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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-11462 3-16047

In the Matter of

The Robare Group, Ltd.
Mark L. Robare, and Jack L. Jones, Jr.,

Respondents.

BRIEF IN SUPPORT OF DIVISION OF ENFORCEMENT'S PETITION FOR REVIEW

Dated: September 11, 2015.

Respectfully submitted,

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PRELIMINARY STATEMENT

Between 2004 and 2013, The Robare Group ("TRG"), a registered investment adviser, received incentive payments from Fidelity Investments ("Fidelity") when placing TRG's advisory clients into certain products hosted on a Fidelity platform. TRG, along with its two principals, Mark L. Robare ("Robare") and Jack L. Jones, Jr. ("Jones"), failed to disclose that agreement, the approximately $400,000 in payments received pursuant to it, or the resulting conflict of interest. Specifically, it is undisputed that Respondents TRG, Robare, and Jones each owed fiduciary duties to their advisory clients and were required to disclose all actual and potential conflicts of interest. (Stip. No. 36; Tr. 415:18-416:2; 442:7-443:2; 727:13-729:6).[1] Likewise, it is undisputed that TRG's agreement with Fidelity solely related to TRG's investment advisory business (Tr. 433:17-22; 781:7-782:13), and Respondents admitted that the agreement and the payments created at least a potential conflict of interest that was required to be disclosed. (Stip. Nos. 20, 30; Tr. 442:7-443:2; 727:13-729:10).

But Respondents did not reference the conflict of interest, in any way, from 2004 until December 2011. In August 2005, Respondents disclosed that they may receive "selling compensation," which might pose a conflict, for transactions facilitated through their broker-dealer "when acting as registered representatives." But they said nothing—then, or for the next six years—about receiving payments as an incentive for recommending that advisory clients place assets on Fidelity's platform in TRG's capacity as an investment adviser. In December 2011, Fidelity told Respondents their Form ADV contained *no disclosure* concerning the

[1] Abbreviations used herein include the following: "Stip. No." refers to the Stipulations of Fact. "Tr." indicates the transcript of the hearing and the page and line number in the transcript. "DX" refers to the Division's exhibits, and "RX" to the Respondents' exhibits. "I.D." refers to the Initial Decision.

payments Fidelity was making. Respondents revised TRG's Form ADV and mentioned the Fidelity payments—but described them as a contingency, when in fact Respondents had been receiving the payments continuously for years and had no reason to expect the practice to change. Respondents further misrepresented that they received no "economic benefit" from a third party for providing advisory services, when in fact they received the Fidelity payments in connection with advisory services. These misleading statements remained in TRG's Forms ADV through at least August 2013.

Respondents' failures to disclose the Fidelity agreement and the payments received pursuant to it breached their fiduciary duties and resulted in violations of Sections 206(1), 206(2), and 207 of the Investment Advisers Act of 1940 ("Advisers Act") by TRG and Robare. Likewise, Jones violated Section 207 of the Advisers Act and aided and abetted, or caused, the violations of TRG and Robare of Sections 206(1) and 206(2) of the Advisers Act. Accordingly, the Division respectfully asks the Commission to hold Respondents liable for these violations and to impose appropriate remedies as discussed below.

PROCEDURAL HISTORY

On September 2, 2014, the Commission issued an "Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940 and Notice of Hearing" ("OIP"), against TRG, Robare, and Jones. The Division alleged that Defendants violated Sections 206(1), 206(2), and 207 of the Advisers Act and breached their fiduciary duty to their clients by failing to disclose the conflict of interest they admittedly had as a result of the compensation they received from

Fidelity when acting as investment advisers, and for misleadingly disclosing the conflict thereafter. On September 24, 2014, Respondents filed their Answer, responding to the OIP's allegations and asserting certain affirmative defenses.

Evidence against Respondents was presented in a three-day hearing in Houston on February 9-11, 2015. The law judge issued an Initial Decision on June 4, 2015 ("Decision"), dismissing all charges against Respondents. On June 25, 2015, the Division filed a petition for review with the Commission. On July 10, 2015, Respondents filed a motion for summary affirmance of the Decision. The Division opposed that motion on July 17, 2015. On August 12, 2015, the Commission denied the motion for summary affirmance and granted the Division's petition for review.

STANDARD OF REVIEW

Rule 411(a) of the Commission's Rules of Practice authorizes the Commission to "affirm, reverse, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and make any findings or conclusions that in its judgment are proper on the basis of the record." 17 C.F.R. § 201.411(a). The Commission's review of an initial decision is *de novo*. *See Gary M. Kornman*, 2009 WL 367635, at *9 n. 44 (Feb. 13, 2009), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010); *Richmark Capital Corp.*, 2003 WL 22570712, at *1 (Nov. 7, 2003) ("We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal").

STATEMENT OF FACTS

TRG is an investment adviser in Houston, Texas, registered with the Commission since 2003. (Stip. Nos. 1, 5). Robare is TRG's majority owner and president, while Jones is TRG's

co-owner and Robare's son-in-law. (Stip. Nos. 2, 3). As a registered investment adviser, TRG uses Fidelity as its custodian and invests its advisory clients' assets on Fidelity's trading platform. (Stip. No. 4). TRG is not a registered broker-dealer. (Tr. 420:8-15). For clients without managed accounts, TRG executes trades through Triad Advisers, Inc. ("Triad"), a registered broker-dealer. (Tr. 415:18-417:20; Stip. No. 8). Robare and Jones are registered representatives associated with Triad. (Stip. No. 7).

In 2004, TRG entered into a contract with Fidelity ("2004 Agreement"), in which Fidelity agreed to pay TRG incentive compensation. This compensation, which was paid quarterly, was based on the volume of advisory client assets that TRG maintained in certain no-transaction-fee mutual funds ("NTFs")[2] offered on Fidelity's investment platform ("Fidelity Payments" or "Payments"). (DX 9; Stip. Nos. 11, 12). The 2004 Agreement explicitly described the Payments as "shareholder servicing fees" and provided for an escalation of basis points, such that the greater the volume of assets TRG held in the NTFs, the greater the basis points Fidelity paid. (DX 9, at 1). The 2004 Agreement also provided that the Fidelity Payments would be paid through TRG's broker-dealer, Triad. (*Id.*). Triad was included as a signatory to the 2004 Agreement--but they played no role in placing TRG client assets in the NTFs and acted merely as a pass-through agent for payments to TRG.[3] (*Id.*). The 2004 Agreement also included a provision that made TRG "responsible for reviewing and determining whether additional

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[2] NTFs are mutual funds available on Fidelity's platform, for which Fidelity does not charge a fee to purchase. (Tr. 29:9-30:24).

[3] None of the parties could remember why the Fidelity Payments were routed through Triad or why Triad was included in the 2004 Agreement. Based on a separate and unrelated agreement between TRG and Triad, Triad kept 10% of the Fidelity Payments and forwarded 90% to TRG. (RX 16).

disclosure is necessary in the Form ADV ... or otherwise with respect to the terms and conditions of this Agreement ...." (DX 9, at 2). The Fidelity Payments were based on transactions Respondents made as investment advisers. (Tr. 460:3-14; 781:20-25).

In late 2004, TRG began receiving the Payments, which have continued, uninterrupted, ever since. (Stip. Nos. 18-19, 27-28; DX 35). Through August 2013, Respondents received $401,778.54 in Payments. (DX 35; Tr. 499:12-503:8).

In the fall of 2012, Fidelity required TRG to execute a new version of the agreement. Respondents signed it May 23, 2013 ("2012 Agreement") (DX 33) (collectively, with the 2004 Agreement, hereinafter the "Fidelity Arrangement").[4] Notably, while the purpose and terms of the original 2004 Agreement remained unchanged, the 2012 Agreement dropped Triad as a party, and Fidelity made the Payments directly to TRG. (DX 33). According to Fidelity, dropping Triad as an intermediary was Respondents' idea. (Tr. 195:8-196:3).

Though Respondents readily admitted that the Fidelity Arrangement always presented a conflict of interest (Stip. Nos. 20, 30), which they knew they were required to disclose, TRG's Forms ADV until December 2011 failed to disclose that conflict. From the commencement of the Payments in October 2004 (Tr. 500:19-21), until December 2011, TRG's Forms ADV were silent about the Fidelity Arrangement and any conflict of interest arising from the Payments. (*See generally* DX 2, 3, 10, 12, 13, 14, 23).

