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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**

RESPONDENTS' REPLY IN SUPPORT OF OPENING BRIEF TO COMMISSION ON REMAND

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What is perhaps most notable about the Division's Response, is what it asks the Commission to ignore. The Division's essential argument is that the D.C. Circuit's reversal of liability on the Section 207 charge – one of only two remaining charges in the case[1] – should be of no consequence to the Commission and, given its unimportance, there is no reason to disturb the second-tier penalties initially imposed.[2] There are several errors with the Division's reasoning.

First, as Respondents carefully detailed in their Opening Brief, prior Commission opinions reflect a long history of imposing second-tier penalties *only* in cases involving intentional, scienter-based conduct and other aggravating facts.[3] Even faced with Respondents' direct challenge to do so, the Division was unable to identify a single prior case where second-tier sanctions were imposed for purely negligent conduct, like that found here.[4] Tellingly, the Division deigned not even to respond. According to those cases, Respondents cited that the Division was unable even to address, the assessment of no penalty or, at most, a low, first-tier penalty, is appropriate.

Second, the Division ignores the fact that the Commission assessed sanctions for two violations: Section 206(2) and 207. On remand, because of the Court's ruling that the Division did not carry its burden of proof on the Section 207 charge, only one charge remains. Thus, the Commission is required to review the relevant sanction findings in light of the (now) single charge remaining and determine what, if any, sanction is warranted in light of the reduction in charges.

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[1] By the time of the appeal, all of the remaining charges in the Order Instituting Proceedings had already been dismissed by the ALJ or the Commission, or both.

[2] Division's Response, p. 6: "[N]othing in the D.C. Circuit's opinion suggests...that reducing the civil penalties (or eliminating the cease and desist orders) would be appropriate."

[3] *See* Respondents' Opening Brief, pp. 4-5. Often, maximum second-tier penalties are imposed as an act of leniency by the Commission in cases that would justify the imposition of a higher, third-tier penalty. In other instances, even where second-tier sanctions were justified, the Commission nonetheless imposed first-tier penalties.

[4] Respondents' Opening Brief on Remand, p. 10.

Third, in attempting to justify its "no change" sanction request, the Division does little more than re-state the finding that there was a Section 206(2) violation. The Division fails to undertake any analysis of the evidence relating to Respondents' conduct; nor does it include a discussion of how that conduct supposedly satisfies the public interest requirement for imposition of a sanction under Section 203(i), the entire objective of this part of the proceeding.

Finally, and perhaps most surprisingly, the Division has taken the position that a Section 207 violation is of *so little importance* that it neither adds to nor detracts from the Commission's prior sanction analysis. For obvious reasons, the Commission cannot endorse such a position. The Court expressly recognized that Section 206(2) and Section 207, which are *both* antifraud[5] provisions, "work in tandem" to ensure proper disclosures are made.[6]

For all of these reasons, discussed in more detail herein, and for the reasons previously set forth, the Commission should reject the Division's sanction request and should determine that no sanction (or, at most, a very mild sanction) is warranted in this case.

I. PRIOR COMMISSION OPINIONS SHOW SECOND-TIER PENALTIES ARE NOT WARRANTED

As set forth in Respondents' Opening Brief, there exists no Commission opinion supporting an award of second-tier sanctions for a *negligent* disclosure failure such as this one.[7] Historical Commission opinions have assessed second-tier sanctions only in cases involving intentional fraudulent conduct and egregious wrongdoing that do not compare to the conduct at

[5] One of the Division's arguments in support of sanctions is that Section 206(2), simply because it is an *antifraud* statute, automatically justifies the "involved in fraud" requirement of Section 203(i)(3)(A). If being identified as an *antifraud* statute carries any weight in that regard, it must carry the same weight when assessing the importance of Section 207 which, as noted above, is a more serious offence in that it punishes *willful* omissions (i.e., subjectively intending to omit) instead of mere *negligent* omissions (failing to meet the reasonable person standard of care).

