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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of:

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

Administrative Proc. No. 3-16047

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RESPONDENTS' BRIEF TO COMMISSION ON REMAND

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I. PROCEDURAL HISTORY

On September 2, 2014, the Division of Enforcement filed an Order Instituting Proceedings against Respondents Mark Robare, Jack Jones and The Robare Group, alleging that they willfully violated Sections 206(1), 206(2) and 207 of the Advisers Act by omitting certain information from the Firms Forms ADV.[1] The OIP also charged Mr. Jones with willfully aiding and abetting the Section 206 violations. The Division alleged that this willful conduct justified an award of sanctions against Respondents in the form of disgorgement and civil penalties.[2]

On June 4, 2015, following a full hearing on the merits, the Administrative Law Judge entered an Initial Decision finding, *inter alia,* that the Division of Enforcement failed to carry its burden of proof, that no disclosure failure occurred, that Respondents acted in good faith reliance on the advice and counsel of their compliance consultants, that Respondents did not act with any intent to defraud, and that *even if* some violation did exist, no sanction were appropriate in light of the evidence presented.[3]

The Division of Enforcement appealed the ALJ's findings to the Commission. On November 7, 2016, the Commission entered an Order (the "Order") agreeing with the ALJ's finding that there was no evidence of scienter (and therefore no Section 206(1) violation, but disagreeing with certain other findings. Specifically, the Commission concluded that Respondents' conduct was negligent (and thus sufficient to state a violation of Section 206(2)) and "willful" (sufficient to establish a violation of Section 207). On the issue of sanctions, two of the three Commissioners concluded *not only* that the imposition of a sanction was warranted by the public interest factors, but that Respondents' conduct was sufficient to justify second-tier penalties.

[1] OIP ¶ 14-16.

[2] The Division also sought a cease and desist pursuant to Section 203(k). OIP p. 6.

[3] Initial Decision pp. 1, 38, 39, 41, 42-43, 44.

The third Commissioner dissented on the issue of sanctions, finding that no sanction was justified under the facts presented (let alone a second-tier penalty).[4] Respondents appealed.

On April 30, 2019, the United States Court of Appeals for the District of Columbia affirmed the Commission's findings with regard to Section 206(2) but reversed the Commission's finding that Respondents acted willfully, reversed the Commission's finding that Respondents violated Section 207 of the Advisers Act, and vacated the sanctions that had been imposed by the Commission. The Court remanded this case to the Commission to determine appropriate sanctions, if any, for the sole remaining violation (Rule 206(2)).[5]

II. RELEVANT FINDINGS OF LAW BY THE COURT OF APPEALS

The Commission had concluded that despite the absence of any evidence establishing scienter, Respondents nonetheless acted "willfully" because they caused the Forms ADV in question to be completed and filed. In reaching this conclusion, the Commission held that evidence of Respondents' good faith mindset and belief that their disclosures were adequate was irrelevant, and that the mere act of completing and filing the Forms ADV constituted "willful" conduct.

The Court of Appeals reversed, holding that the Commission's reasoning:

> misinterprets Section 207, which does not proscribe willfully *completing* or *filing* a Form ADV that turns out to contain a material omission but instead makes it unlawful "willfully *to omit* ... any material fact" from a Form ADV. The statutory text signals that the Commission had to find, based on substantial evidence, that at least one of TRG's principals subjectively intended to omit material information from TRG's Forms ADV.
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> The Commission did not find that Mark Robare or Jack Jones acted with "scienter" in failing adequately to disclose the payment arrangement with Fidelity on TRG's Forms ADV. Instead, the Commission gave "significant weight" to the ALJ's

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[4] The Commission also imposed a cease-and-desist. It declined to award disgorgement due to a total lack of evidence in support.

[5] *Robare Group Ltd., v. S.E.C.*, 922 F.3d 468 (D.C. Cir. 2018).

