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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-16047

In the Matter of	
THE ROBARE GROUP, LTD. MARK L. ROBARE, AND JACK L. JONES, JR.,	**DIVISION OF ENFORCEMENT'S RESPONSE TO RESPONDENTS' OPENING BRIEF ON REMAND**
Respondents.	

Dated: September 23, 2019.

Respectfully submitted,

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I. SUMMARY.

The D.C. Circuit Court of Appeals ("D.C. Circuit") remanded this case to the Commission solely to determine the appropriate sanctions to impose against Respondents The Robare Group, Ltd. ("TRG"), Mark Robare ("Robare"), and Jack Jones ("Jones") (collectively "Respondents") for their violations of Section 206(2) of the Investment Advisers Act of 1940 ("Advisers Act"). *Robare Grp. Ltd. v. SEC*, 922 F.3d 468, 480 (D.C. Cir. 2019). In affirming that Respondents violated Section 206(2) by engaging in conduct which operated as a fraud or deceit upon their clients, the D.C. Circuit specifically concluded that:

> The Commission found that in view of an investment adviser's fiduciary obligation, [Respondents] 'should have known' their disclosures were inadequate. Specifically, the Commission found, *and the record supports*, that the principals acknowledged the payment arrangement with Fidelity created potential conflicts of interest and that they knew of their obligation to disclose this information to their clients. Nevertheless, their disclosures were 'plainly inadequate,' over a period of 'many years.' Because a reasonable adviser with knowledge of the conflicts would not have committed such clear, repeated breaches of its fiduciary duty, [Respondents] acted negligently."

Id. at 477 (emphasis added) (citations omitted).

Although the D.C. Circuit held that Respondents did not "willfully" omit material information from their Forms ADV in violation of Advisers Act Section 207 because they did not do so with scienter, the sanctions imposed by the Commission—other than the order to cease and desist from Section 207 violations—rested on findings (which the D.C. Circuit affirmed) that Respondents repeatedly breached their fiduciary duty to their clients. Because the D.C. Circuit opinion supports, rather than undermines, the Commission's November 7, 2016 sanctions' analyses—and because Respondents offer no persuasive countervailing arguments—the Commission should re-order each respondent to pay a $50,000 civil penalty and to cease-and-desist from committing and causing violations of Section 206(2).

II. BACKGROUND FACTS.

The underlying facts of this matter have previously been set out in detail in opinions from the Commission (*In the Matter of The Robare Group, Ltd., et al.*, AP File No. 3-16047, 2016 WL 6596009 at *1-3 (Nov. 7, 2016) (hereinafter "Comm. Op.")) and the D.C. Circuit (*Robare*, 922 F.3d at 473-77). TRG is a Commission-registered investment adviser that, as of the AP hearing, had approximately $150 million in assets under management on behalf of about 300 households. Comm. Op. at *1 n.1.[1] In 2004, TRG entered into a revenue-sharing agreement with Fidelity Investments ("Fidelity"), whereby Fidelity agreed to pay TRG a percentage fee for maintaining client assets in non-Fidelity, no-transaction fee mutual funds offered on Fidelity's online investment platform (the "Arrangement"). *Robare,* 922 F.3d at 473. The more client assets TRG kept invested in eligible funds, the more fees Fidelity paid TRG. *See* Comm. Op. at *2 (Fidelity paid 2-12 basis points on the value of eligible assets in an increasing formula). This Arrangement created potential conflicts of interest and, Respondents conceded, "could have 'a tendency to slant' TRG's advice to increase revenue." Comm. Op. at *6. But for years, TRG failed to "fully and fairly disclose the conflicts of interest arising from [the Arrangement]." *Robare*, 922 F.3d at 476. In December 2011, Fidelity alerted Respondents that it "did not find" the Arrangement disclosed in TRG's Form ADV and threatened to stop paying Respondents unless the Form ADV specifically referred to the Arrangement. *Id.* In response, Respondents modified its Form ADV to identify the Arrangement for the first time, but they did "not fully and fairly disclose the conflicts of interest" caused by the Arrangement until at least April 2014. *Id.*

[1] Robare testified that about 85% of TRG's clients are retirees; the remainder are within five years of retirement. Tr. 301:23 – 302:18.