[6] *Robare Group, Ltd. v. Sec. & Exch. Comm'n*, 922 F.3d 468, 472 (D.C. Cir. 2019).

[7] Respondents' Opening Brief in Support of Remand, p. 10.

issue here. Respondents are unaware of any Commission opinion finding that the public interest justifies the imposition of second-tier sanctions for a single, purely negligent violation. Despite a direct challenge to do so, the Division did not present any contrary authority. In fact, it did not – because it *could not* – respond to that authority at all.[8]

In the face of the Division's silence, Respondents refer the Commission to previously-cited cases reflecting that second-tier sanctions are justified in response to serious and intentional underlying conduct – including outright theft – that is easily distinguishable from the negligent disclosure failure at issue here. If anything, these authorities show that the maximum sanction here should be, at most, something first-tier or below, including even no sanction at all.[9]

Perhaps the most similar case to the one at hand is *Monetta Fin. Services Inc.,*[10] where the Commission was tasked, on remand from the Seventh Circuit, to re-determine sanctions. A brief overview of *Monetta* is helpful. Following a hearing before the ALJ, the Commission initially

[8] While the Commission is not obligated to make its sanctions uniform, when reviewing the propriety of the Commission's choice of sanction in a given case, it is proper to compare that choice with sanctions in comparable situations. *Lorenzo v. Sec. & Exch. Comm'n*, 872 F.3d 578, 596 (D.C. Cir. 2017), *cert. granted sub nom. Lorenzo v. S.E.C.*, 138 S. Ct. 2650 (2018), and *aff'd*, 139 S. Ct. 1094 (2019); *Collins v. S.E.C.*, 736 F.3d 521, 525–26 (D.C. Cir. 2013) ("But for a court not to require uniformity or "mechanical formulae is not the same as for it to be oblivious to history and precedent. Review for whether an agency's sanction is "arbitrary or capricious" requires consideration of whether the sanction is out of line with the agency's decisions in other cases.").

Moreover, Respondents do not offer this precedent in an attempt to argue that the Commission is precluded from awarding second-tier sanctions in a negligence-only case, simply because it has never done so before. Instead, Respondents offer these cases as a *factual* comparison. That is, both the level of egregious conduct in cases where the Commission has previously imposed second-tier sanctions and the seriousness of the violations in those cases reflect the kind of "act or omission" by a respondent that has been found by the Commission to "involve[] fraud, deceit, manipulation, or deliberate disregard of a regulatory requirement" sufficient to justify such an award. The conduct and violations presented to the Commission in *this* case is so demonstrably different than the conduct and violations at issue in existing second-tier cases that the same sanction simply cannot be warranted.

[9] Which is precisely what one of the three Commissioners found to be appropriate when the Commission reviewed the ALJ's Initial Decision.

[10] *Monetta Fin. Services Inc.,* SEC Release No. 2438, 2005 WL 2453949 (October 4, 2005),

imposed maximum second-tier sanctions along with a cease-and-desist order, summarily concluding that such a sanction was in accord with the public interest.[11] On appeal, the Seventh Circuit[12] reversed, finding, in relevant part, that the sanctions were excessive because (1) the Commission failed to properly analyze the public interest factors,[13] (2) the conduct giving rise to the Section 206(2) violation did not justify second-tier sanctions, and (3) the SEC did not modify the sanction amount despite dismissal of some of the charges.[14]

On remand, the Commission made several changes to its sanction analysis, ultimately concluding that: (1) a cease-and-desist was not warranted, (2) the maximum, second-tier penalties it had previously assessed were excessive based on the specific conduct involved, and (3) a sanction that was ***less than*** the maximum first-tier penalty was appropriate.

The similarities between *Monetta* and this case are obvious and undeniable. Both cases involved a Section 206(2) disclosure failure. In both cases, the charges initially levied by the government had dwindled to only a single charge. In both cases, there was no evidence of scienter and respondents had no disciplinary history. Given the factual similarities, mild first-tier sanctions, like those imposed in *Monetta,* are guiding as to the *maximum* penalty warranted here.