In August 2005, TRG updated its Form ADV, and included the following statement:

> Certain investment adviser representatives of ROBARE [TRG], 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

[4] The 2012 Agreement was sometimes referred to as the "2013 Agreement."

> transactions on Client's behalf through such broker-dealer. ... These other arrangements may create a conflict of interest.

(DX 10 [at p. 17 of 17]). That language clearly does not describe the Fidelity Arrangement—it does not describe the compensation TRG received while acting *as an investment adviser* and for maintaining advisory clients' assets in certain NTFs. Nor does it indicate that such compensation tied to the volume of assets rather than a particular securities transaction "could have a tendency to slant" Respondents' advice, as Robare admitted. (Tr. 335:14-18). TRG used this disclosure language in its Forms ADV from August 2005 until March 2011.

In March 2011, Respondents altered their disclosure language, when they filed their first disclosure brochure after the Commission's adoption of the new Form ADV format. The revised disclosure stated:

> ... 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.

(DX 23 [p. 25 of 29]). Except for identifying Triad by name, the first sentence was essentially the same as the prior disclosure. The new, additional language in that paragraph continued to refer to transaction-based compensation paid to Robare and Jones by a particular mutual fund "when acting as registered representatives." It did not explain that Respondents could be receiving payments from TRG's custodian, Fidelity, for placing advisory clients' assets into and maintaining them in certain NTFs on Fidelity's platform, which could have a tendency to influence Respondents' advice and which posed a conflict of interest.

In December 2011, Fidelity informed Respondents that TRG's then-current Form ADV *failed to disclose* the Fidelity Arrangement and Payments. (DX 41, 43; Tr. 110:12-116:7; 122:2-11). Fidelity required TRG to amend its Form ADV disclosures or face termination of the Payments. (Tr. 118:10-122:1). Respondents did not dispute Fidelity's claims that TRG had failed to disclose the Fidelity Arrangement. (Tr. 122:18-123:11).[5] Nor did Respondents point Fidelity to any other documents where TRG disclosed the conflict. Respondents amended TRG's Form ADV in December 2011. (DX 25).

The disclosure Respondents made in their December 2011 Form ADV was as follows:

> **We do not receive an 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 12b-1 fees or a combination thereof. The prospectus for the investment company will give explicit detail as to the method and form of compensation.
>
> Additionally, **we may receive** additional compensation in the form of custodial support services from Fidelity based on revenue from the sale of funds through Fidelity. Fidelity has agreed to pay us a fee on specified assets, namely no transaction fee mutual fund assets in custody with Fidelity. This additional compensation does not represent addition fees from your accounts to us.

(DX 25 [at 27 of 31]) (emphasis added). While TRG's Form ADV now, for the first time and after seven years, referenced compensation from Fidelity for placing client assets in NTF mutual funds, this "disclosure" misleadingly stated that TRG "may" receive such compensation, when

[5] Jones testified that Respondents thought Fidelity merely wanted *additional* disclosure language, denying that Fidelity said there had been *no* previous disclosure. (I.D., at 39 n. 27; Tr. 821:8-822:22). Jones's testimony is not credible: it is not only not corroborated by any evidence, but it was contradicted by the very email Fidelity sent to Jones, informing him explicitly that Fidelity believed that *no disclosure* had been made. (DX 43).

Respondents had in fact been continuously receiving the Fidelity Payments for more than seven years, and the agreement with Fidelity remained in effect. In addition, TRG affirmatively misstated that it received no "economic benefit" from a third party for performing advisory services, even though the 2004 Agreement described the Payments as "servicing fees" in connection with Respondents' placement of clients into NTFs.

ARGUMENTS AND AUTHORITIES

The record evidence, including several key admissions by Respondents, establishes Respondents' liability. In holding otherwise, the Decision reached several conclusions lacking both legal and factual support.

A. TRG and Robare violated Sections 206(1) and 206(2) of the Advisers Act, and Jones aided and abetted, or caused, those violations.

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; 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. 180, 192 (1963). The elements of Section 206(2) are identical, except that it simply requires proof of negligence. *SEC v. Pimco Advisors Fund Mgmt., LLC*, 341 F. Supp. 2d 454, 470 (S.D.N.Y. 2004).

In this case, there is no serious dispute that both TRG and Robare are investment advisers. The parties stipulated that TRG is an investment adviser. (Stip. No. 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, where the individual engages in activities sufficient to meet the broad definition of "investment adviser" in Section 202(a)(11). 15 U.S.C. § 80b-2(a)(11); *see John J. Kenny*, 2003 WL 21078085, at *17 (May 14, 2003). This conclusion is further supported when the individual controls the adviser. *See John J. Kenny,* 2003 WL 21078085, at *17. Robare, as TRG's founder and controlling owner, is actively engaged in TRG's business of providing securities recommendations and other advisory services to clients and is compensated for those services. Therefore, he meets the definition of "investment adviser." (*See* Tr. 514:14-515:18).

Likewise, there is no dispute that the Forms ADV reflecting the omissions and misleading statements at issue were provided to clients or prospective clients. Respondents admitted they provided TRG's Forms ADV to their clients. (Tr. 361:24 – 362:8; 363:14 – 364:1; 664:3-25; 665:24 – 666:4).

The relevant questions, therefore, are whether the omissions and other statements were materially false or misleading and, if so, whether Respondents acted recklessly or at least negligently.

1. **TRG's and Robare's failure to disclose the Fidelity Arrangement and Payments, and their later statements about the Payments, constituted materially false or misleading omissions and misrepresentations.**

    a. **Respondents' Forms ADV for years failed to disclose, and only later misleadingly disclosed, the conflict of interest created by the Fidelity Arrangement.**

None of Respondents' Forms ADV from 2005 through 2013 disclosed, or adequately disclosed, the admitted conflict of interest presented by the Fidelity Arrangement. Despite their admission that the Fidelity Arrangement created a conflict that required disclosure, Respondents nevertheless completely failed to disclose the Fidelity Arrangement from March 2005 through March 2011. Beginning in December 2011, they inadequately and misleadingly disclosed the Arrangement through August 2013. The language in Items 13A and 14 of TRG's Forms ADV 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 that Respondents were required to provide as fiduciaries.

i. 2004 – 2011 Forms ADV.

The disclosures during this period did not disclose the Fidelity Arrangement. As discussed above, the language Respondents added in August 2005 described only "selling compensation" they received "when acting as registered representatives" for facilitating transactions through their broker-dealer (Triad). That disclosure failed to state that:

- TRG's custodian, Fidelity, was paying TRG a fee.
- The fee was for TRG's placement of its clients' assets into NTFs on Fidelity's investment platform.
- The fee might incentivize TRG to place its clients' assets in those NTFs.
- Such incentive was a potential conflict of interest.
- Fidelity was paying Respondents compensation for actions taken as investment advisers, not for actions as "registered representatives," and for decisions made while exercising discretionary authority over advisory assets, not for the "facilitation" of transactions executed "through [their] broker-dealer." (Tr. 457:3-460:14; 781:20-25; 807:2-19).

Nevertheless, Robare and Jones both claimed the August 2005 Form ADV disclosed the Fidelity Arrangement. (Tr. 677:7-21; *see* Tr. 457:3 – 460:14). Yet the Payments were in no way derived from Robare's or Jones's registered representative relationship with Triad. (Tr. 433:17-22; 459:24 – 460:17; 780:7 – 781:25). The evidence showed that Triad had nothing to do with the transactions on which the Payments were made:

- Triad did not approve the transactions TRG made in the managed accounts. (Tr. 535:25 – 536:4).
- Triad did not select the NTFs for TRG. (Tr. 536:5-8).
- Triad did not process the transactions once TRG decided which NTFs to purchase. (Tr. 536:9-13).
- Triad did not have the ability to place TRG's advisory clients' funds into the NTFs and did not have any ability to invest TRG's advisory clients' assets. (Tr. 755:25 – 726:24).
- Triad did not provide investment advice to TRG's advisory clients. (Tr. 757:1-3).
- Triad did not participate in any way in "facilitating" the actual securities transactions of placing the TRG advisory clients' funds into the NTFs. (Tr. 807:3 – 808:3).