> determination that their testimony and demeanor during cross-examination "belied the notion they were 'trying to defraud anyone.'" (quoting *Initial Decision* at 39). The Commission also found that the record evidence did not "establish that [their] investment decisions on behalf of their clients were influenced by the fees they received from Fidelity." So it did not find Mark Robare or Jack Jones "acted intentionally or recklessly," only that they "acted negligently." Because the Commission found the repeated failures to adequately disclose conflicts of interest on TRG's Forms ADV were no more than negligent for purposes of Section 206(2), the Commission could not rely on the same failures as evidence of "willful[]" conduct for purposes of Section 207.

Id. at 479-80 (emphasis original, internal citations omitted).

Accordingly, the issue presented for the Commission is whether any sanction can be imposed on Respondents in the absence of any willful conduct.

III. ARGUMENT

A. The record does not support the imposition of a sanction against Respondents.

Section 203(i)(1)(A), subparts (i), (ii) and (iii) of the Advisers Act authorizes the Commission to issue monetary penalties for "willful" violations of the Securities Act, Exchange Act or Advisers Act, so long as that penalty is within the "public interest."[6] Sanctions are not appropriate here for two reasons: Respondents did not act willfully, and, even if they did, sanctions would not be in the public interest.

1. Sanctions are unavailable under Section 203(i) in the absence of willful conduct.

As noted above, Respondents were found not to have "willfully" undertaken any of the actions set forth in subparts (i) – (iii) of Section 203(i)(1)(A). This finding alone vitiates any argument in favor of sanctions inasmuch as the Division's entire claim for sanctions was predicated exclusively on willfulness. Indeed, the Division explicitly argued both to the ALJ and then the Commission that a civil penalty was necessary because Respondents "willfully

[6] Subpart (iv) does not require willful conduct, but it is not at issue in this case.

violated...the Advisers Act or the rules and regulations thereunder" by omitting material information from the Forms ADV.[7] In light of the Court's ruling that there was no evidence of willful conduct in this case, an award of monetary penalties pursuant to 203(i)(1)(A), requiring willful violations, is unavailable here.

2. Monetary sanctions are not in the public interest.

Any assessment of monetary penalties by the Commission must be in the public interest.[8] 15 U.S.C. §80b-3(i)(3) sets forth six "public interest" factors the Commission must assess: (a) whether the act or omission involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (b) the harm to other persons resulting either directly or indirectly from the act; (c) the extent of unjust enrichment; (d) prior violations; (e) need for deterrence; and (f) other factors.[9] The Commission found the first two factors present in this case but assessed no weight to the remaining four.[10]

Specifically, in its 2-1 split decision, the Commission held that a second tier sanction was in the public interest because – even though there was no evidence of scienter – the conduct "involved fraud," was "serious," and harmed the firm's customers by depriving them of conflict-free advice.[11] This finding erred in four respects.

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[7] Division's Brief in Support of Petition for review pp. 41, 4 ("Section 203(i) of the Advisers Act...authorizes the imposition of a civil monetary penalty against a respondent who ***willfully violated...***); Division's Post-Hearing brief p. 48 (same).

[8] Section 203(i)(3).

[9] *Id; See also Steadman v. S.E.C.*, 603 F.2d 1126, 1140 (5th Cir. 1979*), aff'd on other grounds*, 450 U.S. 92 (1981) ("Steadman factors").

[10] Order p. 16.

[11] *Id.* at 17-18. Commissioner Piwowar, in his dissent, found that only one factor was arguably present and therefore no sanction justified in this case. The ALJ had reached a nearly identical conclusion. Initial Decision p. 44 note 30.

First, there is no evidence that Respondents' conduct involved fraud, manipulation, deceit, deliberate or reckless conduct.[12] To the contrary, the sole finding against Respondents is that they were negligent, which, as the Court explained, was defined to mean they *lacked* any such intent:[13]

> "Intent and negligence are regarded as mutually exclusive grounds for liability." "Any given act may be intentional or it may be negligent, but it cannot be both." Intent is defined as acting "with the purpose of producing" a given consequence or "knowing that the consequence is substantially certain to result..." Negligence, by contrast, means acting "without having purpose or certainty required for intent" but in a manner that is nevertheless unreasonable.