Monetta is also instructive on the propriety of sanctions in the face of reduced findings. The Seventh Circuit reversed the sanction determination because "without explanation, the SEC imposed the same sanctions as the ALJ despite the SEC's dismissal of the majority of the

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[11] *Monetta Financial Services, Inc.,* Release No. 2136, 2003 WL 21310330 (June 9, 2003) (Initial Commission Opinion).

[12] *Monetta Financial Services v. SEC*, 390 F.3d 952 (7th Cir. 2004).

[13] *Id.* at 957-958 ("Although the SEC opinion references these factors, the opinion does not reflect that the SEC meaningfully considered these factors when it imposed sanctions.")

[14] *Monetta Financial Services Inc.,* Release No. 2438, 2005 WL 2453949 (2005) (Commission Opinion on Remand).

charges."[15] Here, too, the fact that the charges levied against Respondents have been *halved* renders rather dubious the Division's argument that the sanctions should remain the same.

II. RESPONDENTS' *CONDUCT* IS THE CENTRAL FOCUS ON REMAND

The public interest factors listed in Section 203(i)(3) focus on the respondent's conduct and the impact of that conduct in determining which, if any, sanction tier is proper. The first public interest factor asks whether "the act or omission" upon which the penalty is based involved fraud, deceit, manipulation, or reckless disregard. This factor is inherently focused on the individual's level of culpability in committing the violation. *Steadman v. S.E.C.*, 603 F.2d 1126, 1140–41 (5th Cir. 1979), aff'd, 450 U.S. 91 (1981) ("We heartily endorse the Commission's view that while scienter is not required to make out violations of several of the statutory sections involved here, the respondent's state of mind is highly relevant in determining the remedy to impose"). Similarly, the second and third public interest factors look to the impact of the conduct. The final specified factor considers any prior discipline.

The Division, therefore, which carries the burden here, was expected to identify evidence in the record that supports the penalty sought. It did not. Instead, the Division did little more than quote the public factors and repeatedly point out that Section 206(2) is an *antifraud* provision, a point that Respondents do not contest. This superficial review does not nearly substitute for the required robust analysis of the public interest factors. Section 203(i) presumes that a violation has occurred. The question it poses is what, if any, sanction is justified under the circumstances.

The Section 206(2) violation here arose from Respondents' failure to adequately disclose conflicts arising from the Fidelity agreement.[16] That failure is the "act or omission" the

[15] *Monetta,* 390 F. 3d at 958.

[16] Commission Opinion, p. 12; *Robare,* 922 F.3d at 478.

Commission is now called on to assess and determine whether it warrants the imposition of a sanction. Under the first public interest factor, the Commission considers whether, when Respondents omitted the information from Form ADV, their actions rose to the level of "fraudulent, deceptive, manipulative or deceptive" conduct under Section 203(i)(3)(A). As Respondents have articulated, the Commission should conclude this standard has not been met.

First, it is well-settled that Respondents did not act intentionally or even willfully in omitting the disclosure.[17] The D.C. Circuit determined that there was no evidence that Respondents "subjectively intended" to omit the disclosure from the Forms ADV.[18] In the same way that the D.C. Circuit determined that the Division cannot rely on negligent conduct to establish willfulness, it cannot rely on negligent conduct to satisfy the "fraudulent, manipulative, deceptive or reckless" standard set forth in Section 203(i).

Second, the Commission should consider all facts relating to the omission, including those which undercut a finding that the conduct at issue was "fraudulent" in nature, including:[19]

- Respondents updated their disclosure many times attempting to achieve adequacy, including: March 2011, December 2011, April 2013, June 2013 and April 2014.
- The ALJ found that Respondents were not trying to "defraud anyone, let alone their investment clients."[20] The Commission assessed "significant weight" to this finding.
- The record evidence does not establish that Respondents' investment decisions on behalf of their clients were influenced by the fees received by Fidelity.[21]
- The record does not indicate that TRG clients were disproportionately invested in eligible funds.[22]

[17] Commission Opinion, pp. 12-13. *Robare,* 922 F.3d at 480.