If that language was truly intended to encompass the Fidelity Payments, TRG's August 2005 Form ADV is completely misleading, causing a reasonable advisory client to think that the compensation relates to Respondents' broker-dealer relationship and activities. And it omitted the basis on which Fidelity was in fact paying TRG—the discretionary placement of client assets into NTFs on Fidelity's platform. Respondents recklessly, or at least negligently, failed to

disclose the Fidelity Arrangement in the August 2005 Form ADV. All subsequent Forms ADV including the same language likewise failed to disclose the conflict.

ii. 2011 – 2013 Forms ADV

In TRG's December 2011 amendment to the Form ADV, Respondents added language making at least *some* reference to the Fidelity Arrangement for the first time, but TRG's disclosure remained woefully deficient and misleading. TRG's statement that it 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 the same inquiry in Question 13A over the previous six years. The Fidelity Payments were, and are, an economic benefit. (Tr. 801:6-9). It was undisputed that by August 2013, Respondents had received more than $400,000 from Fidelity pursuant to the Fidelity Arrangement. (Tr. 499:12-503:8). It was also undisputed that these Payments were for "advisory services" to TRG's clients, as they derived from TRG's placement and maintenance of advisory client assets in certain mutual funds on Fidelity's custodial platform. (Tr. 32:24-35:7; 800:21-801:9; *see also* 781:20-25).[6] Because TRG clearly *did* receive an economic benefit from Fidelity in connection with "other advisory services" to clients, its December 2011 Form ADV was false or misleading.

Additionally, the new material in the third paragraph of this disclosure is also deficient and misleading. 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. They also stated that the fees

6 Fidelity described the Payments as "servicing fees" in the original contract (DX 9) and as payment for "services" provided by the "advisor" in the 2012 replacement contract. (DX 33).

were based on NTFs in custody with Fidelity. But the new disclosure failed to make clear that the fees were paid for TRG's placement of *its clients' assets* into particular funds, which in Robare's words, "could have a tendency to slant" TRG's investment advice (Tr. 335:14-18), and that TRG's receipt of such fees therefore presented an actual or potential conflict of interest. This language is hardly the "full and fair" disclosure required by the Supreme Court.[7] *Capital Gains*, 375 U.S. at 194 ("courts have imposed on a fiduciary an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts'").

In addition, the third paragraph stated that TRG "may" receive additional compensation, which characterized the receipt of the Fidelity Payments as a contingency and thus led clients to believe that Respondents were not then receiving the Payments—but might in the future. Using the word "may" under these circumstances violates the Form ADV instructions. (Tr. 271:3 – 272:22; DX 90, at 81 of 110, DX 92, at 216 of 243, ¶ 2 ["If you have a conflict or engage in a practice with respect to some (but not all) types of classes of clients, advice, or transactions, indicate as such *rather than disclosing that you 'may' have the conflict or engage in the practice."*]). When the compensation has in fact been paid, for years, a contingent disclosure is inaccurate and misleading. *See Larry C. Grossman*, 2014 WL 7330327, at *31 (Dec. 23, 2014) (Initial Dec.), *pet. for review granted*, 2015 WL 351409 (Jan. 28, 2015) (use of the word "may" is misleading when the investment adviser is in fact receiving the payments); *see also Alan Gavornik*, 2014 WL 6617088, at *6 (Nov. 24, 2014) (settled Order Instituting Proceedings) ("...

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[7] 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).

use of the prospective 'may' … is misleading because it suggested the mere possibility that Tore would make a referral and/or be paid 'referral fees' at a later point," when in fact the arrangement was already in place and generating income to respondents). 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 that the payments would continue indefinitely. (Tr. 469:23-470:2).[8] Respondents' use of the word "may" was therefore misleading.

b. The omission of the conflict of interest was material as a matter of law.

The omission of actual or potential conflicts of interest is material as a matter of law under the Advisers Act. 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); *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").

Respondents' failure to disclose the Fidelity Arrangement and the resulting conflict of interest was material. Robare and Jones conceded that, as a result of the Fidelity Arrangement, Respondents could have "a tendency to slant" their investment advice and their exercise of discretion over advisory clients' assets. (Tr. 335:14-18; 725:15-24). Although Robare qualified this key concession by claiming, without proof, that he believes his advice was never *actually* slanted, his claim is irrelevant: an adviser must disclose any actual *or potential* conflict of

[8] These same misleading statements—that Respondents "may" receive the Payments and received "no economic benefit"—appeared in each of TRG's subsequently filed Forms ADV through August 2013.

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 the potential conflict 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 (Stip. Nos. 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. The law judge correctly recognized that actual and potential conflicts of interest are material for investment advisers and ruled that the conflict of interest here was indeed material. (I.D., at 35-36).

c. Respondents erroneously claimed other documents, including the Fidelity brokerage account agreement, disclosed their conflict of interest.

Respondents claimed 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; RX 97, 98, 99). But those documents only generically address conflicts and are devoid of any reference to Fidelity, the Fidelity Arrangement, or the Payments TRG received.[9]

[9] 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 Respondents' Exhibits 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).

Respondents also argued that Fidelity itself disclosed the Fidelity Arrangement in its Brokerage Account Client Agreements ("Fidelity Form").[10] (RX 76-79; Tr. 358:20 – 360:17). In fact, a section titled "How We Support Your Adviser," appearing on page 9 of the 16-page Fidelity Form, mentioned Fidelity's servicing fee arrangement and stated, "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 "[y]our advisor may be influenced by this ...." (*E.g.*, RX 79). This document did not discharge Respondents' own duty to make full and fair disclosure of conflicts of interest for several reasons.

First, the quoted language did not appear in the Fidelity Forms until sometime in 2005. By that time, Respondents already had approximately 150 clients—who followed them from Allmerica, their prior firm, to TRG in 2003—who executed new Fidelity Forms prior to the existence of the Fidelity Arrangement and the appearance of Fidelity's description in the Form. (Tr. 422:19 – 424:13; 739:22 – 741:17). Those clients never received any Fidelity Form describing the servicing fee program. (*See, e.g.*, DX 75 [Fidelity Form dated October 2004 without description of Fidelity Arrangement]; Tr. 422:19 – 424:13; 737:12-16). Hence, at least half of TRG's current roster of clients of 300 clients never received Fidelity's description, and, of course, Respondents made no such disclosure themselves.[11]

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

[11] Respondents agreed that TRG's clients were entitled to know if and when the advisory relationship with Fidelity changed. (Tr. 741:11-17; 742:5-11).

Second, as to those TRG's advisory clients who did receive the Fidelity Form discussing payment of the custodial support fees, Fidelity did not identify Respondents by name in its description. This makes sense, as Fidelity services approximately 2,700 registered investment advisers on its platform, but only about 40 participate in the servicing fee program. Moreover, Fidelity described the Payments to the unnamed investments advisers in contingent language, stating that they "may" receive payments. By using the contingent language and not naming TRG, Fidelity's description of the Fidelity Arrangement did not disclose *Respondents'* conflict of interest.[12]

Third, the vague Fidelity Form does not and cannot satisfy Respondents' fiduciary obligation to make full and fair disclosure of the conflict of interest posed by the Fidelity Arrangement. (Tr. 443:3-6 [a fiduciary cannot delegate his duty]; 743:5-8 [Fidelity cannot discharge TRG's fiduciary duty]). While Form ADV allows disclosure of conflicts to be made "by other means," it does not contemplate—as the Decision held (I.D., at 37)—that those means include incidental, general disclosure by a third party that fails to reference the adviser by name. (DX 90, at 82 [Form ADV instruction states, "*You* may disclose this additional information to clients in your brochure or by some other means."] (emphasis added)). Clients are entitled to look to their advisers—who owe them fiduciary duties—for full disclosure of salient facts, particularly conflicts of interest. Requiring clients to seek out such information buried in third-party documentation created for totally different purposes would relieve advisers of their disclosure duties and instead burden clients with the responsibility to determine whether and

[12] Respondents' silence in its Form ADV about the Fidelity Arrangement could lead investors to reasonably believe that TRG was *not* participating in Fidelity's service fee program. Respondents did not adopt, incorporate, or refer to Fidelity's language in any of their own documents.

where their advisers had disclosed conflicts of interest.[13] That is simply not consistent with the fiduciary duties investment advisers owe their clients.[14]

d. As a defense, Respondents also claimed that they had disclosed the conflict because the Payments were "commissions," or 12b-1 fees, and thus fit within their disclosure of "selling compensation" in their 2005-2011 Forms ADV.