III. RELEVANT PROCEDURAL HISTORY.

A. The Commission's Opinion.

On November 7, 2016, the Commission held that: (a) TRG and Robare, as investment advisers with fiduciary obligations to their clients, failed to adequately disclose material conflicts of interest; (b) TRG and Robare acted negligently—but without scienter—in violating Section 206(2) of the Advisers Act; and (c) Jones caused the violations. Comm. Op. at *5.

With respect to TRG's disclosures, the Commission made the following findings:

- TRG's Form ADV disclosure "was *plainly inadequate* before December 2011 because it did not disclose the [Fidelity] Arrangement *at all.*" *Id.* at *6 (emphasis added). Indeed, "no reasonable client reading" the pre-December 2011 Forms ADV "could have discerned the existence—let alone the details—of the Arrangement." *Id.* at *8. After TRG identified the Arrangement for the first time in its December 2011 Form ADV, its disclosure "continued to be inadequate until at least April 2014." *Id.* at *6.
- TRG and Robare were negligent, displaying "a clear failure to reasonably fulfill the disclosure obligations of investment advisers. Although aware of their duty to disclose and that the Arrangement presented at least potential conflicts of interest, TRG and Robare for many years provided inadequate disclosure." *Id.* at *9.
- TRG and Robare "should have known the disclosure was inadequate because ... it plainly failed to provide their clients with the information they needed to assess the relevant conflicts of interest and did not even, at a minimum, satisfy the specific disclosure requirements of Form ADV." *Id.*

The Commission found that Jones caused the Section 206(2) violations because he "knew about the Arrangement, was significantly involved in the Firm's disclosure responsibilities, and signed each of the relevant Forms ADV," and thus acted negligently in signing the forms "without disclosing the conflicts of interest the Arrangement presented ...." *Id.* at *11.

The Commission also held that Respondents willfully omitted material facts from TRG's Form ADV, thereby violating Section 207 of the Advisers Act. *Id.*

With respect to remedies, the Commission considered whether civil penalties were warranted under Advisers Act Section 203(i) [15 U.S.C. § 80b-3(i)], which authorizes the

Commission to impose penalties in a cease-and-desist proceeding upon a finding that a person "has violated any provision" of the Advisers Act or "was a cause of the violation." *Id.* at *12. The Commission evaluated the statutory public-interest factors in Section 203(i)(3) [15 U.S.C. § 80b-3(i)(3)] and concluded that a civil penalty was in the public interest:

> In light of the relevant factors, we will impose a $50,000 second-tier penalty on each Respondent (TRG, Robare, and Jones) *based on their failure to provide any disclosure of the Arrangement before December 2011.* Although we do not find that they acted with scienter, Respondents' conduct involved fraud and constituted *a fundamental breach of their fiduciary duties* to their clients. Respondents' conduct also harmed their clients by depriving them of conflict-free advice. Given the serious nature of the violations of the Advisers Act, a second-tier civil penalty is appropriate to deter future misconduct by Respondents and others.

Id. (emphasis added).

Similarly, the Commission analyzed the relevant cease-and-desist factors (a/k/a the *Steadman* factors[2]), and concluded that a cease-and-desist order was appropriate, stating:

> Respondents failed in their fundamental fiduciary duty to provide full and fair disclosure of all material facts. This failure *occurred over several years.* Although we do not find that Respondents acted with scienter, they *acted unreasonably in their role as fiduciaries* and should have known their disclosures were inadequate. The Division has not demonstrated any concrete economic harm to TRG's clients, but these clients were unknowingly deprived of conflict-free advice from their investment adviser. Given Respondents' continuing responsibilities in the investment advisory industry (and as registered representatives of a broker-dealer), we find there is a sufficient risk of future violations . . . .

Id. at *11-12 (emphasis added).

B. The D.C. Circuit's Opinion.

Respondents appealed the Commission's November 7, 2016 opinion to the D.C. Circuit. In its opinion, the D.C. Circuit highlighted the Supreme Court's decision in *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963), to reiterate that the Advisers Act "was intended to achieve a high standard of business ethics in the securities industry" by

[2] *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979).