In the absence of this element alone, the "balancing" of the public interest factors weighs against the imposition of any sanction in this case.

Second, the Commission's finding that Respondents' conduct "involved fraud" is contradicted by both the evidentiary record and the Commission's own findings that Respondents acted in good faith and with a "subjective belief that their disclosures were proper."[14] Indeed, the Commission placed "significant weight" on the ALJ's determination that Respondents' testimony at trial "belied the notion that they were 'trying to defraud anyone, let alone their investment clients.'"[15] The absence of the "fraudulent intent" factor weighs against imposition of a sanction.

Third, as to the "resultant harm" factor, the Commission rested the imposition of sanctions on its belief that TRG's clients were "deprived conflict-free advice." In so doing, however, the Commission ignored evidence showing the lack of harm, including its own express findings that:

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[12] H.R. Rep. No 101-606 (1990)(WL 1990 U.S.C.C.A.N. 1379, 1387) ("The first factor would be 'whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.' This factor recognizes that the ***Commission may assess the violator's culpability, including whether the violator acted with scienter***.

[13] *Robare, at* 479–80. (Internal citations and some punctuation omitted for brevity).

[14] *Id.,* at 479.

[15] Commission Order p. 12, quoting Initial Decision p. 39.

(1) "the Division has not demonstrated any concrete economic harm to TRG clients;"[16] (2) the Division failed to establish there existed a connection between the disclosure failure and the fees received from Fidelity;[17] (3) the Division failed to present evidence that the absence of the disclosure had any bearing on the investment decisions;[18] and (4) the Division failed to prove that the disclosure had any bearing on the client's decision to retain TRG as their investment adviser.[19] To the extent some abstract harm existed in the form of an absence of "conflict-free advice," it must nonetheless be viewed in context of the lack of objective customer harm. Accordingly, this factor is insufficient to justify the imposition of a monetary sanction.

Fourth, the Commission failed properly to "balance" the evidence relating to each of the six factors, as required,[20] and instead based its decision almost exclusively on a single factor (i.e., its finding that Respondents' conduct "involved fraud," which is addressed above). When considering the six public interest factors, no one factor is dispositive.[21] The Commission must take into account the factors weighing against imposition of a sanction, including the lack of customer harm (addressed above), the fact that Respondents were not unjustly enriched (same),

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[16] Commission Order p. 16.

[17] Commission Order p. 17.

[18] Commission Order p. 12.

[19] Commission Order p. 17.

[20] As acknowledged by the dissenting Commissioner. Although not all factors are necessarily afforded the same weight, each evidence was presented in this case as to each factor. The Commission previously improperly ignored the evidence weighing *against* imposition of a monetary sanction.

[21] *Steadman,* 603 F.2d at 1140; H.R. Rep. No 101-606 (1990) discusses that despite having the ability to seek civil monetary penalties, they are not warranted in every case, including where the underlying conduct is unintentional:

> The Committee contemplates that the Commission would not seek or impose a civil money penalty in every case. When a failure to comply with Commission requirements involves isolated or unintentional conduct, the implementation of new procedures or a similar remedial measure may be the most appropriate resolution of the case.

that Respondents have no disciplinary history, and the absence of evidence that the imposition of a sanction would have a deterrent effect.[22]

Moreover, the Commission can consider "other factors" that may be relevant in a specific case. Here, the Commission failed to take into consideration in its analysis the fact that at all times Respondents did everything in their power to try to ensure their disclosures in Form ADV were complete and accurate, hiring expert consultants to assist with that, and readily agreed to any suggested changes to improve their disclosures.

Finally, the Commission should afford "significant" weight to the ALJs conclusion that, even if a violation had occurred:[23]

> "I would conclude that no sanctions were appropriate. The public interest factors set forth in [*Steadman*] weigh in Respondents' favor and do not support the sanctions sought by the Division. Respondents did not act with scienter and their conduct was not egregious. Indeed, they relied on compliance professionals in attempting to craft appropriate disclosures. Finally, the Division presented no evidence of any losses to Respondents' clients.