Respondents' 2005-2011 Forms ADV disclosed only that they received "selling compensation" when acting *as registered representatives*, but said nothing about a conflict of interest resulting from non-transaction-based compensation received when acting *as registered investment advisers*. Because the Fidelity Payments were made as a result of Respondents' investment advisory services, the disclosure in their Forms ADV from 2005-2011, did not, and could not, refer to the Payments. Fidelity drew the same conclusion when informing Respondents in 2011 that TRG's Form ADV did not disclose the Fidelity Arrangement. (DX 43).

Perhaps recognizing this fatal flaw, Respondents' defense was that their Forms ADV properly disclosed the conflict because the forms stated that Respondents received "selling

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[13] 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 2005 received, at best, only a meager reference to Fidelity's service fee program, which appeared on page 9 of a 16-page agreement, authored by someone 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.

[14] There was no evidence that Respondents orally disclosed the Fidelity Arrangement to their clients. Robare testified that he "reviewed" the Fidelity Form with his clients when they opened their account. But Robare *did not explicitly testify*, as the Decision stated, that he discussed with each new client "that this language" in the Fidelity Form disclosed the potential conflict to TRG clients. (Compare I.D., at 33, to Tr. 356:17-358:25). There was no evidence that Robare explicitly called his clients' attention to the Payments' description in the Fidelity Form, and no testimony that Robare specifically informed each client that TRG was one of the advisers referred to in Fidelity's Form. Without more specific testimony on this point, Robare's blanket statement that he reviewed *the form* in general with his clients (Tr. 357:21-23), as opposed to the specific description of the servicing fee program, is inadequate to prove that he fulfilled his fiduciary duty to those clients by expressly directing their attention to the specific language in the Form and adopting it as TRG's own disclosure.

compensation," and the Payments were commissions. (Tr. 459:24 – 460:17; 757:7-15; 780:7-17). But this position fails to withstand scrutiny: it is a *post-hoc* attempt to avoid liability by shoehorning the facts into TRG's prior but inadequate disclosures.

Respondents admitted that the Payments arose from their actions as an investment adviser, not as registered representatives of a broker-dealer. (Tr. 433:15-22; 781:20-25). Respondents also conceded that investment advisers cannot receive commissions. (Tr. 429:4-17; 432:15-20; 759:1-23).[15] Robare admitted that no one told him the fees were commissions. (Tr. 429:4-17; 432:11-14). He just assumed the fees were commissions. (Tr. 432:15-22). He did not ask anyone, including Fidelity or Triad. He claimed he did not even know enough 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, which no witness could explain the reason for and which also elevates form over substance.[16] (Tr. 432:8 – 433:1). But when the 2004 Agreement was replaced by the 2012 Agreement, Triad was jettisoned. And according to Tim Fahey, Fidelity's relationship manager for its account with TRG, Robare readily accepted the new arrangement with future fees paid directly to TRG. (Tr. 141:15-142:15).

In the end, Respondents failed to explain how the very same Payments were commissions when routed through Triad, but were something else when paid directly to TRG, or somehow still commissions but which they admit they are prohibited from receiving as an investment

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15 Investment advisers who are not registered broker-dealers may not receive transaction-based compensation for investment advisory-related work, as that would put them in violation of Section 15(a) of the Exchange Act and FINRA Rule 2040 for acting as an unregistered broker-dealer.

16 This argument is also circular: Respondents claim the Payments had to be commissions because they were routed through Triad, TRG's broker-dealer, while also claiming that the Payments had to be routed through their broker-dealer because they were commissions. (Tr. 418:17-22; 429:4-17; 431:10-17; 432:8 – 433:1; 781:1-16).

adviser. (Tr. 433:15-20; 434:17 – 436:12; 761:6 – 762:24). Respondents cannot escape liability by now re-labeling the Fidelity Payments as "commissions" to fit them within a disclosure that nowhere puts advisory clients on notice about the Fidelity Arrangement and its inherent conflict of interest.

In a similar but equally misguided effort, Respondents also argued that the Payments were 12b-1 fees, which are considered commissions, and thus were also referenced by TRG's Forms ADV. Although the Decision found this position credible, the finding was flawed. (I.D., at 34). The Payments are not 12b-1 fees; 12b-1 fees are *paid by mutual fund companies,* pursuant to a plan authorized by the mutual fund's board and adopted pursuant to Rule 12b-1 under the Investment Company Act of 1940. Respondents' own exhibit, an excerpt from the Commission's investor education website, stated, "So-called '12b-1fees' are fees paid *by a mutual fund* out of fund assets ...." (RX 123) (emphasis added). The Payments could not possibly have been "12b-1 fees" because they were not paid to Respondents *by* any mutual fund company.[17]

Respondents, and the law judge, confused the *source* of the money that Fidelity may or may not have used to make the Payments with the actual 12b-1 fee itself. (Tr. 435:3-23). If Fidelity, as the payor, used 12b-1 fees it received from mutual fund companies to pay TRG under the 2004 Agreement, that would not make the Fidelity Payments 12b-1 fees. Because the

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[17] One of Fidelity's subsidiaries or business units offers and sells mutual funds. But in this case, it was Fidelity's clearing broker and the custodian of Respondents' advisory clients' assets that were the business units making the Payments to Respondents. (*See* Tr. 25:6-24; 32:24-33:23; DX 9, at 3). Indeed, the Fidelity Arrangement *excluded* Fidelity's mutual funds from eligibility for the payments. (DX 9, at 1). For these additional reasons, the Payments could not possibly have been 12b-1 fees.

Payments flowed *from Fidelity and not a mutual fund company* to TRG, whether through Triad or not, the Payments were not and could not have been 12b-1 fees.[18]

Finally, even if the Payments could somehow be considered "selling compensation," or commissions, or 12b-1 fees, such re-labeling would not cure the Form ADV's fundamental defect of identifying only compensation received for "acting as registered representatives" through the broker-dealer. Robare and Jones unequivocally testified that the Fidelity Arrangement was premised strictly on their advisory business and that the Fidelity Payments were only remitted in connection with their performance of investment advisory services. (Tr. 460:3-14; 781:20-25). They admitted that the Payments were not in connection with any work Robare or Jones performed as registered representatives. (Tr. 457:14-460:14; 781:20-25). They admitted that the transactions triggering the Payments were *not* the facilitation of brokerage transactions made through a broker-dealer. (Tr. 457:14-22; 807:2-19). They admitted that Triad played no role in placing Respondents' advisory client assets on Fidelity's platform into NTFs. (Tr. 535:25-536:13; 755:25-756:24). Therefore, regardless of the label attached to the Payments, Respondents did not receive the Payments for transactions they made "when acting as registered representatives" of Triad. Respondents' 2005-2011 Form ADV disclosures therefore unquestionably omitted material information about the nature and impact of the Fidelity Payments, and as a result their advisory clients were left completely unaware about the conflict of interest that their investments advisers had.

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[18] The Fidelity senior vice president whose department administered the Fidelity Arrangement, Melissa Morganti-Zizza, testified categorically that the Payments were not 12b-1 fees. (Tr. 63:25- 64:3).

2. **TRG and Robare acted recklessly or, at least, negligently in failing to disclose this known conflict.**

a. **The standard of care is that of reasonable prudence.**

The other element at issue in TRG's and Robare's violations of Sections 206(1) and 206(2) of the Advisers Act is that of *scienter* and negligence. A violation of Section 206(1) requires evidence of *scienter*, which may be established by "recklessness, defined as ... an extreme departure from the standards of ordinary care." *See, e.g., S.E.C. v. Seghers*, 298 Fed. Appx. 319, 327, 333 (5th Cir. 2008); *Vernazza v. S.E.C.*, 327 F.3d at 860, *amended*, 335 F.3d 1096 (9th Cir. 2003); *S.E.C. v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992). *David Henry Disraeli*, 2007 WL 4481515, at *5 (Dec. 21, 2007).