"establish[ing] 'federal fiduciary standards' to govern the conduct of investment advisers." *Id.* at 472. "This reflects 'a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which [is] not disinterested." *Id.* The D.C. Circuit also noted that Advisers Act Sections 206 and 207 "work in tandem: Section 206 governs disclosures to clients, while Section 207 governs disclosures to the Commission." *Id.*

The D.C. Circuit affirmed the Section 206(2) violations and the factual findings supporting the Commission's analysis. *See Robare*, 922 F.3d at 473-78. The D.C. Circuit held that "the Commission's findings of negligent violations under Section 206(2) are supported by *substantial evidence*." *Id.* at 471 (emphasis added). The D.C. Circuit also found that there was *substantial evidence* to support the Commission's findings that:

- TRG's Form ADV did not fully and fairly disclose the conflicts of interest arising from the Arrangement until at least April 2014. *Id.* at 476.

- Respondents "failed to discharge their fiduciary duty by providing clients with copies of TRG's General Information and Disclosure Brochure (Jan. 2004) and Fidelity's Brokerage Account Client Agreement." *Id.* at 476-77.

- Respondents' purported reliance on consultant advice "was objectively unreasonable because TRG and its principals knew of their fiduciary duty to fully and fairly disclose the potential conflicts arising from the payment arrangement with Fidelity, yet repeatedly failed to disclose the source and details of the conflicts." *Id.* at 478.

The D.C. Circuit also found that:

- Respondents stipulated that the receipt of payments under the Arrangement created actual or potential conflicts of interest, and created an incentive for them to maximize their payments from Fidelity. *Id.* at 474-75.

- Respondents' clients could not properly assess relevant conflicts, because "the Commission concluded, *as is evident*, that '[b]ecause [TRG's December 2011 filing] failed to mention that not all 'no transaction fee mutual fund assets in custody with Fidelity' resulted in [payments to TRG], the disclosure failed to reveal that TRG had

an economic incentive to put client assets into eligible non-Fidelity, non-transaction fee funds over other funds available on the Fidelity platform." *Id.* at 476.

- Respondents failed to disclose conflicts created by the receipt of Fidelity payments, as TRG's Forms ADV "in no way alerted its clients to the potential conflicts of interest presented by the undisclosed Arrangement." *Id.* at 471, 475.

- Respondents' disclosures were "plainly inadequate," over a period of "many years," because they did not refer to the Arrangement, "much less its terms," in any disclosures to their clients. *Id.* at 477-78.

- While Respondents acknowledged that, as investment advisers, they owed a fiduciary duty to their clients to disclose the Arrangement, they "*resisted* doing so for years." *Id.* at 478 (emphasis added).

The D.C. Circuit reversed the Commission's finding that Respondents violated Section 207, holding there was no evidence that they "willfully" omitted material information from their Forms ADV. *Id.* at 479-80. It therefore vacated the order imposing sanctions, remanding to the Commission solely to determine appropriate sanctions for Section 206(2) violations. *Id.* at 480.

IV. ARGUMENTS AND AUTHORITIES.

In its November 7, 2016 opinion, and after finding it was in the public interest, the Commission imposed a $50,000 civil penalty and a cease-and-desist order on each Respondent based on repeated breaches of their fundamental fiduciary duties, which resulted in a practice or course of business, which operated as a fraud or deceit upon their clients. Comm. Op. at *11-12. Because the findings surrounding Respondents' breaches of fiduciary duties have been affirmed by the D.C. Circuit, the Commission should impose the same sanctions against Respondents—second-tier civil penalties and cease-and-desist orders against future violations of Section 206(2).

In spite of the reversal of Respondents' Section 207 violations, nothing in the D.C. Circuit's opinion suggests either that the Commission's sanctions analysis was flawed, or that reducing the civil penalties (or eliminating the cease-and-desist orders) would be appropriate.

Indeed, there are compelling reasons that Respondents' decade-long breach of their fiduciary duties—to the retirees and soon-to-be retirees in the 300 households they advise—requires sanctions that will deter similar conduct and protect retail investors. Respondents offer no persuasive reasons why the Commission's previously imposed sanctions are inappropriate.

A. The Commission's analyses of the relevant factors for both civil penalties and cease-and-desist orders is bolstered by the D.C. Circuit's opinion.

Because the D.C. Circuit upheld the Commission's factual findings based on "substantial evidence," there is no reason to disturb the sanctions previously ordered—other than omitting the reference to Section 207 in the cease-and-desist order.

