Respondents were obligated to disclose all conflicts, entirely and unreservedly, including the admitted conflict presented by the Fidelity Arrangement. *See Capital Gains*, 375 U.S. at 194. The Court need only determine whether Respondents actually disclosed it. The evidence illustrates they did not.

b. Respondents failed to disclose the conflict of interest in this case.

None of Respondents' Form ADVs from 2005 through 2013—described and discussed in detail above—disclosed, or adequately disclosed, the admitted conflict of interest presented by

[31] In addition, DOE Ex. 78, the Division's corrected version of Respondents' chart [Resp. Ex. 40], showed that the percentage of advisory assets placed in NTF funds ranged from 69% to 91%. Conversely, the percentage of advisory assets placed in Fidelity funds, based on the inverse of the percentages on the corrected chart, ran from 9% to 31%.

the Fidelity Arrangement. Despite their admitted knowledge that the Fidelity Arrangement created a conflict of interest they knew they were required to disclose, Respondents nevertheless failed to disclose the Fidelity Arrangement from March 2005 through March 2011, and then inadequately and misleadingly disclosed the Arrangement between December 2011 and August 2013. The language in Items 13A and 14 of TRG's Form ADVs fell woefully short of providing advisory clients, or prospective clients, a full and fair description of the conflict of interest inherent in the Fidelity Arrangement.

Respondents' defense is that their Form ADVS properly disclosed the conflict because the fees Fidelity paid were commissions, and Respondents disclosed that they received commissions. [Tr. 459:24 – 460:17; 757:7-15; 780:7-17.] This position fails to withstand scrutiny because it is merely a *post-hoc* attempt to avoid liability by shoehorning the facts into TRG's prior disclosures. As noted above, Respondents' argument is circular and self-contradictory. Respondents claim the fees had to be commissions because the payments were routed through Triad, TRG's broker-dealer, but the fees had to be routed through the broker-dealer because they were commissions. [Tr. 418:17-22; 429:4-17; 431:10-17; 432:8 – 433:1; 781:1-16.] This, they claim, is because investment advisers cannot receive commissions. [Tr. 429:4-17; 432:15-20; 759:1-23.] And yet, they freely admit that the fees arose from their actions as an RIA, not from their actions as registered representatives. [Tr. 433:15-22; 781:20-25.]

Robare admitted that no one told him the fees were commissions. [Tr. 429:4-17; 432:11-14.] Simply put, Robare—at best—just assumed the fees were commissions. [Tr. 432:15-22.] He did not ask anyone, including Fidelity or Triad.[32] He claimed he did not even know enough

[32] Fidelity knew that the fees were not commissions. [Tr. 36:16-19.] In December 2011, when Fidelity directed Respondents to update TRG's Form ADV to disclose the Fidelity contract, Fidelity's Legal-Risk-Compliance department obviously read

to ask. [Tr. 433:17 – 434:15.] He made his assumption solely on the "mechanics" of the payment—the fact that Fidelity paid the fees through TRG's broker-dealer, Triad. [Tr. 432:8 - 433:1.] But when the 2004 Agreement was replaced by the 2012 Agreement, Triad was jettisoned. And according to Fahey, Robare readily accepted Fidelity's offer to pay future fees directly to Fidelity. [Tr. 141:15 - 142:15.] Respondents fail to explain how the very same fees are commissions when routed through Triad, but either something else when paid directly to TRG or, worse, somehow still commissions, which they admit they are prohibited from receiving as RIAs. [Tr. 433:15-20; 434:17 – 436:12; 761:6 – 762:24.] This flaw in Respondents' defense exposes the fact that their efforts to re-label the fees as commissions in order to force-fit them into other disclosures they *did* make is nothing but a *post-hoc* justification.

3. *TRG's and Robare's misrepresentations and omissions were made with scienter, and they did not rely in good faith on the advice of third-party professionals.*

The evidence shows that in failing to disclose the Fidelity Arrangement, TRG and Robare acted with a "mental state embracing the intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder, et al.*, 425 U.S. 185, 193 n. 12 (1976).[33] As TRG's founder, controlling owner, and Chief Compliance Officer, Robare unquestionably had personal knowledge about the existence and nature of the Fidelity Arrangement, the underlying contracts, and the receipt of the payments from Fidelity. [*E.g.*, Tr. 371:5-13; 433:17-22; 504:16-18.] He was aware of Fidelity's requirement that TRG disclose the potential conflict of interest to its clients. [Stips. 14, 17, 26;

Respondents' disclosure of commissions but knew that was *not a disclosure of the servicing fees,* which caused them to direct Respondents to amend TRG's form. In addition, Fidelity testified that it was unusual for the servicing fees to be routed through a broker-dealer. [Tr. 53:15-24; 80:1 – 81:10; 141:3-8; Resp. Ex. 92, at 7 of 9.]

[33] Either knowing misconduct or reckless disregard for the truth will establish *scienter. Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000). Conduct that presents a "danger [of misleading] ... that was either known to the defendant or so obvious that the defendant must have been aware of it" establishes *scienter. Id.*

Tr. 441:14 – 442:6.] Moreover, he knew that the fees "could have a tendency to slant" their clients' portfolios. [Tr. 335:14-18; 725:11-24.]