The elements of a Section 206(2) violation 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 at 470. For Section 206(2) liability, 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); 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 its 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). *See SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008).

In this case, the standard of care for recklessness and negligence was whether Respondents were reasonably prudent in "keeping [their] clients and prospective clients informed of all relevant, material information," *Bolla*, 401 F. Supp. 2d at 72, such that those clients were aware of and could consent to the conflict inherent in the Fidelity Arrangement. The Division presented evidence of this standard through Melissa Harke, is a branch chief in the Division of Investment Management's Office of Chief Counsel. (Tr. 260:18-264:4). She helped draft the revision to the 2010 amendments to the Form ADV. (Tr. 267:19-268:21). She testified that an adviser's duty—as a fiduciary—is to make "meaningful disclosures" to its clients, as the Form ADV is intended to "inform a client about your business practices and that it needs to be, you know, fair—a fair description of your business." (Tr. 271:3-274:8). She also testified that "your guiding principle, *which hasn't changed since 1979,* is really that it [the Form ADV] is intended to inform a client and give them a meaningful opportunity to understand and consent to conflicts of interest." (Tr. 272:8-22) (emphasis added).

When applied to the facts of this case, it is clear that Respondents did not meet that standard: they failed to exercise reasonable care in ensuring that they gave their clients a meaningful opportunity to understand and consent to the conflict of interest.

b. Evidence at the hearing proved TRG and Robare acted recklessly and negligently.

The evidence at the hearing proved TRG's and Robare's recklessness in violating Section 206(1) because their disclosures did not give their clients a meaningful opportunity to understand

and consent to the conflict. By failing, for many years, to fully and accurately disclose the Fidelity Arrangement, the Payments they received, and the potential conflict the Payments created – all despite Robare's knowledge that the Fidelity Payments "could have a tendency to slant" their investment advice – TRG and Robare committed an extreme departure from the ordinary standard of care applicable to investment advisers.[19] Moreover, Robare's *scienter*, or recklessness, is imputed to TRG. *See SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1089 n.3 (2d Cir. 1972). But if the Commission does not find that TRG's and Robare's conduct was reckless in violation of Section 206(1), it should nevertheless find them negligent and in violation of Section 206(2).

It is undisputed that the Fidelity Arrangement created a potential conflict. (Stip. Nos. 20, 30; Tr. 335:14-18). It is also undisputed that Respondents knew the conflict existed when the Fidelity Arrangement began 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.
- What the fees were for.

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[19] For reasons discussed in detail above, Robare and TRG cannot avoid a finding of *scienter* by claiming they believed the Fidelity Payments were "commissions." No contemporaneous evidence showed that Respondents concluded the Payments were "commissions." To the contrary, they knew – or were reckless in not knowing – that the Payments were not "commissions." Respondents repeatedly admitted that, as investment advisers, they are not permitted to receive commissions. (*E.g.*, Tr. 418:17-19; 759:1-4). And they conceded 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 Payments. (*See id.*). They also 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).

- Where the fees came from.
- How Fidelity characterized the payments.

(Tr. 746:2-16). Respondents' decision to seek out and enter into the Fidelity Arrangement without inquiring about its nature, purpose, or implications for their clients, and their further decision to remain willfully blind to that information, falls woefully short of the standard of care of making full and fair disclosure of all material facts to their clients. Considering the facts that (a) Respondents failed to obtain available, critical information concerning the Fidelity Arrangement when they filed Forms ADV during the relevant period; (b) Respondents knew the Fidelity Arrangement created a conflict of interest; and (c) TRG's disclosures in Items 13A and 14 on Forms ADV during the period do not reveal, or suggest, the existence or conflicted nature of the Fidelity Arrangement, Respondents' conduct was unreasonable and, consequently, reckless, or at least negligent in violation of Section 206(2).

Other substantial evidence demonstrated Respondents' recklessness, or at a minimum negligence, in failing to make a meaningful disclosure to their clients. This evidence included such facts as:

- TRG is a registered investment adviser, and Robare and Jones hold multiple securities licenses and have worked in the industry for many years. As industry professionals, they are held to a standard of knowing how to disclose facts to their clients that would be understandable to their clients. They admitted that they had a duty to fully and fairly disclose conflicts of interest to their clients. (Stip. Nos. 1-3, 36; Tr. 287-288; 658; 442-443; 720).

- Respondents admitted that the Fidelity Payments always constituted, at a minimum, a potential conflict of interest that they were obligated to disclose. (Stip. Nos. 20, 30). Thus, they *knew* they were supposed to disclose the Payments and had a duty to do so fully and fairly. (Tr. 442:7-443:6).

- Respondents admitted that the 2004 Agreement expressly reminded them of their obligation to ensure that *they*—and not Fidelity—made the proper disclosures about the Fidelity Arrangement. (Stip. No. 17).

- Respondents admitted that the Payments were based on the volume of advisory assets that they alone—and not their broker-dealer—maintained in NTFs on Fidelity's platform, and that they were *acting as investment advisers* when they invested client assets in that manner. (Tr. 433:17-22; 460:3-14).

- Respondents admitted that the Payments could have a tendency to slant the adviser's advice they gave to advisory clients. (Tr. 335:14-18).

- Respondents admitted that the Payments were not based on transactions they undertook as registered representatives and were not effected through their broker-dealer. (Tr. 535:25-536:13).

- The plain language of TRG's Forms ADV from 2005 through 2011, which Respondents now claim was deliberately crafted to disclose the Fidelity Arrangement (Tr. 790:1-794:7),[20] disclosed only that Respondents would receive "selling compensation" when acting "as registered representatives of a broker-dealer" for "the facilitation of certain securities transactions ... through such broker-dealer." Respondents admitted they drafted this language or approved it and filed these Forms ADV. (Stip. Nos. 31, 32, 34, 35). This disclosure clearly did not address the Fidelity Payments, which arose from their transactions when acting as investment advisers.

- Although Respondents had been receiving the Payments for years and had every expectation that the Payments would continue, in the December 2011-August 2013 Forms ADV they deliberately used misleading contingent language that they "may" receive the Payments, implying they were not currently receiving them. (DX 35; Tr. 803:9-803:21).

- Respondents falsely stated in the December 2011-August 2013 Forms ADV that they did not receive an economic benefit for providing advisory services, when they admitted that they did receive such a benefit. (Tr. 800:15-801:9).

Given all of these facts, Respondents were reckless, or the very least negligent, in not ensuring that they made a "meaningful disclosure" from which their clients could understand the Fidelity

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[20] Jones testified that Respondents deliberately chose the words they did to disclose the Fidelity Arrangement, but he was impeached with investigative testimony, in which he admitted the Form ADV did not disclose the Fidelity Arrangement specifically.

Arrangement. They either deliberately chose words that mischaracterized the Payments, or they completely failed to make any disclosure regarding the agreement. Either way, they failed to make a meaningful disclosure such that a reasonable investor could comprehend the conflict of interest, and they were reckless, or at a minimum negligent, in doing so.

c. The Decision applied an incorrect standard of care and misapplied the requirements of the reasonable reliance on advice of a professional concept.

The Decision did not apply a standard of reasonable care, and instead determining that the standard was whether Respondents employed compliance consultants and relied on their advice. (I.D., at 42, 43). The Decision arrived at that conclusion by crediting Respondents' expert's testimony that investment advisers "operate in an uncertain regulatory environment" and rely on compliance consultants to advise them about disclosures. (I.D., at 30, 42). The Decision's holding, however, is contrary to established law. Reliance on professionals is *not* a defense to securities fraud. *E.g., U.S. v. Peterson*, 101 F.3d 375, 381 (5th Cir. 1996) (good faith reliance on advice of counsel is not a defense to securities fraud); *Tarvestad v. United States*, 418 F.2d 1043, 1047 (8th Cir. 1969) (compliance with federal securities laws cannot be avoided by retaining outside counsel to prepare required documents). Reasonable reliance on advice of counsel, or other professionals such as compliance consultants, is at best, only a factor in considering a respondent's *scienter*. *See, e.g., Howard v. SEC*, 376 F.3d 1136 (D.C. Cir. 2004) (reliance on advice of counsel is simply evidence of good faith, a relevant consideration in evaluating defendant's *scienter*); *Markowski v. SEC*, 34 F.3d 99, 104-105 (2d Cir. 1994) (reliance on advice of counsel is only one factor to be considered).