1. The public-interest factors favor the imposition of civil penalties.

As discussed, the Commission analyzed the public interest factors, determined that second-tier civil penalties were appropriate[3] and in the public interest,[4] and ordered each Respondent to pay a $50,000 civil penalty. The Commission stated that, "[i]n light of the relevant factors," a second-tier penalty was in the public interest "based on [Respondents'] failure to provide any disclosure of the Arrangement before December 2011." *Id.* at *12. The Commission also stated that Respondents' conduct "involved fraud," constituted a "fundamental breach of their fiduciary duties to their clients," "harmed their clients by depriving them of conflict-free advice," and was of such a "serious nature" that second-tier penalties were needed to "deter future misconduct by Respondents and others." *Id.* All of these findings were either directly adopted by the D.C. Circuit, or are entirely consistent with the D.C. Circuit's opinion.

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[3] A second-tier penalty is appropriate for each "act or omission" that involves "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. § 80b-3(i)(2)(B).

[4] For a civil penalty, the statutory public interest factors include: (1) whether the conduct involved fraud; (2) whether it resulted in harm to others; (3) existence of unjust enrichment; (4) prior disciplinary history; (5) the need for deterrence; and (6) such other matters as justice may require. Comm. Op. at *12 (citing 15 U.S.C. § 203(i)(3)).

2. The Commission should enter cease-and-desist orders.

The Commission may issue a cease-and-desist order against any person it finds to have violated the Advisers Act. 15 U.S.C. § 80b-3(k)(1). The Commission based the cease-and-desist order on facts satisfying the *Steadman* factors,[5] including that: (1) Respondents' fundamental failure to satisfy their fiduciary duties occurred over several years; (2) they acted unreasonably as fiduciaries, even if they did not act with scienter; (3) they should have known their disclosures were inadequate; (4) TRG's clients were harmed by being "unknowingly deprived of conflict-free advice" from their advisers; and (5) Respondents' occupations present opportunities for future violations, as Respondents continue to work in the investment advisory and broker-dealer industries.[6] *Id.* at *12.

3. The D.C. Circuit's affirmance substantiates the facts on which sanctions were based.

The D.C. Circuit's opinion does not alter *any* of the Commission's analysis merely by holding that Section 207 requires scienter. *Robare*, 922 F.3d at 479-80. Indeed, the D.C. Circuit affirmed the Commission's factual findings on which the sanctions were based and found they were established by "substantial evidence":

- "[T]he evidence before the Commission demonstrated that TRG and its principals *persistently* failed to disclose known conflicts of interest arising from the payment arrangement with Fidelity in a manner that would enable their clients to understand the source and nature of the conflicts." *Id.* at 477 (emphasis added).

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[5] For a cease-and-desist order, the factors to consider are: (1) egregiousness of respondents' actions; (2) the isolated or recurrent nature of the violations; (3) the degree of scienter involved; (4) the sincerity of respondents' assurances against future violations; (5) respondents' recognition of the wrongful nature of their conduct; and (6) the likelihood that respondents' occupations will present opportunities for future violations. Comm. Op. at *11 (citing *Donald L. Koch*, 2014 WL 1998524, at *21). Additional factors may include whether the violations are recent, the degree of harm to investors or the marketplace, and the remedial function served by the cease-and-desist order in the context of other sanctions being sought in the same hearing. Comm. Op. at *11 (citing *KPMG Peat Marwick LLP*, 2001 WL 47245, at *26 (Comm. Op. Jan. 19, 2001)).

[6] Respondents' "continuing responsibilities" have expanded over the years. From the time TRG was first registered in 2003 until the AP hearing in February 2015, TRG's client-base had grown from 150 to 300 families. *See* Comm. Op at *9.

- "Evidence that their clients suffered harm was not required." *Id.*

- "TRG and its principals cannot, and do not, suggest their payment arrangement with Fidelity was not a material fact of which their clients needed to be fully and fairly informed, nor do they explain how, during the period of years at issue, that material fact was conveyed through TRG's Forms ADV or other means." *Id.*

- The Commission found it "telling" that after years of failing to disclose the Arrangement to its clients, the Fidelity compliance team had to tell Respondents that it "did not find" the disclosure of the arrangement in TRG's Form ADV and that it would stop paying the fees unless TRG added a disclosure. *Id.* at 476.