For any of these reasons, or all of them taken together, the Commission should conclude that the imposition of a sanction is not within the public interest. [24]

a. Evidence of Respondents' good faith effort to comply.

Respondents not only lacked intent to violate the Act, the evidence showed they strove to comply by retaining experts[25] to provide assistance drafting and reviewing their Forms ADV to

[22] *In the Matter of Ambassador Capital Mgmt., LLC, & Derek H. Oglesby*, Release No. 672 (S.E.C. Release No. Sept. 19, 2014) (sanctions imposed on recent violations have the potential for deterrent effect).

[23] Initial Decision p. 44, note 30.

[24] The mere reduction of the number of violations found to exist in this case compels reduction of the sanction. *Monetta Fin. Services, Inc. v. S.E.C.*, 390 F.3d 952, 957 (7th Cir. 2004).

[25] One of the factual disputes in this case has been whether or not the evidence was sufficient to show that the compliance consultants were aware of the servicing fee agreement with Fidelity. Respondents called one consultant to testify at hearing. While he could not recall whether he received the agreement itself, he testified, unequivocally, that Respondents were very involved in the ADV drafting process and

ensure that their disclosures were adequate.[26] The Commission previously held that this conduct did not reflect reasonableness sufficient to negate a finding of negligence. The same evidence is nonetheless relevant in assessing whether a sanction is in the public interest.[27] The sole case the Commission cited in rejecting the evidence of Respondents' reliance on their compliance consultants was a case involving a corporate officer who objectively *knew* his statements were false and simply retained an expert to "cover" that knowledge. *S.E.C. v. Goldfield Deep Mines,* 758 F.2d 459, 467 (9th Cir. 1983). Not surprisingly, this was not permitted. That case, however, provides no insight into whether the retention of industry experts in the *absence* of knowledge or intent to mislead is sufficient to negate negligent conduct.

In this case, Respondents testified that they believed their disclosures were entirely accurate and that potential conflicts of interest were adequately disclosed, and one of the reasons for that belief was the fact that their industry consultants had reviewed their Form ADV for years without comment. Putting aside whether this evidence shows reasonable conduct sufficient to rebut a negligence charge, it is nonetheless a relevant factor to consider in determining whether Respondents pose a risk to the public sufficient to justify imposition of a sanction.

Also relevant is the fact that Respondents' ADV was reviewed annually by their broker-dealer for the express purpose of ensuring that disclosures were complete and accurate.[28] The broker-dealer, Triad, reviewed the Form ADV every year beginning in 2004, but never raised any

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"forthcoming" and "full frank and timely" with information. Tr. 557:7 10; 587:8 11. Mr. Robare testified that he discussed the Fidelity arrangement with the consultant. Tr. 510:1-12. The consultant likewise testified that while he could not recall whether he had such a conversation ten years prior, he believed that he would have because he was well trained to "follow the money" and paid special attention to compensation sources. Tr. 555, 549-50.

[26] Initial Decision p. 30, 39; RX-119. p. 4; Tr. 637-639.

[27] *Steadman v. S.E.C.*, 603 F.2d 1126, 1140–41 (5th Cir. 1979), *aff'd,* 450 U.S. 91 (1981) ("[R]espondent's state of mind is highly relevant in determining the remedy to impose.")

[28] RX 16, 17, 22, 27; Tr. 389, 392, 395; Tr. 607-608; Tr. 660.

issues or indicated there were any problems with the Form ADV disclosures.[29] Between 2004 and 2012, that broker-dealer was a party to the Fidelity Agreement (and necessarily aware of it).[30] When the second agreement was executed in 2012, the evidence showed that while Triad was no longer a party to the contract, it nonetheless reviewed and approved the 2012 agreement before it was executed.[31]

These facts demonstrate that Respondents attempted and intended to comply with the law, opened their doors to the advice of industry professionals, and honestly believed their Forms ADV were compliant.[32] This evidence tips the scales significantly *against* imposition of a sanction.

b. Form ADV amendments in response to SEC exam.