Robare reviewed each of TRG's Form ADVs and possessed the ultimate authority over their contents and filing. [Stip. 34; DOE Ex. 56 (at 68:13-19).] He was thus aware of the disclosures TRG made about *other* compensation and *other* conflicts of interest and was equally aware that TRG was not disclosing – or at least inadequately disclosing – the Fidelity Arrangement. Yet he and TRG failed to make *any* disclosures concerning the Fidelity Arrangement until December 2011 when Fidelity threatened to cut off the payments. [DOE Ex. 43, 46, 47.] Even then, they failed to identify the 2004 Agreement, provide any sort of clear description of the nature of the Fidelity Arrangement, and misleadingly characterized the arrangement as a contingency. [Tr. 469:12 – 470:15; 802:3 – 803:21.]

Robare and TRG attempt to avoid a finding that they acted with *scienter* by claiming that always operated in their clients' best interests. [Tr. 308:19 – 309:3; 537:18 – 538:10; 738:18-21.] But even the mere temptation for personal enrichment is material as a matter of law; the Division is not required to prove that Robare or his clients "would have acted differently if an accurate disclosure was made." *SEC v. DiBella*, 587 F.3d 553, 565 (2d Cir. 2009). Whether Robare acted with "anything other than reasonable and good-faith investment advice" when they entered into, and received fees under, the Fidelity agreements is totally irrelevant. *In re Montford and Co.*, 2014 WL 1744130, at *16 (May 2, 2014) (Commission Op.) ("The soundness of their investment advice is irrelevant to their obligation to be truthful with clients and to disclose a conflict of interest.").

TRG and Robare also hope to avoid a *scienter* finding by claiming they relied in good faith on the advice of myriad compliance consultants. [Tr. 406:24 – 407:3.] As the Division

pointed out in its Prehearing Brief, rebuttal of *scienter* requires proof that a respondent sought advice as to the legality of his conduct, made a complete disclosure to the professional, received advice that his conduct was legal, and then relied on that advice in good faith. *SEC v. Savoy Industries, Inc.*, 665 F.2d 1310, 1314 n. 28 (D.C. Cir. 1981).

Respondents fall well short of meeting the elements required to establish good faith reliance. Robare claimed he and TRG relied on National Regulatory Services ("NRS"),[34] Capital Markets Compliance ("CMC"), and Renaissance Regulatory Services ("RRS") as compliance consultants. [Tr. 406:14-17.] However, Respondents offered no testimony on a single specific conversation they had with any of these consultants. They presented no testimonial or documentary evidence of any specific questions they asked of their consultants, or facts they disclosed to them, or advice they received and followed.[35] [Tr. 507:20 – 511:2.]

Likewise, Respondents cannot escape liability by pointing to Triad and the SEC. Specifically, they also claim to have relied on Triad's supervision of TRG's IA business (as part of Triad's broker-dealer duties) and the SEC exam staff. Triad conducted audits of TRG's business; the SEC conducted a one-day risk assessment exam, which concluded with a "no further action" letter. Respondents' defense with respect to all these entities can be summed up in this way: each one "looked at" TRG's Form ADVs, and no one told them anything was wrong with it. [Tr. 679:10 – 680:18.]

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[34] Respondents did not identify NRS as one of their consultants until the opening statements. In their Wells Submission, Respondents only listed Triad as an "independent compliance consultant" and RRS as a third-party consultant. [DOE Ex. 34, at 4, 5.] In their Answer, Respondents mentioned that they relied on "two separate and independent consulting firms." [Answer, at 2.]

[35] In fact, Robare could not recall the specifics of any conversation. [Tr. 510:19 – 511:22.]

But Respondents have not offered any evidence suggesting it was even close to reasonable for Respondents to have been assured any of these entities were examining the disclosure of the Fidelity Arrangement. In fact, there is no evidence suggesting that these entities even knew about the existence of the 2004 Agreement.[36] And there is certainly no evidence demonstrating that TRG was specifically looking to them for advice on whether the particular disclosure in response to Items 13A and 14 were accurate, in light of the Fidelity Arrangement. Their "reliance" on their consultants falls far below the standard for rebutting the other, abundant evidence in the record of their *scienter*.

At the very least, the Respondents' conduct was severely reckless. *Scienter* may be established by "recklessness, defined as ... an extreme departure from the standards of ordinary care." *In re David Henry Disraeli*, 2007 WL 4481515, at *5 (quoting *SEC v. Rubera*, 350 F.3d 1084, 1094 (9th Cir. 2003)). In TRG's and Robare's actions in failing to fully and accurately disclose to their clients the Fidelity Arrangement, the payments they received, the potential conflict the payments created, and the fact that Fidelity's payments "could have a tendency to slant" their investment advice, TRG and Robare were at the very least extremely reckless.

Finally, regardless of whether Robare and TRG believed the fees were commissions, the lack of disclosures from 2004 through 2013 did not comport with Respondents' fiduciary duty to make sure their clients received a clear statement describing the Fidelity Arrangement and its attendant conflict of interest. Robare and TRG were thus at least extremely reckless in failing to *know* that the Fidelity fee payments were not "commissions."[37] Hence, based on the record

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[36] While Triad was a party to the 2004 Agreement, there is no evidence that the Triad auditors who saw TRG's Form ADV were aware of the Fidelity Arrangement.