- Respondents "acknowledged that as investment advisers they had a fiduciary duty to disclose the payment arrangement with Fidelity to their clients, and yet the administrative record shows they *resisted doing so for years*." *Id.* at 478 (emphasis added).

The D.C. Circuit's affirmance of these factual findings as being supported by substantial evidence reinforces the Commission's original sanctions analysis.

4. The Commission has a significant interest in protecting retail investors by ensuring that investment advisers carry out their fiduciary duties.

In enacting the Advisers Act, Congress intended "to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry." *Capital Gains*, 375 U.S. at 186. Investment advisers, who give trusted advice to clients about how to invest their money, are held to the highest standard: they are fiduciaries. *Id.* at 194; *see also Transamerica Mortg. Advisors, Inc., v. Lewis*, 444 U.S. 11, 17 (1979). They have "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading [their] clients." *Capital Gains*, 375 at 191, 194. Further, when advisers breach their fiduciary duties by failing to disclose material conflicts of interest, this nondisclosure is "one variety of fraud and deceit" prohibited by Section 206(2). *Id.* at 198-99. Indeed, Section 206(2)

was intended "to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested." *Id.* at 191-93.

The Commission—charged with enforcing the federal securities laws, and thus ensuring that investment advisers fully and fairly carry out their fiduciary duties—has a significant interest in protecting investors, particularly retail investors, by deterring exactly the type of conduct that occurred in this case: recurrent and pervasive breaches of fiduciary duties. While there may not have been evidence presented in this case of direct economic harm suffered by Respondents' clients in this situation, it is indisputable that their clients were deprived of: (1) conflict-free advice, and (2) the receipt of information known to their advisers (here, actual or potential conflicts) that would have allowed them to make informed investment decisions.

Similarly, as the D.C. Circuit noted, Sections 206 and 207 work in tandem: Section 206 governs disclosures to clients, while Section 207 governs disclosures to the Commission. *Robare*, 922 F.3d at 472. Thus, the D.C. Circuit's reversal of the Section 207 violations is of little, if any, consequence to the sanctions that are appropriate in this situation, because it is the underlying conduct at issue—the repeated breaches of fiduciary duties—that justifies the imposition of meaningful sanctions. As a result, any reduction in the civil penalties imposed against these Respondents would undermine the Commission's efforts to protect retail investors.

B. Respondents' arguments do not warrant the imposition of weaker sanctions.

Respondents argue, incredibly, that no sanctions should be imposed against them, despite the D.C. Circuit's affirmance of their Section 206(2) violations and the underlying facts supporting those violations. Respondents' Brief to Commission on Remand (hereinafter "Resp. Br."), at 3, 9, 10. Specifically, Respondents contend that: (1) "willfulness" is a prerequisite to

the Commission's imposition of a penalty; (2) their conduct did not "involve fraud;" (3) investors were not harmed; (4) the Commission did not balance the public interest factors properly; (5) their alleged reliance on advice from consultants and purported "good faith" should be considered; and (6) a cease-and-desist order is improper. However, these arguments are misguided and unpersuasive.

1. Willfulness is not required to impose civil penalties.

Respondents argue that the Advisers Act requires a finding of "willfulness" before the Commission may impose civil penalties. Resp. Br. at 3 (citing to Advisers Act Section 203(i)(1)(A)(i)-(iii)). They maintain that because the D.C. Circuit held that "willfully" under Section 207 requires scienter, the Commission cannot impose a civil penalty under Section 203(i)(1)(A) because there was no finding of scienter in this case.

However, Respondents misconstrue the statute. In this cease-and-desist proceeding, the Commission imposed civil penalties pursuant to Section 203(i)(1)*(B)*, not Section 203(i)(1)*(A)*. Comm. Op. at *12 n. 51. Section 203(i)(1)(B) requires only that the Advisers Act was violated, not a finding of willfulness. Because Respondents violated Section 206(2), the Commission may impose civil penalties without addressing whether those violations were willful.