After the SEC began its exam and indicated to Respondents that it believed the Form ADV disclosures were insufficient, Respondents made several revisions to the Form in an attempt to comply. Because the SEC did not share with Respondents *why* or *how* it considered the disclosures inadequate, Respondents embarked on a series of revisions, hoping to cure the (unspecified) issues the examiners had detected.[33] These amendments serve to corroborate Respondents' testimony that they were willing to make whatever changes were proposed to them by any expert – whether that be their broker-dealer, compliance consultant or the SEC itself.

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[29] *Id.*

[30] RX-1.

[31] Tr. 703-04.

[32] These facts likewise undercut any argument by the Division that sanctions will serve to "deter" similar conduct in the future by Respondents or other firms. Punishing wrongdoers for conduct undertaken intentionally or willfully or with other kinds of malintent sends a message to others in the industry not to follow that example. Here, Respondents attempted to comply, took the reasonable step of hiring professionals to assist them, had their broker-dealer review their forms ADV, cleared several SEC examinations without issue, caused no harm to their clients, lost no clients, and made a series of amendments to their Form ADV in attempt to please the SEC examiners prior to the initiation of this lawsuit. Punishing Respondents for this good faith behavior would not serve the Commission's objective of deterrence.

[33] DX-29, Tr. 709; Commission Opinion p. 4.

3. Second-tier sanctions are not justified.

Following the above discussion, which renders dubious the question whether *any* sanction is justified here, it nearly goes without saying that the Commission's imposition of second-tier sanctions[34] was against the weight of the evidence. The Commission is authorized to impose second-tier sanctions only where the omission "involved fraud, deceit, manipulation or deliberate or reckless disregard of a regulatory requirement."[35] For the reasons already set forth above, that finding was in error and no sanction is in accordance with the public interest.

In addition, the decisions previously issued by the Commission and Courts of law on the propriety of second-tier sanctions underscore the lack of justification in this case.[36] Respondents are unaware of a single case imposing second-tier sanctions for unintentional conduct similar to that involved here. To the contrary, the Commission has historically awarded second-tier sanctions only in the presence of an express finding of *scienter* (including scienter based on a recklessness standard).[37]

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[34] As noted previously, this was a split decision amongst the three Commissioners, with Commissioner Piwowar concluding that no sanction was warranted under the facts presented which, at the time of the Order, included a (since reversed) finding of willfulness and a Section 207 violation.

[35] 203(i)(2)(B).

[36] *Steadman v. S.E.C.*, 603 F.2d 1126, 1137 (5th Cir. 1979), aff'd, 450 U.S. 91 (1981) ("We conclude that when the Commission chooses to order the most drastic remedies at its disposal, it has a greater burden to show with particularity the facts and policies that support those sanctions and why less severe action would not serve to protect investors.")

[37] *E.g., In the Matter of J.S. Oliver Capital Mgmt., Lp, & Ian O. Mausner*, Release No. 4431 (S.E.C. Release No. June 17, 2016) (second-tier sanctions imposed along with an industry bar); *In the Matter of Saving2retire, LLC, & Marian P. Young*, Release No. 1195 (S.E.C. Release No. Oct. 19, 2017) (Same. Notwithstanding intentional conduct, SEC did not even request third-tier penalties, like it did in this proceeding); *In the Matter of Warwick Capital Mgmt., Inc. & Carl Lawrence*, Release No. 2694 (S.E.C. Release No. Jan. 16, 2008) (finding second-tier penalties warranted alongside an industry bar and cease-and-desist, but declining to impose them). *In the Matter of Edgar Lee Giovannetti*, Release No. 914 (S.E.C. Release No. Nov. 6, 2015) (considering disclosure failures under Sections 206 and 207) (declining to impose second-tier penalties and imposing only first-tier penalties notwithstanding an industry suspension and findings of scienter-based conduct); *In Re F.X.C. Inv'rs Corp.*, Release No. 218 (S.E.C. Release No. Dec. 9, 2002) ("I conclude that the $100,000 penalties sought by the Division in this proceeding are grossly disproportionate to the gravity of the proven offenses, and thus constitutionally excessive under the

4. Cease-and-desist is not warranted.

The Commission should determine that a cease-and-desist order is not warranted here. In its Order, the Commission held that the public interest factors justified the imposition of a cease-and-desist[38] order because the evidence showed Respondents acted "unreasonably" and, therefore, given their ongoing presence in the industry, there was a "sufficient risk" of future violations.