[37] For reasons discussed in greater detail above, Robare and TRG cannot avoid a finding of *scienter* by claiming they believed the Fidelity payments were "commissions." They knew – or

evidence in this case, it is clear that Robare's failures to disclose the Fidelity conflict were undertaken with *scienter*, and his *scienter* is imputed to TRG. *See SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1089 n.3. (2d Cir. 1972).

B. TRG and Robare willfully violated Advisers Act Section 206(2).

The elements of Section 206(2) are identical to Section 206(1) except that "Section 206(2) simply requires proof of negligence." *SEC v. Pimco Advisors Fund Mgmt. LLC*, 341 F. Supp. 2d 454, 470 (S.D.N.Y. 2004). The Division need only show that TRG and Robare:

> ... failed to exercise the ordinary care required of an investment adviser in meeting [their] obligations under the Advisers Act and keeping [their] clients and prospective clients informed of all relevant, material information.

SEC v. Bolla, 401 F. Supp. 2d 43, 72 (D.D.C. 2005). Negligence is not a mental state but rather conduct that fails to satisfy an applicable standard of care. *See Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009) (discussing violations of Section 14(a) of the Exchange Act, which also does not require *scienter*, and holding that "negligence is not a state of mind; it is a failure ... to come up to the specified standard of care"); W. Page Keeton, et al., PROSSER AND KEETON ON THE LAW OF TORTS, § 31, at 169 (5th ed. 1984) ("Negligence is conduct, not a state of mind."). Because of their fiduciary obligations, an investment adviser's mere failure to disclose potential or actual conflicts, without more, can constitute a negligent violation of Section 206(2).

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were extremely reckless in not knowing – that the payments were not "commissions." Respondents repeatedly admit that as RIAs they are not permitted to receive commissions. [*E.g.*, Tr. 418:17-19; 759:1-4.] And they agree that Fidelity paid them in connection with the parties' investment advisory client relationship with Fidelity. [Tr. 433:17-22; 781:20-25.] Respondents never bothered to ask Fidelity whether it considered the payments to constitute commissions. [Tr. 431:25 – 433:20; 434:4-15; 746:2-19.] They never asked whether they were legally permitted to receive the Fidelity payments. [*See id.*] They never provided the underlying fee contracts to their compliance consultants to understand what they were receiving from Fidelity and whether they were properly disclosing the arrangement. [Tr. 578:2-25.]

See SEC v. Tambone, 550 F.3d 106, 146 (1st Cir. 2008). Thus, even if the Court does not find that TRG and Robare violated Section 206(1) with *scienter*, it should nevertheless find them liable for violating Section 206(2).

To show that Respondents acted willfully, the Division must show merely an intent to do the act that constitutes the violation. *See Wonsover v. SEC,* 205 F.3d 408, 414 (D.C. Cir. 2000); *SEC v. K.W. Brown and Co.*, 555 F. Supp. 2d 1275, 1309 (S.D. Fla. 2007) ("A finding of willfulness does not require intent to violate (or scienter), but merely intent to do the act which constitutes a violation"). Here, the parties agree that Respondents intended to form the Fidelity Arrangement and intended to file the subject Form ADVs at issue. [Stips. 11-14, 18, 20-21, 24-30, 31, 33-35.]

It is undisputed that the Fidelity Arrangement created a potential conflict that "could have occurred to the detriment of clients." *Slocum, Gordan & Co.*, 334 F. Supp. 2d at 183. [Stips. 20, 30; Tr. 335:14-18.] As the *Slocum* court acknowledged, "the fiduciary duty imposed on Defendants *compelled* disclosure" of the potential conflict to the client. *Id.* at 184 (emphasis added). It is also undisputed that Respondents knew the conflict existed when it arose in 2004 and knew then that they were obligated to disclose it. [Tr. 422:19 – 424:13; 739:22 – 741:17.] Despite being armed with this knowledge and aware of their obligations, Respondents never asked Fidelity:

- Why it was paying the fees to advisors. [Tr. 746:2-4.]
- What the fees were for. [Tr. 746:5-8.]
- Where the fees came from. [Tr. 746:9-12.]
- How Fidelity characterized the payments. [Tr. 746:13-16.]

Astonishingly, Respondents also claim they never asked – and never knew – *which* non-Fidelity NTF mutual funds triggered payment of the Fidelity fee.[38] [Tr. 342:4-9; 745:24 – 746:1; 747:9 – 752:5.] But Jones was impeached on this issue at the hearing and ultimately admitted that Respondents possessed data from which they could determine the specific funds covered by the Fidelity Arrangement – they simply chose not to. [Tr. 751:11 – 752:20.]

> Q: At some point, your firm had access to a thumb drive from which you could have derived the information of which funds were eligible in paying the Fidelity fee, correct?
>
> A: Correct. But I would add that we would only know which ones were eligible that we were in at the moment. It had nothing to do with new funds that we might choose to add, select and deselect in portfolios.
>
> . . .
>
> Q: You never tried to go ask that question [of Fidelity] did you?
>
> A: We had no need to find that information out.
>
> . . .
>
> Q: And your testimony in 2012 was that it was not worth your time to go through the data on that thumb drive to determine which funds, at least at that time, were paying the fee pursuant to the Fidelity Arrangement, correct?
>
> A: Then or now it's not worth our time.

[Tr. 751:11 – 752:20.]