[18] *Id.*

[19] *Steadman v. S.E.C.*, 603 F.2d 1126, 1141 (5th Cir. 1979), *aff'd,* 450 U.S. 91 (1981).

[20] Commission Opinion, p. 12.

[21] Commission Opinion, p. 12.

[22] Commission Opinion, p 5.

- In December 2011, in response to Fidelity's request, Respondents modified their Form ADV. Fidelity told Respondents they had "nailed" the language.[23]
- Respondents' compliance consultant was aware of the arrangement with Fidelity as of December 2011 when Form ADV was revised to disclose the agreement and was involved in every Form ADV revision thereafter.[24]
- Respondents' broker-dealer, Triad, was a party to the Fidelity Agreement and was responsible for reviewing Respondents' Form ADV annually. Triad's CCO testified that Triad "reviewed[ed] and approv[ed] TRG's forms ADV" and that none of the audits ever raised any issue regarding the disclosure.[25] Triad received 10% of all fees paid by Fidelity.[26]

In the end, the Division fails to answer or even address the question presented on remand: what *conduct* by Respondents satisfies this requisite element of a second tier sanction?[27]

III. THE REMAINING PUBLIC INTEREST FACTORS ARE NOT PRESENT

The public interest factors also involve a consideration of what, if any, (1) harm resulted from the violation, (2) the extent of unjust enrichment, (3) whether the respondent has previous violations, and (4) the need for deterrence. The Division addresses only two of these factors, since the other two (unjust enrichment and prior violations) do not exist here.

[23] Commission Opinion, p. 10. Division Exhibit 45.

[24] In rejecting Respondents' testimony that they relied upon the expertise of their compliance consultants to assist them in drafting adequate disclosures, the Commission acknowledged authority stating that the engagement of compliance professionals could "mitigate the egregiousness" of one's conduct. The Commission referred to this authority in making its liability determination but did not consider it in the context of sanctions and whether that reliance *mitigated* the severity of the conduct and, therefore, the sanction (notwithstanding the finding of liability). Here, especially after December 2011, when it is undisputed that the consultant was aware of the arrangement, this evidence is mitigating from a sanction perspective. Commission Opinion, p. 13, *citing Edgar R Page,* Advisers Act Release No. 4400, 2016 WL 3030845 at *6 (May 27, 2016).

[25] Commission Opinion, p. 5.

[26] Commission Opinion, p. 2.

[27] There is perhaps no greater example of the Division's indifference to the record in this case than its assertion that the Court of Appeals' reversal of the Commission's willfulness finding, and its dismissal of the Section 207 charge is inconsequential to the Commission's sanction determination. For obvious reasons, the Commission cannot adopt the Division's position that a Section 207 charge – a violation carrying a higher intent element – is meaningless or unimportant.

As to resultant harm, the Division concedes that there is no evidence of financial harm, and argues that because TRG's clients were "unknowingly deprived of conflict free advice," it is within the public interest to impose a civil penalty. Even if true, this "harm" must be evaluated in light of the fact that the record also shows that Respondents' investment advice was not, in fact, influenced by the fees received by Fidelity,[28] that clients were not disproportionately placed into NTF funds that generated a payment from fidelity,[29] and that Respondents maintained a 97% client retention rate.[30] While the Division has pointed to *a* harm, it did not assess the *level* or *severity* of harm, nor establish that, when considered along with the other facts in the record, the harm justifies the imposition of a sanction.

Nor does the imposition of a sanction serve the Commission's objective of deterring similar conduct. The disclosures at issue in this case range from old to very old, with a time period beginning in 2005 and ending more than five years ago.[31] This, combined with the absence of any disciplinary history over Respondents' combined years in the industry, shows that any risk Respondents pose to the investing public is infinitesimally small.

When all of these factors are weighed together, with no one factor being determinative, it is clear that the monetary sanctions are simply not within the public interest. Certainly, the second-tier sanctions previously awarded are excessive. Accordingly, Respondents respectfully request

[28] Commission Opinion, p. 12.