2. Respondents' conduct unquestionably "involved fraud."

The Commission found, and the D.C. Circuit affirmed, that Respondents violated Section 206(2). Comm. Op. at *12; *Robare*, 922 F.3d at 472, 478. Section 206(2)—one of the Advisers Act's anti*fraud* provisions—makes it unlawful "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. § 80b-6(2); *see also* Comm. Op. at *6-7; *Robare*, 922 F.3d at 472; *Capital Gains*, 375 U.S. at 195. Nonetheless, Respondents claim there was "no evidence" that their conduct "involved

fraud, deceit, manipulation, or deliberate or reckless conduct," as is required for a second-tier penalty. Resp. Br. at 5. But Respondents do not explain how conduct that operated as a fraud or deceit does not "involve fraud" under Section 203(i)(2)(B).[7]

3. Investors were harmed, and proof of economic harm is not required.

Respondents also argue that their clients suffered no harm. Resp. Br. at 5-6. However, just because there may not have been direct evidence presented in this case proving that Respondents' conduct caused quantifiable financial harm to their clients, it does not mean Respondents' clients were not harmed. As the Commission highlighted, Respondents' conduct "plainly failed to provide their clients with the information they needed to assess the relevant conflicts of interest. . ." [Comm. Op. at *9], and Respondents' clients were unknowingly deprived of conflict-free advice from their investment adviser." [*Id.* at *12].

Fundamentally, Respondents' clients were entitled—before they entrusted their money to Respondents—to "decide[e] [for themselves] whether [Respondents] [were] serving two masters or only one, especially if one of the masters happens to be economic self-interest." *Capital Gains*, 375 U.S. at 196 (quotation omitted). As a result of their recurring and pervasive conduct, Respondents denied their clients the right to make their choice by hiding Respondents' "personal interest in [their] recommendations. *Id.* at 201; *see also Geman v. SEC*, 334 F.3d 1183, 1190 (10th Cir. 2003).

4. The Commission's balancing of public-interest factors was appropriate.

Respondents accuse the Commission of improperly balancing the statutory public-interest factors and imposing sanctions based on one factor: that the conduct involved fraud. Resp. Br. at

[7] While Commissioner Piwowar dissented from the imposition of civil penalties, he agreed that Respondents' conduct involved fraud.

6. They further insist the Commission *must* consider other factors that they allege weigh in their favor—the lack of unjust enrichment, lack of prior disciplinary history, alleged lack of customer harm,[8] and "absence of evidence" that sanctions would have a deterrent effect.[9] Resp. Br. at 6-7.

While Respondents disagree with the Commission's result, they offer no authority or explanation for why the balancing was improper. Mere disagreement with the relative weight the Commission assigned to public-interest factors does not establish that the sanctions ordered were "unwarranted in law" or "without justification in fact." *See Kornman v. SEC*, 592 F.3d 173, 186 (D.C. Cir. 2010) (administrative agency's "judgment is entitled to the greatest weight" and "[o]nly if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene").

Further, Respondents mischaracterize the Commission's analysis as relying almost exclusively on a single factor. The Commission weighed heavily the fact that Respondents' conduct involved fraud—as it should in seeking to protect investors—but the Commission also expressly referred to and relied on other factors, including the harm investors suffered by being deprived of conflict-free advice and the need for deterrence. Further, Respondents do not explain how (or why) their purported lack of unjust enrichment or prior disciplinary history should outweigh their "persistent," unreasonable breaches of fiduciary duties to their clients for "many years" through their "plainly inadequate" disclosures.[10] *See Robare*, 922 F.3d at 478.

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[8] As discussed above, Respondents' contention that there was "no customer harm" contradicts explicit findings by the Commission, which found investor harm, and the Supreme Court, which has held that investor harm is not required for this type of fraud. *Capital Gains*, 375 U.S. at 195.

[9] Notably, Respondents cite no legal authority to support that evidence of a civil penalty's deterrent effect is required.

[10] Congress clarified that consideration of the statutory factors is "permissive and not mandatory, because not all of the factors [will] apply in any given case," and often the factors that "are applicable should not be accorded the same weight." H.R. Rep. No. 101-616 at 20. Even when one or more factors is inapplicable, the Commission may still impose penalties if it would serve the public interest. S. Rep. No. 101-337 at 17; *see* 15 U.S.C. § 80b-3(i)(3).

5. The D.C. Circuit and the Commission found that Respondents' purported reliance on consultants is not supported by the record.