Respondents' decision to seek out and enter into the Fidelity Arrangement without inquiring about its nature, purpose, or characterization, and their further decision to remain willfully blind to that information falls woefully short of the standard of care applicable to fiduciaries; they simply chose not to act in the best interest of their advisory clients. Considering

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[38] The record is undisputed that Fidelity's platform offers Fidelity and non-Fidelity mutual funds and that there are only *two* types of non-Fidelity mutual funds available, TF (transaction fee) and NTF. [Tr. 29:9 – 30:2.]

the fact that (a) Respondents voluntarily lacked available, critical information concerning the Fidelity Arrangement when they filed Form ADVs during the relevant period; and (b) a fair and reasonable reading of TRG's Item 13A and 14 disclosures on Form ADVs during the period does not reveal, or suggest, the existence or true nature of the Fidelity Arrangement, it is clear that Respondents' conduct during the relevant period was unreasonable and, consequently, negligent and violative of Advisers Act Section 206(2).

C. Jones willfully aided and abetted, and caused, TRG and Robare's violations of Advisers Act Section 206(1).

Jones aided and abetted, and caused, TRG and Robare's Sections 206(1) and 206(2) violations. The three elements necessary to find aiding and abetting liability are: (1) a primary violation of the securities laws; (2) "general awareness" by the aider and abettor of his role in the violation; and (3) "that the aider and abettor knowingly rendered 'substantial assistance' in furtherance" of the violation. *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 621 (5th Cir. 1993) (citations omitted); *In re Clarke T. Blizzard*, 2004 WL 1416184, at *5 n.10 (June 23, 2004) (Comm'n Op.). For "causing" liability, three elements must be established: (1) a primary violation; (2) an act or omission by the respondent that was a cause of the violation; and (3) the respondent knew, or should have known, that his act or omission would contribute to the violation. *In re Robert M. Fuller*, 2003 WL 22016309, at *4 (Aug. 25, 2003). A finding that a respondent willfully aided and abetted violations of the securities laws necessarily makes that respondent a "cause" of those violations. *See In re M.A.G. Capital, LLC,* 2009 WL 510315, at *4 (March 2, 2009); *In re Blizzard*, 2004 WL 1416184, at *5 n.10.[39]

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[39] Jones may be held liable for causing a non-*scienter* violation of Section 206(2) even if aiding and abetting is not established. For non-*scienter* offenses, "causing" liability requires only a showing of negligence. *See, e.g., In re Don S. Hershman,* 2011 WL 323849, at *7 (Feb. 2, 2011).

As discussed above, TRG and Robare violated Sections 206(1) and 206(2) of the Advisers Act. Jones was aware of all the key facts underlying the violations – he knew the Fidelity Arrangement was formed, and that when it was formed it posed a conflict of interest that TRG needed to disclose. [Stips. 14, 16-18, 20, 24-30, 36; Tr. 728:13 – 729:5.] He was aware of the contents of the relevant Form ADVs and reviewed them before they were filed or furnished. [Stip. 35.] Importantly, Jones signed each of TRG's Form ADVs from August 18, 2005 forward. [Stip. 35.] Jones was, therefore, aware of his role in and substantial assistance in furtherance of Robare and TRG's violation.

Jones was also Fidelity's primary point of contact at TRG. [*See* Tr. 467:24 – 468:8.] He was directly involved in communications in December 2011 in which Fidelity required TRG to disclose their arrangement or risk termination of further receipt of fees. In fact, when Fidelity confronted Jones about TRG's failure to disclose the Fidelity Arrangement, he did not object or disagree. [Tr. 122:2 – 123:11; 132:16 – 133:6; DOE Exs. 41- 47.]

Despite Fidelity's communications with Jones, TRG ignored Fidelity's suggested disclosure language stating that TRG "shall receive" payments under the Fidelity agreement. [DOE 41, at 2.] And while Fidelity's proposed disclosure also stated that the Fidelity Arrangement might create a conflict of interest, TRG intentionally chose not to use that language in Form ADVs Jones reviewed and signed. [Tr. 792:9 – 794:7.] Instead, TRG opted to disclose that it "may" receive additional compensation and omitted to state that the Fidelity Arrangement created conflict of interest. [DOE Exs. 25, 45.] Jones signed the December 2011 Form ADV in response to Fidelity's disclosure-directive, knowing he and his firm had rejected fuller and more complete language Fidelity proposed which would have explained the material facts more clearly to TRG's advisory clients. [Tr. 793:12 – 794:7.]

The evidence shows that between 2005 and 2011 Respondents wholly failed to even reference, much less properly disclose the Fidelity Arrangement. Respondents refuse to admit this but, at the hearing, Jones at least admitted that TRG's supposed disclosures during the relevant period were inadequate:

> Q: Thank you, sir. In that exchange [regarding Jones's prior testimony], you agreed at the time that this language between 2005 and March 2011 did not specifically disclose the Fidelity Arrangement, correct?
>
> A: I said that it didn't name it specifically.
>
> Q: And, in fact, you could have disclosed it more specifically in those years, correct?
>
> A: Yes.
>
> Q: You could have chosen to explicitly name the contract for your clients, couldn't you?
>
> A: Yes.
>
> Q: And you could have told your clients Fidelity pays us money when we place your assets under management into particular funds. You could have said that, right?
>
> A: Yes.
>
> Q: And you could have said, this presents a conflict of interest to us, yes?
>
> A: Yes.
>
> Q: And you could have said, but we're going to address this conflict of interest in any number of ways. It doesn't cost you the client any more money. You could have said that in all these years, couldn't you?
>
> A: Yes, we could have said that.
>
> Q: In fact, you checked to see if this was going to cost the client more money, right?
>
> A: We did.
>
> Q: So you had at your disposal an entire vocabulary from which you could have selected in plain English the terms that would have clearly told your advisory clients or prospective clients between 2005 and March 2011 the nature of the arrangement that you had with Fidelity, correct?