The Decision's choice of standard also did not match the issue: the ultimate issue in this case was not whether *regulators* thought Respondents' disclosure was adequate; it was whether an ordinary investor would be able to understand the conflict from Respondents' description of it in order to consent to it. Applying that standard does not require specialized knowledge from an expert about the "regulatory environment," or the process of drafting conflicts disclosures. *See SEC v. Daifotis*, 2012 WL 2051193, at *4 (N.D. Cal. June 7, 2012) (expert opinions about what investors understood or should have understood based on disclosures is unhelpful and not proper subject for expert testimony); *Taylor v. U.S. Bank Nat'l Ass'n*, 2015 WL 507526, at *3 (S.D. Tex. Feb. 6, 2015) (expert opinions are not required where establishing elements of claim for jury could be considered obvious or common sensical). The descriptions Respondents provided in their Forms ADV would not have put a reasonable investor on notice as to the existence and facts of the Fidelity Arrangement.

In addition, the Decision's analysis as to whether Respondents reasonably relied on their compliance consultants—both for the determination of the existence of *scienter* and for determining whether they acted recklessly and negligently—was flawed. It failed to properly analyze or give due weight to the elements of reasonable reliance. In addition to its limited purpose of rebutting *scienter,* reasonable reliance requires proof of specific elements, namely: (1) that the party who seeks to rely on the professional advice make a complete disclosure of relevant facts to the professional; (2) that the party request the professional's advice as to the contemplated action; (3) that the party receive advice concerning the contemplated action; and (4) that the party actually rely in good faith on that advice. *See Zacharias v. SEC,* 569 F.3d 458, 467 (D.C. Cir. 2009) (listing the four prerequisites for reliance on advice of counsel defense and

holding that defendant failed to meet them); *SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1314 n. 28 (D.C. Cir. 1981).

In addition, the advising professional must be a disinterested party. *Arthur Lipper Corp. v. SEC*, 547 F.2d 171, 181-182 (2d Cir. 1976); *see also Kunz v. SEC*, 64 Fed. Appx. 659, 666 (10th Cir. 2003).

Respondents fell short of meeting any of these required elements. Respondents claimed they relied on Triad, their broker-dealer, and Renaissance Regulatory Services ("RRS") as compliance consultants. (Tr. 406:14-17). However, Respondents offered no testimony of a single specific conversation they had with any consultant about the Fidelity Arrangement or otherwise.[21] They presented no testimonial or documentary evidence of any specific questions they asked their consultants, or of facts they disclosed to them, or advice they received and followed. (Tr. 507:20 – 511:2; *see also* 550:3-6; 554:23-555:14; 631:11-632:14). Respondents' evidence from their consultants consisted entirely of vague testimony from representatives of Triad and RRS. Moreover, Triad, as a party to the 2004 Agreement and recipient of 10% of the Fidelity Payments from 2004 to April 2013 (Stip. No. 19), was *not* a disinterested party on whom Respondents could reasonably rely.

In addition, no evidence established any of the required elements as to Triad. There was no evidence that Respondents specifically asked Triad for its advice on how to disclose the Fidelity Arrangement or its inherent conflict of interest,[22] no evidence that Respondents made a

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

[22] Respondents relied solely on inferences: they testified they presented TRG's Forms ADV to Triad and RRS, claimed it was for their review, and Triad never informed Respondents that the Forms ADV had any defects. (Tr. 630:7-631:21; 641:3-23; 645:24-647:5). Respondents then asked the Triad witness: If Triad did not point out

full disclosure of all material facts related to the Fidelity Payments to a specific Triad representative who would be providing the requested advice,[23] no evidence that Triad expressly provided Respondents any advice, and no evidence that Respondents followed such advice. The Decision found that Ernest Strauss, the Triad representative, testified that Triad reviewed and approved of TRG's Form ADV. (I.D., at 41). But Strauss testified only as to a general practice, i.e., that Triad "would" review and approve TRG's Forms ADV. Importantly, Strauss went on to admit that—as to the particular conflicts disclosures here—he did not know if Triad had actually reviewed and approved those disclosures. (Tr. 630:7-632:14).

The only reliable, and documented, evidence as to whether Triad ever offered any advice on the disclosure at issue here was the January 22, 2013 letter from Strauss to the Division. (Tr. 642:13-644:1). In that letter, Strauss declared, "*Triad is unaware* if the [Fidelity] service fees were disclosed to the clients of the Robare Group." (DX 83) (emphasis added). That statement confirms that Triad was never asked for its advice about the Form ADV disclosure at issue and never provided its advice. Triad was unaware, because it never had an explicit discussion with Respondents about the disclosure in TRG's Form ADV regarding the Fidelity Arrangement. The letter also contradicted the impermissible inferences Respondents offered at the hearing, in their

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any deficiencies in the Forms ADV to Respondents, would it be "fair" to conclude that Triad considered TRG's disclosures on the Fidelity Arrangement to be adequate? (Tr. 645:18-647:5). The law judge sustained the Division's objection to that question (Tr. 646:5-647:5), but the Decision nevertheless relied on that very inference. (I.D., at 21). In addition, the Triad witness repeatedly testified that he did not have first-hand knowledge of whether Triad had ever reviewed TRG's specific disclosures on the Fidelity Arrangement or even advised TRG as to how to word them. (Tr. 630:12-632:14).

[23] The Decision found that because Triad as an entity was a party to the 2004 Agreement, every employee at Triad could be presumed to have knowledge of the existence of the contract, including the Triad auditors who conducted annual reviews of TRG. (*See* I.D., at 21, 40 at n. 49). Yet there was no evidence, either from the auditors or from their reports, that they were aware of the existence of the 2004 Agreement, or had affirmatively determined that TRG's Forms ADV "accurately disclosed" the specific Fidelity Arrangement.

after-the-fact effort to convert Triad's silence about defects in TRG's Form ADV disclosures into express approval of the particular disclosures at issue in this case. (Tr. 645:23-647:5).

Respondents' evidence of RRS's advice was equally insufficient. The RRS witness, Bartholomew McDonald, could not remember conversations with the Respondents about the Fidelity Payments before December 2011. (Tr. 584:21-586:3). Similar to Strauss at Triad, he testified only that he "would have" discussed the disclosure issue with Respondents. (Tr. 550:3-6). McDonald, however, was impeached with his investigative testimony, where he conceded that he did not even recall the agreement with Fidelity (Tr. 582:19-583:9), much less any discussions about it. McDonald's testimony that he "would have" discussed the disclosures with Respondents was further unreliable because he was forced to admit that RRS *did not even have a copy* of the 2004 Agreement until May 2014, when he received one from the Division staff during this investigation. (Tr. 578:2-579:5). He also admitted, ultimately, that having a copy of the 2004 Agreement would have been "important" before RRS could render any advice to TRG about the conflict. (Tr. 584:1-20).[24]

In short, there was no reliable evidence adduced at the hearing that Respondents explicitly requested advice from Triad or RRS regarding how to properly disclose the Fidelity Payments, or that Respondents ever made a complete disclosure of all material facts to Triad or RRS, or that Respondents actually received explicit advice from Triad or RRS on how to disclose the conflict raised by the Fidelity Arrangement, or that Respondents followed any such

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[24] The Decision made an assumption that RRS knew about the 2004 Agreement, in spite of McDonald's testimony to the contrary, by relying on the single statement from McDonald that it was RRS's generic business practice to ask clients about revenues. (Tr. 549:6-550:6). Based on that statement, and contrary to clear evidence in the record, the Decision found as a matter of fact that RRS had explicit knowledge of the 2004 Agreement with Fidelity because RRS *would have* asked TRG about its revenues. (I.D., at 19).

advice. Accordingly, Respondents cannot defend their reckless and negligent failure to disclose the conflicted Fidelity Arrangement by claiming that they received the blessing of a compliance consultant.