Relevant authority, however, including that previously relied upon by the Division,[39] has rejected imposition of a cease-and-desist order based solely on the vague assertion that there existed "some risk" of a future violation or that the violations were "serious" in nature:[40]

> Thus the SEC's stated bases for the cease-and-desist order fall apart. The "risk of future violation" cannot be the sole basis for its imposition of the order, as the SEC's standard for finding such a risk is so weak that it would be met in (almost) every case; and the finding that the violation was serious depends on the mistakenly assumed clarity of the rule and on [respondent's] good faith use of procedures made available by the Commission expressly for parties in [respondent's] position.

As in *WHX*, the Commission should not impose a cease-and-desist order here in light of the express findings as to: (1) the lack of scienter; (2) the lack of willfulness; (3) the lack of investor harm;

Excessive Fines Clause of the Eighth Amendment. That is a matter that justice requires me to consider. Four of the six statutory factors favor [respondents]. Although the antifraud violations were serious and there were prior violations, the facts and circumstances persuade me that a cease-and-desist order, a censure, and an order to engage a compliance consultant fully vindicate the public interest."); *In the Matter of Christopher M. Gibson*, Release No. 1106 (S.E.C. Release No. Jan. 25, 2017), *review granted*, Release No. 4657 (S.E.C. Release No. Mar. 6, 2017) (second-tier penalties assessed for intentional conduct justifying not only scienter findings but industry bar).

[38] Order page 15, *citing In the Matter of Donald L. Koch & Koch Asset Mgmt., LLC*, Exchange Act Re. no. 72179, 2014 WL 1998524, at 20-21 (May 16, 2013) ("In determining whether a cease-and-desist order is appropriate, we consider the *Steadman* factors identified above as well as "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings.")

[39] Division's Brief in Support of Petition for Review on Appeal to Commission p. 44 citing *WHX Corp. v. S.E.C.*, 362 F.3d 854, 861 (D.C. Cir. 2004) which reversed the Commission's imposition of a cease-and-desist order.

[40] *WHX Corp. v. S.E.C.*, 362 F.3d 854, 861 (D.C. Cir. 2004).

and (4) the absence of previous violations.[41] Giving "meaningful consideration"[42] to each of these factors, the Commission should decide that a cease-and-desist order is not warranted.

IV. CONCLUSION

For the reasons set forth herein, Respondents submit that the Commission's opinion on remand should conclude that no sanction is in the public interest and should decline to impose the same.

Respectfully submitted this 23rd day of August, 2019.

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[41] *Id.* at 861.

[42] *Monetta Fin. Services, Inc.*, 390 F.3d at 957 ("Although the SEC's opinion references these factors, the opinion does not reflect that the SEC meaningfully considered these factors when it imposed the sanctions. In fact, many of the aforementioned factors suggest that the sanctions are excessive.")

CERTIFICATE OF SERVICE

I hereby certify that this **RESPONDENTS' BRIEF TO COMMISSION ON REMAND** has been sent to the following parties entitled to notice in the matter set forth herein:

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Re: In the Matter of The Robare Group, Mark Robare, and Jack Jones, AP No. 3-16047

Dear Ms. Countryman:

Please find enclosed an original copy of Respondents' Brief to the Commission on remand in the above-captioned matter, filed by facsimile today.

Please do not hesitate to contact me with any questions.

Sincerely,

Heidi E. VonderHeide

cc: Janie L. Frank, Esq (via overnight delivery and email)

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