A: We could have been more explicit in our disclosures.

...

Q: So this [March 2005 Form ADV] is the worst of them, yes?

A: That had the least amount of information in March of 2005.

Q: And so it's least amount of information, to slowly over time providing more information. Well, it's the least amount of information, maybe a little bit more information, nothing new, nothing new, nothing substantively new. Then we get to December 20, 2011, at which point Fidelity has instructed you to disclose the Fidelity Arrangement, correct?

A: Correct.

[Tr. 792:8 – 793:19; 796:24 – 797:6.]

Jones's admissions, his role in reviewing and signing TRG's Forms ADV, and his communications with Fidelity establish that he knew TRG was obligated to disclose the 2004 Agreement from its inception but, before December 2011, TRG had never done so in part due to his substantial assistance. [*Id.*; DOE Ex. 41-47.] Likewise, this evidence establishes Jones's knowledge and participation in TRG's inadequate and misleading disclosures of the Fidelity Arrangement from December 2011 through August 2013.

D. TRG, Robare, and Jones willfully violated Section 207 of the Advisers Act.

Section 207 of the Advisers Act makes it

> ... unlawful for any person willfully to make any untrue statement of material fact in any registration application or report filed with the Commission ... or willfully to omit to state in any such application or report any material fact required to be stated therein.

15 U.S.C. § 80b-7. *Scienter* is not required to prove a violation of this provision. *In re J.S. Oliver Capital Management, L.P.*, 2014 WL 3834038, at *46 (Aug. 5, 2014), *review granted by* 2014 WL 4980336 (Oct. 7, 2014); *In re Parnassus Invs., Inc.*, 1998 WL 558996, at *18 (Sept. 3, 1998) (Initial Decision). The Commission has stated that:

Form ADV and its amendments embody 'a basic and vital part in our administration of the [Advisers] Act, and it is essential in the public interest that the information required by the application form be supplied completely and accurately.'

In re Montford & Co., 2014 WL 1744130, at *16 (May 2, 2014); *In re Oppenheimer & Co.*, 1980 WL 26901, at *1-2 (May 19, 1990) (the failure to make a required report, *even if inadvertent,* constitutes a willful violation).

Under Section 207 of the Advisers Act, an investment adviser has a duty to file Form ADVs that are not false or misleading and that do not omit to state material facts required to be stated therein. *See In re S Squared Tech. Corp.*, 1996 WL 464141, at *5 (Aug. 7, 1996) (settled Section 207 action involving disclosures by the investment adviser concerning its soft dollar practices). A person violates Section 207 by filing a false Form ADV, including any amended Form ADVs. *In re Stanley Peter Kerry*, 1996 WL 30013, at *2 (Jan. 25, 1996).

For reasons discussed above, TRG, Robare, and Jones each directly violated Section 207 by filing false Form ADVs between March 2005 and August 2013. In sum, TRG's Form ADVs during that period were false insofar as they failed to state that:

- Fidelity was paying TRG a fee.
- The fee Fidelity was paying TRG was for TRG's placement of TRG's clients' assets into NTF mutual funds on Fidelity's investment platform.
- The fee Fidelity was paying TRG might incentivize TRG to place its clients' assets in those mutual funds.
- Such incentive, and the entire Fidelity Arrangement, was a potential conflict of interest.
- The "selling compensation" disclosed was in fact for actions taken as investment advisers, not for actions taken as "registered representatives" in the "facilitation" of transactions "through such broker-dealer."
- Triad had no role whatsoever in TRG's actions as an investment adviser and no role in TRG's actions that generated the fee paid by Fidelity.

- The fee Fidelity was paying TRG was for TRG's actions regarding the clients' assets over which TRG exercised discretionary authority.
- Payment of the fees was not a contingency, which was the inference suggested by Respondents' use of the word "may" in their disclosure, and in fact Respondents counted on the fees and tracked them down if they thought a payment was missed. [Tr. 469:23 – 470:2; 768:6 – 769:23; Resp. Ex. 92.]
- The payments from Fidelity posed an actual or potential conflict of interest and the fact that they knew it presented an actual or potential conflict of interest.

Robare and Jones are fiduciaries who admit that the Fidelity Arrangement presented a conflict of interest they were required to disclose. [Tr. 442:7 – 443:2; 728:13-15; Stips. 20, 30.] They also admit that they were solely responsible for the disclosures inadequately made in, or omitted from, their Form ADVs between 2005 and 2013. [*See* Tr. 442:7 – 443:6; 757:4-6.] Finally, they admit that they reviewed each of TRG's Form ADVs during the relevant period, that Robare had ultimate authority over their content as Chief Compliance Officer, and that Jones signed each of them. [Stips. 34, 35; DOE Ex. 56 (at 68:13-19); *see* Tr. 514:8-11.] For all of these reasons, each Respondent violated Section 207 of the Advisers Act.