[29] Commission Opinion, p 5.

[30] Commission Opinion, p. 11.

[31] Commission Opinion, p. 8.

that the Commission conclude this proceeding by entering an Order finding that no sanction against them is warranted in this case.[32]

IV. NO CEASE-AND-DESIST

The Division's one-paragraph argument in support of a cease-and-desist does nothing more that cite the applicable standard and the fact of the violation.[33] As previously noted, the imposition of a cease-and-desist is not appropriate because: (1) the record does not support a finding that the conduct was "serious," (2) the lack of any subjective intent, (3) the lack of investor harm, (4) the lack of opportunity to commit future violations, and (5) the lack of unjust enrichment. Accordingly, Respondents request that no cease and desist be entered against them.

V. THE DIVISION'S REQUEST FOR CIVIL PENALTIES WAS SOUGHT UNDER SECTION 203(I)(1)(A) AND WAS BASED ON RESPONDENTS' "WILLFUL" CONDUCT

Rewriting history, the Division makes clear that it is now requesting sanctions pursuant to Section 203(i)(1)(*B*), not Section 203(i)(1)(A). While the Commission is empowered to award sanctions under either provision, until now, the Division had requested them under only one: 203(i)(1)(B). This change of position is due to the fact that Section (B) penalties do not require them to show willfulness. The Division chose not to acknowledge this in its Response; yet, its prior submissions speak for themselves:

Division's Pre-Hearing Brief, page 29 requested:

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[32] The Division, as it must, argues that Respondents' request that no sanction be imposed is somehow incredible. In doing so, it ignores that this is *exactly* the conclusion reached by one of the previous Commissioners in the previous decision by the Commission in this case. Commission Opinion p. 18.

[33] The Division also unpersuasively attempts to distinguish the *WHX* case as "inapposite" to the case at hand which is, at a minimum, perplexing given that *the Division itself* cited and relied on that case in its appeal of the Initial Decision and before the D.C. Circuit, in support of its argument that a cease and desist was warranted. Division Response, p. 15; Division's Brief in Support of Petition for Review, p. 43. Division's D.C. Circuit Brief pp. 48, 49, and 50.

> **F. RESPONDENTS' CONDUCT WARRANTS IMPOSITION OF SIGNIFICANT SANCTIONS.**
>
> Sections 203(e) and 203(f) of the Advisers Act authorize the Commission to sanction an investment adviser or an associated person if it is in the public interest and if the adviser or associated person has willfully violated...
>
> The Division's Post-Hearing Brief, page 48, sought:
>
> **C. The Court should order Respondents to pay civil penalties.**
>
> Section 203(i) of the Advisers Act, 15 U.S.C. § 80b-3(i), authorizes the Court to impose a civil monetary penalty against a respondent who willfully violated...In this case, Respondents' violations were willful because...

The Division did not even mention Section 203(i)(1)(B) until the appeal to the Commission,[34] and, even then, it was mentioned only in passing, in a paragraph devoted solely to willfulness.

The Division has avoided addressing this issue by pointing out the difference between Section 203(i)(1)(A) and (B),[35] but that discussion misses the point. Putting aside what the Commission is, generally, empowered to do, the Division long ago abandoned any claim for sanctions under Section 203(i)(1)(B) when it premised the entirety of its prosecution on the Respondents' "intentional" and "willful" conduct. In the same way that the Commission, in its initial Opinion, refused to consider the Division's request for an industry bar – raised for the first time on appeal[36] – it should refuse here to consider the Division's request, while reserving its power to do so in other cases when properly raised and prosecuted by the Division

VI. CONCLUSION

For each of these reasons, and those set forth previously by Respondents, 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.

[34] Division Brief in Support of Petition for Review, page 41.

[35] Division's Response, p. 11.

[36] Commission Opinion, p. 16.

Respectfully submitted this 7TH day of October, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that this **RESPONDENTS' REPLY IN SUPPORT OF 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' Reply 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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