The Decision, however, improperly converted silence from Triad and RRS, or, worse, their presumed failures to uncover defective disclosures, into express approval of TRG's disclosure about the Fidelity Arrangement. (I.D., at 40-41). But silence by the professional does not equate to good faith reliance on a specific opinion. *See SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682, 712 n. 68 (D.D.C. 1978) (defendant did not rely on actual advice of counsel, but, if at all, on counsel's silence; "this blind inaction hardly constitutes good faith reliance on counsel"); *see also Dolphin and Bradbury, Inc. v. SEC*, 512 F.3d 634, 642 (D.C. Cir. 2008) (defendant cannot rely on the silence of others to absolve himself of responsibility when non-disclosure presented such an obvious danger of misleading investors).[25]

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[25] Respondents also claimed to have relied on the silence in the no-further-action letter issued after a one-day examination of TRG in 2008 by the Office of Compliance, Inspections, and Examinations ("OCIE") that was not prompted by or focused on the Fidelity Arrangement. (DX 79). In that letter, OCIE staff expressly advised Respondents that they were *not* to construe the letter as any indication that TRG's activities complied with the federal securities laws. (*Id.*; Tr. 226:6-228:24). Nevertheless, that is exactly what Robare testified to. Robare stated that, based on the Commission's silence, he concluded that TRG's Form ADV disclosures were adequate because otherwise he would have expected the staff to say something. (Tr. 409:15-410:13-25).

The Decision appeared to credit Robare's testimony, that he was correct in relying on the Commission's silence and in assuming the Commission would have informed him of *literally any* fault with TRG's Form ADV – even though there was no evidence that OCIE staff knew about the Fidelity Arrangement. (I.D., at 29-30). This position is contrary to existing law, establishes troubling policy concerning the scope and effect of Commission exams, and warrants clarification that registrants cannot rely on silence in OCIE communications to escape liability for securities law violations. *See Application of Ronald Pellegrino*, 2008 WL 5328765, at *14 (Dec. 19, 2008); *Quest Capital Strategies, Inc.*, 2001 WL 1230619, at *8 (Oct. 15, 2001) (advice from staff that an investigation has been terminated "must in no way be construed as indicating that the party has been exonerated").

Given the complete lack of credible evidence in the record, Respondents failed to prove they are entitled to the benefit of reasonable reliance on advice of a professional in rebutting *scienter*.

3. Jones aided and abetted, and caused, the violations of TRG and Robare of Sections 206(1) and 206(2).

Jones aided and abetted, and caused, TRG's and Robare's violations of Sections 206(1) and 206(2). 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); *Clarke T. Blizzard*, 2004 WL 1416184, at *5 n.10 (June 23, 2004). 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. *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 M.A.G. Capital, LLC,* 2009 WL 510315, at *4 (March 2, 2009); *Clark T. Blizzard*, 2004 WL 1416184, at *5 n.10, (June 23, 2004).

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 about the Fidelity Arrangement and that it posed a conflict of interest that TRG needed to disclose. (Stip. Nos. 14, 16-18, 20, 24-30, 36; Tr. 728:13 – 729:5). He was aware of the contents of the relevant

Forms ADV and reviewed them before they were filed or furnished. (Stip. No. 35). Importantly, Jones signed each of TRG's Forms ADV from August 18, 2005 forward. (*Id.*). Jones was, therefore, aware of his role in and substantially assisted Robare's 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 the December 2011 communications when Fidelity informed TRG that it had not disclosed the Fidelity Arrangement in its Form ADV and required TRG to disclose their arrangement or risk termination of the Payments. In fact, when Fidelity confronted Jones about TRG's failure to disclose the Fidelity Arrangement, Jones did not object or disagree or point to any document or language where disclosure had been made. (Tr. 122:2 – 123:11; 132:16 – 133:6; DX 41- 47).

Despite Fidelity's communications with Jones, TRG ignored Fidelity's suggested disclosure language, stating that TRG "shall receive" payments under the Fidelity Arrangement. (DX 41, at 2). And, while the disclosure Fidelity proposed to Jones also stated that the Fidelity Arrangement might create a conflict of interest, TRG intentionally chose not to use that language in Forms ADV Jones reviewed and signed. (Tr. 792:9 – 794:7). Instead, TRG opted to disclose only that it "may" receive additional compensation and omitted to state that the Fidelity Arrangement created a conflict of interest. (DX 25, 45). Jones signed the December 2011 Form ADV in response to Fidelity's ultimatum, knowing he and his firm had rejected the more complete language Fidelity had 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, TRG's Forms ADV wholly failed even to reference, much less properly disclose, the Fidelity Arrangement. At the hearing, Jones

admitted that TRG's supposed disclosures during the relevant period could have been more fulsome in a number of material respects:

> 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.

(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 or was at least reckless in not knowing that 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.*; DX 41-DX 47). Likewise, this evidence establishes Jones's knowledge and substantial assistance in TRG's inadequate and misleading disclosures of the Fidelity Arrangement from December 2011 through August 2013.[26]

B. Each Respondent violated Section 207 by not disclosing the Fidelity Arrangement and TRG's conflict of interest in its Forms ADV.

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. 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.'

Montford & Co., 2014 WL 1744130, at *16 (May 2, 2014).

Under Section 207 of the Advisers Act, an investment adviser has a duty to file Forms ADV that are not false or misleading and that do not omit to state material facts required to be stated therein. *See, e.g., 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

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

practices). A person violates Section 207 by filing a false Form ADV, including any amended Forms ADV. *Stanley Peter Kerry*, 1996 WL 30013, at *2 (Jan. 25, 1996).

Scienter is not required to prove a violation of Section 207. *Parnassus Invs., Inc.*, 1998 WL 558996, at *18 (Sept. 3, 1998) (Initial Dec.). Section 207 provides that misstatements or omissions be made "willfully," but this requires only that the person intend to undertake *the act* in question. *SEC v. K.W. Brown and Co.*, 555 F. Supp. 2d at 1309 (finding of willfulness does not require intent to violate or *scienter*, but merely intent to do the act which constitutes the violation); *SEC v. Moran*, 922 F. Supp. 867, 900 (S.D.N.Y. 1996); *see also 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).

Contrary to this precedent, and despite citing *Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.C. Cir. 2000), the Decision incorrectly merged the statutory requirement of "willfullness" under Section 207 with *scienter* and dismissed the Section 207 charge. (I.D., at 43-44). But, for the reasons discussed above, the evidence shows that TRG, Robare, and Jones each acted willfully and directly violated Section 207 by filing false or misleading Forms ADV between March 2005 and August 2013 that willfully contained untrue statements or omitted required information. Specifically, TRG's Forms ADV during that period omitted to state material facts that:

- TRG's custodian, Fidelity, was paying TRG a fee.
- The fee was for TRG's placement of its advisory clients' assets into NTFs on Fidelity's investment platform.
- The fee might incentivize TRG to place its clients' assets in those NTFs.

- Such incentive, and the entire Fidelity Arrangement, was a potential conflict of interest.

TRG's Forms ADV during the relevant period also included untrue statements that:

- "We do not receive an economic benefit from a non-client for providing investment advice or other advisory services to our clients."
- "We may receive additional compensation in the form of custodial support services from Fidelity based on revenue from the sale of funds through Fidelity."

Robare and Jones admit that they were responsible for the disclosures inadequately made in, or omitted from, TRG's Forms ADV between 2005 and 2013. (*See* Tr. 442:7 – 443:6; 757:4-6; 790:1-3; 795:24-796:20). They admit that they reviewed each of TRG's Forms ADV during the relevant period, that Robare had ultimate authority over their content as Chief Compliance Officer, and that Jones signed each of them. (Stip. Nos. 34, 35; DX 56 (at 68:13-19); *see* Tr. 514:8-11). For all of these reasons, each Respondent violated Section 207 of the Advisers Act.

C. Respondents should be subject to sanctions.

The evidence in the record establishes that TRG and Robare violated Sections 206(1) and (2) of the Advisers Act, that Jones aided and abetted or caused their violations, and that each Respondent violated Section 207 of the Advisers Act. Accordingly, it will be in the public interest to order remedies against the Respondents.

1. The Commission 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 the 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. *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474-75 (2d Cir. 1996), *cert. denied*, 522 U.S. 812 (1997); *SEC v. Resnick*, 604 F. Supp. 2d 773, 782 (D. Md. 2009); *Thomas C. Bridge*, 2009 WL 3100582, at *23 (Sept. 29, 2009). 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 Financial Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989). 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 Financial Corp.*, 890 F.2d at 1232.