IV. REMEDIES

A. The Court should order Respondents to disgorge their ill-gotten gains.

Section 203 of the Advisers Act permits the Commission to order Respondents to disgorge their ill-gotten gains (1) to deprive them of their unjust enrichment; and (2) to deter them and others from violating securities laws by making violations unprofitable. *SEC v. First Pac. Bancorp.*, 142 F.3d 1186, 1191 (9th Cir. 1998), *cert. denied*, 525 U.S. 1121 (1999). To obtain disgorgement, the Commission need only show a reasonable approximation of profits causally connected to the violations. *In re Thomas C. Bridge*, 2009 SEC LEXIS 3367, at *93

(Sept. 29, 2009); *SEC v. Resnick*, 604 F. Supp. 2d 773, 782 (D. Md. 2009); *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474-75 (2d Cir. 1996), *cert. denied*, 522 U.S. 812 (1997) (citations omitted). All doubts concerning the approximation are to be resolved against the respondent. *SEC v. Hughes Capital*, 917 F. Supp. 1080, 1085 (D.N.J. 1996); *see also SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989); *SEC v. MacDonald*, 699 F.2d 47, 55 (1st Cir. 1983). Once the Division establishes that its disgorgement amount is a reasonable approximation of ill-gotten gains, the burden of proof shifts to the respondent to show otherwise. *First City Fin. Corp.*, 890 F.2d at 1232.

Respondents agree that they profited from the Fidelity Arrangement. [*See* Tr. 502:19 – 503:8; 801:6-9.] They agree that, from September 2005 through the end of April 2013, they received $351,860.44 in Fidelity fees, representing 90% of the total sums paid by Fidelity in accordance with the terms of the 2004 Agreement.[40] [DOE 35; Tr. 499:12 – 503:8; 764:20 – 765:21.] Likewise, they admit that from May 2013 through September 2013, they received an additional $49,918.10, representing 100% of the fees Fidelity paid under the 2012 Agreement. *Id.* Hence, Respondents received $401,778.54 in Fidelity fees during the relevant period. [Tr. 501:13 – 502:25.] Of course, Respondents obtained those sums throughout a nine-year period during which they intentionally, or at least recklessly, failed to disclose the fact of their receipt, much less the existence or true nature of the Fidelity Arrangement and the known conflict of interest it created. *See* discussion *supra*. That figure is a reasonable approximation of what Respondents received from Fidelity. [Tr. 502:19 – 503:8.]

Robare individually received the Fidelity fees and transferred those sums to a bank account maintained by Robare Asset Management ("RAM"), TRG's managing general partner.

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[40] September 2005 is the first date provided by Fidelity for payment of fees as shown in DOE 35. [Tr. 500:15-24.]

[Tr. 765:22 – 766:4; Stip. 1.] The salaries of Respondents and others, TRG's and RAM's overhead expenses, and other expenses were and are paid out of the same RAM account into which the Fidelity fees were deposited. [Tr. 766:5-8.] Consequently, the Fidelity fees were at least in part received by TRG, Robare, and Jones individually. [Tr. 766:9-13.] Jones testified, however, that because Respondents pool their revenue, "there would be no way to know" what portion of the Fidelity fees he received. [Tr. 766:14 – 767:15.]

It is beyond dispute that Jones and Robare are, and always have been, stewards of TRG. Given this fact, and because they acted in combination with TRG to mislead advisory clients and prospective clients about the existence, and true nature, of the Fidelity Arrangement, Respondents should be ordered to jointly and severally disgorge $401,778.54.[41]

B. The Court should order Respondents to pay prejudgment interest.

Rule 600(a) of the Commission's Rules of Practice ("ROP") provides that prejudgment interest "shall be due on any sum required to be paid pursuant to an order of disgorgement." This is particularly necessary here, where Respondents were able to enjoy the fruits of their fraudulent conduct for more than nine years. *See Hughes Capital*, 917 F. Supp. at 1090 ("It comports with the fundamental notions of fairness to award prejudgment interest. The defendants had the benefit of nearly $2 million dollars [sic] for the nine and one-half years between the fraud and today's disgorgement order. In order to deprive the defendants of their unjust enrichment, the court orders the defendants to disgorge . . . prejudgment interest.").

The IRS underpayment of federal income tax rate, as set forth in 26 U.S.C. § 6621(a)(2), is the required rate for calculating prejudgment interest in SEC enforcement actions such as this one.

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[41] "[J]oint and several liability is appropriate in securities cases where, as here, individuals collaborate or have close relationships in engaging in illegal conduct." *SEC v. Halek*, 537 Fed. Appx. 580 (5th Cir. 2013); *SEC v. United Energy Partners, Inc.*, 88 Fed. Appx. 744, 747 (5th Cir. 2004) (*per curiam*).

ROP 600(b). That rate "reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant derived from its fraud." *SEC v. First Jersey Sec., Inc.*, 101 F.3d at 1476. Based on a principal disgorgement amount of $401,778.54, application of the tax underpayment rate from October 1, 2013,[42] through March 31, 2015, results in a total prejudgment interest amount of $18,405.30. *See* Prejudgment Interest Report, attached hereto as Ex. A.

The Division urges the Court to require Respondents to disgorge all of their ill-gotten gains, plus prejudgment interest.