Respondents re-allege that they acted in good faith[11] by relying on the advice of consultants. Resp. Br. at 7. However, the Commission rejected Respondents' purported reliance argument, stating "the record does not contain convincing evidence that TRG specifically sought or received advice from its consultants about how to disclose the Arrangement and relied on that advice in good faith." Comm. Op. at *10. No matter how many times they attempt to assert it, even as a public interest factor, Respondents' dubious claim that they sought and received advice on this specific issue is not supported by the evidence. *Id.* Furthermore, assuming they had in fact received such advice, "reliance on such advice was *objectively unreasonable* because TRG and its principals *knew* of their fiduciary duty to fully and fairly disclose the potential conflicts arising from the payment arrangement with Fidelity, yet repeatedly failed to disclose the source and details of the conflicts." *Robare*, 922 F.3d at 478 (emphasis added).

Respondents also argue that they "embarked on a series of revisions" to their Form ADV in response to an SEC exam, in which unidentified SEC staff members allegedly indicated insufficiencies in the Form ADV. Resp. Br. at 9.[12] Respondents offer these wholly unsupported statements for the first time on remand in the hopes of establishing their "good faith," but there is

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[11] Respondents wrongly claim that the Commission *found* that they had "acted in good faith and with a subjective belief that their disclosures were proper." Resp. Br. at 5. But the Commission made no such finding. In their brief, Respondents cited the D.C. Circuit's opinion for this alleged finding by the Commission, but the D.C. Circuit did not state that the Commission made that finding; nor did it make that finding itself. Instead, the D.C. Circuit quoted Respondents' allegation that the Commission had refused to consider their claimed "good faith and subjective belief that their disclosures were proper" in deciding that they acted willfully in violation of Section 207. Respondents have inaccurately put their *own* words into the mouth of the Commission.

[12] The only evidence in the record about an SEC exam concerned the 2008 exam resulting in a "no-further-action letter." Comm. Op. at 10 n. 37. Respondents made a series of revisions between 2012 and 2014, but that was during the Division's investigation, which led to the filing of this action. *See generally* Comm. Op. at *10 (references to Triad and Renaissance making representations to the Commission in 2013 and 2014).

no evidence in the record that SEC exam staff discussed TRG's Forms ADV with Respondents or that Respondents revised their Form ADVs in response to advice from the exam staff.

6. Respondents' cease-and-desist argument is misplaced.

Respondents' sole argument that a cease-and-desist order is unwarranted relies on *WHX Corp v. SEC*, 362 F.3d 854 (D.C. 2004), which is inapposite to the facts of this case. In *WHX*, the D.C. Circuit reversed a cease-and-desist order because, *inter alia,* WHX committed "a single, isolated violation," then came into compliance in time to avoid harm to investors. *Id.* at 860-61. Notably, WHX's violation did not involve, as Respondents' violation did, breaches of fiduciary duties lasting more than a decade, or, as Respondents' did, harm to investors.

V. CONCLUSION.

The D.C. Circuit affirmed Respondents' Section 206(2) violations and concluded that the Commission's factual findings were supported by "substantial evidence." Thus, nothing about the bases for the sanctions previously ordered has changed. The D.C. Circuit's reversal of the Section 207 violation does not alter the Commission's analysis, which focused on Respondents' conduct that resulted in the Section 206(2) violations. Moreover, the Commission has a significant interest in deterring investment advisers from breaching their fiduciary duties and in protecting retail investors from being unknowingly deprived of conflict-free advice from their investment advisers. The Commission should order each Respondent to pay a second-tier penalty of $50,000, as previously ordered, and order them to cease and desist from committing or causing violations of Section 206(2).

Dated: September 23, 2019

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 *Division of Enforcement's Response to Respondents' Opening Brief on Remand* was served on the persons listed below on the 23rd day of September, 2019, via certified mail, return-receipt requested:

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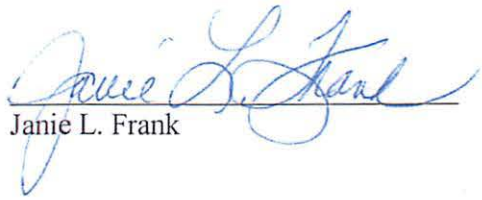

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