Respondents agree that they profited from the Fidelity Arrangement. (*See* Tr. 502:19 – 503:8; 801:6-9). Specifically, they agree that, from September 2005 (not the beginning of their receipt of the Fidelity Payments)[27] through September 2013, they received $401,778.54 in Fidelity Payments. (DX 35; Tr. 499:12 – 503:8; 764:20 – 765:21). Respondents obtained those sums continuously throughout a nine-year period during which they recklessly, or at least negligently, 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. That figure is a reasonable approximation of the ill-gotten gain 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. (Tr. 765:22 – 766:4; Stip. No. 1). The salaries of Robare and Jones and others, TRG's and

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

RAM's overhead expenses, and other expenses were and are paid out of the same RAM account into which the Payments were deposited. (Tr. 766:5-8). Consequently, the Payments 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 Payments he received. (Tr. 766:14 – 767:15).

It is beyond dispute that Jones and Robare are, and always have been, the principals 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.[28]

2. The Commission 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 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 Commission enforcement actions. 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

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[28] "[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*).

$401,778.54, the application of the tax underpayment rate from October 1, 2013,[29] through September 30, 2015, results in a total prejudgment interest amount of $24,749.08.

3. The Commission should order Respondents to pay civil penalties.

Section 203(i) of the Advisers Act, 15 U.S.C. § 80b-3(i), authorizes the imposition of a civil monetary penalty against a respondent who willfully violated, *inter alia,* the Advisers Act or the rules and regulations thereunder. *See also* Advisers Act § 203(i)(1)(B) (civil penalties also available in cease-and-desist proceedings under § 203(k), for violating or causing a violation under the Advisers Act). 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 to make the disclosures that they made, choosing their words deliberately. (Tr. 789:15-790:3). They further intended to file or furnish to clients each of the 11 deficient Forms ADV at issue during the relevant period.

Before assessing a civil penalty, the Commission must determine that it is in the public interest to do so. That determination must be made in light of six statutory factors: (1) whether the violation involved fraud, deceit, manipulation, or a reckless disregard of a regulatory requirement; (2) whether any harm to others resulted from the violation; (3) 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

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[29] The disgorgement amount was tallied at trial through September 2013. Thus, the prejudgment interest is calculated as beginning from October 1, 2013. The last violation occurred on August 26, 2013, with the filing of the last defective Form ADV.

may require. Advisers Act Section 203(i)(3) [15 U.S.C. § 78u-2].[30]

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. *See* Advisers Act Section 203(i)(2)(C). At the very least, second-tier penalties should be assessed. The Division contends that the Commission should impose a penalty up to the maximum statutory amount, times 11, against each Respondent, based on the fact that Respondents willfully and recklessly made untrue statements and/or omissions in 11 separate Forms ADV during the relevant period. The evidence amply establishes that such penalties are in the public interest because:

(1) Each Respondent committed, or in the case of Jones aided and abetted or caused, fraud in violation of Section 206. In addition, all Respondents violated Section 207 by making untrue statements or omissions in TRG's Forms ADV.

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

(3) Respondents' fraud occurred over a nine-year period, from the inception of the 2004 Agreement through at least August 2013.

(4) Respondents' conduct deprived their clients of the crucial ability to learn about, and consent to, a clear conflict of interest that jeopardized the sound and untainted advice they expected from their fiduciary investment adviser.

(5) Respondents profited substantially from their misconduct.

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[30] Other factors that may also be considered include: (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).

(6) Deterrence is necessary because Respondents ignored the problems their conduct created, to the detriment of their clients, but they nevertheless continue to operate TRG, and as a result continue to act as fiduciaries for hundreds of advisory clients.

(7) Public deterrence is also necessary to inform others, including other registered investment advisers, that they will be penalized if they ignore their fiduciary obligations and do not at all times act in the best interests of their clients.

(8) Respondents have not acknowledged their wrongdoing but, instead, claim they did nothing wrong, and in so doing provided self-serving, and at times disingenuous, testimony at the hearing.[31]

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

4. The Commission should impose cease-and-desist orders against each Respondent.

Section 203(k) of the Advisers Act, 15 U.S.C. § 80b-3(k), authorizes the imposition of 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 who 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 commit future violations, the degree of harm to investors, the extent to which the respondent was

[31] 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 (RX 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), when in fact that was exactly what Fidelity's email said. (DX 43).

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 Commission 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 law violations over a nine-year period. Robare and Jones continue to operate TRG as a registered investment adviser 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.[32]

CONCLUSION

With each Form ADV Respondents prepared and provided to current and prospective clients and filed with the Commission over a nine-year period, they failed to discharge their legal

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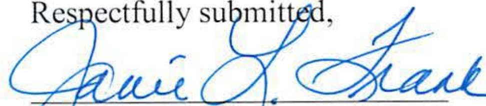
[32] In addition to the remedies discussed above, Section 203(f) of the Advisers Act provides that the Commission may also bar or suspend Robare and Jones from associating with an investment adviser, limit their association, or censure them, based on their willful violations described herein, if it would be in the public interest to do so. In analyzing the public interest, the Commission considers, among other things, the same *Steadman* factors analyzed above. *Toby G. Scammell*, 2014 WL 5493265, at *9-10 (Oct. 29, 2014). For the reasons discussed above, the Commission has ample evidence on which to base a bar or suspension.

obligation and fiduciary duty to fully, fairly, and accurately disclose the nature of the Fidelity Arrangement and its inherent and admitted conflict of interest. Respondents' violations left their clients in the dark about a serious conflict of interest that had the potential to influence how their assets would be invested. As a result, Respondents' clients could not properly evaluate the investment advice they received, or even whether to do business with Respondents at all. The disclosure failures in this case, which were amply established at the hearing, thus strike at the very heart of the fiduciary relationship between an investment adviser and its clients. By absolving Respondents of all liability, the Decision not only disregarded clear facts and law but also sent a troubling message that advisers need not be transparent with their clients and may instead offload their essential disclosure obligations to third parties. Accordingly, the Division respectfully requests that the Commission reverse the Decision's findings that no violations occurred and issue an opinion that TRG and Robare violated Sections 206(1) and 206(2) of the Advisers Act, that Jones aided and abetted and caused those violations, and that all three violated Section 207 of the Advisers Act. The Commission should further order the remedies requested in the original Order Instituting Proceedings.

Dated: September 11, 2015.

Respectfully submitted,



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SERVICE LIST

In accordance with Rule 150 of the Commission's Rules of Practice, I hereby certify that a true and correct copy of the foregoing *Brief in Support of Division of Enforcement's Petition for Review* was served on the persons listed below on the 11th day of September, 2015, via certified mail, return-receipt requested:

Honorable James E. Grimes
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

Honorable Brenda P. Murray
Chief Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

Mr. Mark Robare
Mr. Jack Jones
Robare Group, Ltd.
c/o Alan Wolper
Ulmer & Berne LLP
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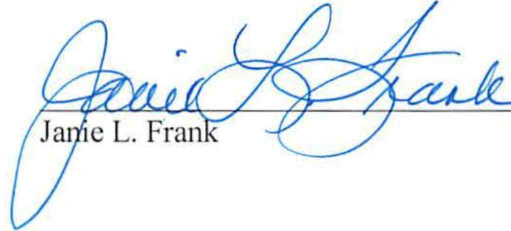
Janie L. Frank

CERTIFICATE OF COMPLIANCE

In accordance with Rule 450(d) of the Rules of Practice, I certify that this brief, exclusive of the cover page, table of contents, table of authorities, and signature blocks is in compliance with the 14,000-word limit. The brief contains 13,964 words, according to the word processing system used to prepare the brief.



Jamie L. Frank

U.S. Securities and Exchange Commission

Division of Enforcement

Prejudgment Interest Report

Robare Group Payments from Fidelity

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
04/01/2015-06/30/2015	3%	0.75%	$3,142.74	$423,326.58
07/01/2015-09/30/2015	3%	0.76%	$3,201.04	$426,527.62

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
10/01/2013-09/30/2015	**$24,749.08**	**$426,527.62**