C. The Court should order Respondents to pay civil penalties.

Section 203(i) of the Advisers Act, 15 U.S.C. § 80b-3(i), authorizes the Court to impose a civil monetary penalty against a respondent who willfully violated, *inter alia,* the Advisers Act or the rules and regulations thereunder. A "willful" violation is one in which the actor intends his action; willfulness does not require showing that the violator intended to harm someone. *Wonsover*, 205 F.3d at 413-15. In this case, Respondents' violations were willful because they intended not to disclose, or intended to inadequately and misleadingly disclose, the Fidelity Arrangement and further intended to file or furnish each of the 11 Form ADVs at issue during the relevant period.

Before assessing a civil penalty, the Court must conclude that it is in the public interest to do so. Whether a proposed penalty is in the public interest is considered in light of six factors: (1) whether the violation involved fraud, deceit, manipulation, or a reckless disregard of a regulatory requirement; (2) whether any harm to others to others resulted from the violation; (3)

[42] The disgorgement amount was tallied at trial through September 2013; thus the prejudgment interest is calculated as beginning from the next month. The last violation occurred on August 26, 2013, with the filing of the last defective Form ADV.

the extent of the wrongdoer's unjust enrichment; (4) whether there are any prior violations; (5) whether there is a need to deter the wrongdoer or others from such violations; and (6) such other matters as justice may require. Advisers Act Section 203(i)(3) [15 U.S.C. § 78u-2].[43]

Penalties are statutorily authorized in three tiers and differ for "natural persons" and "other persons," or entities. 15 U.S.C. § 80b-9(e)(2). The original statutory penalty amounts have been adjusted over time for inflation. 17 C.F.R. § 201.1003. For acts committed after February 15, 2005 through March 3, 2009, first-tier penalties may be imposed in the amount of $6,500 for individuals and $65,000 for entities per violation. 15 U.S.C. § 80b-9(e)(2)(A); 17 C.F.R. Pt. 201, Subpt. E, Table III. Where the violative act involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, second-tier penalties may be imposed of $65,000 for individuals and $325,000 for entities per violation. 15 U.S.C. § 80b-9(e)(2)(B); 17 C.F.R. Pt. 201, Subpt. E, Table III. If the violative act or omission involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, and directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission, a third-tier penalty may be imposed of $130,000 for individuals and $650,000 for entities per violation. 15 U.S.C. § 80b-9(e)(2)(C); 17 C.F.R. Pt. 201, Subpt. E, Table III.

Maximum penalties increased for violations occurring March 4, 2009 and after. 17 C.F.R. § 201.1004. For individuals, the three tiers of penalties are $7,500, $75,000, and

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[43] Other factors that may also be considered: (1) the egregiousness of the violations at issue; (2) the degree of Respondents' scienter; (3) the repeated nature of their violations; (4) their failure to admit their wrongdoing; (5) whether their conduct created substantial losses or the risk of substantial losses to other persons; (6) their lack of cooperation and honesty with authorities, if any; and (7) whether a penalty that would otherwise be appropriate should be reduced due to respondent's demonstrated current and future financial condition. *SEC v. Lybrand*, 281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003), *aff'd*, 425 F.3d 143 (2d Cir. 2005).

$150,000 per violation. For entities, for post-March 3, 2009 conduct, the three tiers are $75,000, $375,000, and $725,000 per violation. 17 C.F.R. Pt. 201, Subpt. E, Table IV.

In this case, given the clear conflict of interest involved, the fact that Respondents' actions involved fraud, their reckless disregard of a regulatory requirement, and the substantial pecuniary gain to the Respondents, third-tier penalties are warranted. At the very least, second-tier penalties should be assessed. While the Court enjoys discretion in setting a respondent's penalty and in determining the number of violations by each respondent in calculating its penalty, the Division contends that the Court may impose a penalty, up to the maximum amount, times 11, against each Respondent, based on the fact that Respondents willfully and intentionally, or at least recklessly, filed or furnished 11 separate but equally misleading Form ADVs during the relevant period. The evidence amply establishes that such penalties are in the public interest because:

(1) Each Respondent committed, or aided and abetted, fraud in violation of Section 206 and/or 207 of the Advisers Act.

(2) Respondents' fraud was egregious insofar as they knew the Fidelity Arrangement posed a conflict of interest that they admit could cause them to slant their investment advice and that they were therefore required to disclose, but which they chose not to disclose until Fidelity required a disclosure, and thereafter inadequately disclosed it.

(3) Respondents' fraud occurred over an extended period of time, between March 8, 2005, when they filed their first Form ADV after entering into the Fidelity Arrangement and failed to disclose the arrangement, and 2013, during which time they were free to amend TRG's Form ADV to disclose the Fidelity Arrangement but *chose* not to.

(4) Respondents' conduct harmed investors who were bereft of fiduciaries upon whom they could rely for sound and untainted investment advice.

(5) Respondents profited from their misconduct.

(5) Deterrence is necessary because Respondents were in the best position to understand the problems created by their conduct but ignored those problems, to

the detriment of investors, but they nevertheless continue to operate TRG, wherein they are required to act as fiduciaries for hundreds of advisory clients.

(6) Public deterrence is also necessary to inform others, including other RIAs, that investment advisors cannot ignore their fiduciary obligations and must at all times act in the best interests of their clients over whose assets they exercise discretion.

(7) Respondents do not acknowledge their wrongdoing but, instead, claim they did nothing wrong and in so doing provided self-serving, often disingenuous, testimony at the hearing.[44]

For all of these reasons, a civil penalty should be assessed against each Respondent.

D. Cease-and-Desist orders should be issued against each Respondent.

Section 203(k) of the Advisers Act, 15 U.S.C. § 80b-3(k), authorizes the Court to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate" any provision of the Advisers Act or the rules and regulations thereunder, as well as any other person that is, was, or would be a cause of the violation. In determining whether a cease-and-desist order is appropriate, the Commission considers numerous factors, including the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, the respondent's opportunity to

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[44] For example, Jones characterized Fidelity's December 2011 request to disclose the 2004 Agreement as Fidelity asking for "more detail" [Tr. 822:8-22], "further" disclosure [Tr. 689:20-23], and "additional disclosure" [Tr. 691:12-13], implying that Respondents had made a partial disclosure of the Fidelity Arrangement. Contrary to documentary evidence [Resp. Ex. 81] and Fidelity's testimony [Tr. 64:4-14; 66:2-10; 110:12-20; 112:15 – 113:2; 122:2-11], Jones testified twice that Fidelity never told him that something "was not disclosed" in TRG's Form ADV. [Tr. 690:2-4; 822:5-7].

In addition, Jones stated it was his belief that TRG was in compliance with the law after the 2008 SEC exam, solely because the examiners did not affirmatively express a deficiency. [Tr. 680:16-25.] That statement directly contradicts the language of the exam staff's no further-action letter, which stated that "the fact that we are not making any specific comments should not be construed as any indication that the Registrant's activities are in full compliance with the federal securities laws or other application rules and regulations." [Resp. Ex. 95, at 1.]

commit future violations, the degree of harm to investors, the extent to which the respondent was unjustly enriched, and the remedial function to be served by the cease-and-desist order in the context of other sanctions being sought. *WHX Corp. v. SEC*, 362 F.3d 854, 859-60 (D.C. Cir. 2004) (appeal of administrative cease-and-desist order); *KPMG v. SEC*, 289 F.3d 109, 124-25 (D.C. Cir. 2002) (same). "The risk of future violations required to support a cease-and-desist order is significantly less than that required for an injunction, and, absent evidence to the contrary, a single past violation ordinarily suffices to raise a sufficient risk of future violations." *In re Rodney R. Schoemann*, 2009 WL 3413043, at *12-13 (Oct. 23, 2009), *aff'd*, 2010 WL 4366036 (D.C. Cir. 2010). The Court should also "consider the function that a cease-and-desist order will serve in alerting the public that a respondent has violated the securities laws." *In re Fundamental Portfolio Advisers, Inc.*, 2003 WL 21658248, at *18 (July 15, 2003).

The evidence demonstrates that Respondents committed recurring securities violations over a nine-year period. The Division also demonstrated that Robare and Jones continued to operate TRG as an RIA with more than 300 clients for whom they act as fiduciaries. Hence, for all of the reasons stated above regarding the propriety of, and need for, monetary relief, cease-and-desist orders are also warranted.

With each Form ADV Respondents prepared and provided to advisory clients and prospective clients, they failed to perform their fiduciary duty to fully, fairly, and accurately disclose the nature of the Fidelity Arrangement and its inherent and admitted conflict of interest. Respondents' violations harmed investors by depriving them of a true fiduciary and denied them their right to receive material information that would have or was likely to influence their investment decisions, or even the decision of whether to do business with Respondents. The entry of ease-and-desist orders will not only address Respondents' violations and the risk they

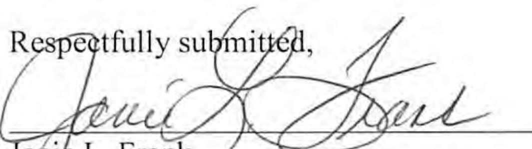
pose of committing future violations, they also serve the important function of alerting the public that Respondents committed serious violations of the securities laws.

V.
CONCLUSION

The evidence in this case establishes that Robare and TRG violated Sections 206(1) and 206(2) of the Advisers Act and that Jones aided and abetted those violations. The evidence further establishes that Respondents violated Advisers Act Section 207. For these reasons, the Division respectfully asks that the Court: (a) order Respondents to disgorge their ill-gotten sums with prejudgment interest thereon; (b) order Respondents to pay civil penalties for their egregious, prolonged, and inexcusable violations of the federal securities laws; and (c) order Respondents to cease-and-desist from such violations in the future. The Division further requests all other relief to which it may be entitled at law or in equity.

Dated: March 20, 2015.

Respectfully submitted,



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Prejudgment Interest Report

Prejudgment interest on Robare Group disgorgement figure

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$401,778.54
10/01/2013-12/31/2013	3%	0.76%	$3,038.11	$404,816.65
01/01/2014-03/31/2014	3%	0.74%	$2,994.53	$407,811.18
04/01/2014-06/30/2014	3%	0.75%	$3,050.20	$410,861.38
07/01/2014-09/30/2014	3%	0.76%	$3,106.79	$413,968.17
10/01/2014-12/31/2014	3%	0.76%	$3,130.28	$417,098.45
01/01/2015-03/31/2015	3%	0.74%	$3,085.39	$420,183.84

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
10/01/2013-03/31/2015	**$18,405.30**	**$420,183.84**