

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
August 12, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 75686 / August 12, 2015

INVESTMENT ADVISERS ACT OF 1940
Release No. 4168 / August 12, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31750 / August 12, 2015

Admin. Proc. File No. 3-16047

In the Matter of

THE ROBARE GROUP, LTD.,
MARK L. ROBARE, AND
JACK L. JONES, JR.

ORDER DENYING MOTION
FOR SUMMARY
AFFIRMANCE, GRANTING
PETITION FOR REVIEW, AND
SCHEDULING BRIEFS

On June 4, 2015, an administrative law judge issued an Initial Decision dismissing administrative proceedings against The Robare Group, Ltd. ("TRG"), a registered investment adviser, and TRG limited partners Mark L. Robare and Jack L. Jones, Jr.¹ The Order Instituting Proceedings alleged, among other things, that Respondents violated, or aided, abetted, and caused violations of, Sections 206(1), 206(2), and 207 of the Investment Advisers Act of 1940 based on TRG's failure to disclose financial incentives it had "to favor particular mutual funds over other mutual funds" in making recommendations to clients.² The law judge based his dismissal on various findings, including that Respondents, in making the disclosures at issue, "relied in good faith on the advice" of compliance consultants TRG had retained, which was, according to the law judge, "facially valid" and based on TRG's "full and honest disclosure"

¹ *The Robare Group, Ltd.*, Initial Decision Release No. 806, 2015 WL 3507108, at *41 (June 4, 2015).

² More specifically, the OIP alleged that TRG and Robare committed primary violations of Section 206(1) and (2), which Jones aided, abetted, and caused. The OIP also alleged that all respondents willfully violated Section 207. *The Robare Group, Ltd.*, Exchange Act Release No. 72950, 2014 WL 4296690, at *4 (Sept. 2, 2014).

On June 25, 2015, the Division filed a 28-page petition for review of the Initial Decision, seeking reversal of the law judge's decision to dismiss, a finding of liability, and the imposition of sanctions. The Division asserts that "[s]everal aspects" of the decision "warrant review" but focuses on the role of the compliance consultant in the law judge's analysis. According to the Division, the Initial Decision "shifts the burden of fully disclosing a conflict of interest from an investment adviser, who has a fiduciary duty to and a relationship with its clients, to a compliance consultant (who has no such connection)."

On July 10, 2015, Respondents moved for summary affirmance of the Initial Decision, claiming that the "Division's Petition fails to raise any true issue which warrants the Commission's consideration." For the reasons discussed below, we deny Respondents' motion, grant the Division's petition for review, and set a briefing schedule for this appeal.

I.

Under Commission Rule of Practice 411(e)(2), summary affirmance may be granted if "no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument."³ The rule further provides for denial of summary affirmance "upon a reasonable showing that a prejudicial error was committed in the conduct of the proceeding or that the decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review."⁴

Respondents claim that "nothing in the Initial Decision reflects either a prejudicial error or an important issue warranting Commission review." They assert that the law judge properly dismissed the Division's allegations and that the Division "has taken upon itself to try to manufacture something warranting the Commission's deliberation." According to Respondents, the Division "has resorted to Frankensteinian tactics . . . slicing and dicing the Initial Decision, then stitching it back together in an attempt to turn it into something scary that would . . . create the illusion that" it had important policy implications. Respondents dismiss other points raised by the Division as "simply seek[ing] to second guess specific factual findings and credibility determinations made by the [law] judge"

The Division opposes Respondents' motion arguing that "this case warrants full review rather than the abbreviated and disfavored procedure of summary affirmance." According to the Division, "the proceedings below involved a substantial record reflecting significant disagreements concerning material facts, and the Decision implicates a variety of important

³ 17 C.F.R. § 201.411(e)(2).

⁴ *Id.*; *cf.* Rule of Practice 411(b)(2), 17 C.F.R. § 201.411(b)(2) (providing that, in determining whether to grant a petition for discretionary review, the Commission shall consider whether the petition makes a reasonable showing that "(i) a prejudicial error was committed in the conduct of the proceeding; or (ii) the decision embodies: (A) a finding or conclusion of material fact that is clearly erroneous; or (B) a conclusion of law that is erroneous; or (C) an exercise of discretion or decision of law or policy that is important and that the Commission should review").

policy issues." Among other concerns, the Division asserts that the law judge's findings, if permitted to stand, "significantly weaken the long-standing fiduciary standards applicable to investment advisers."

II.

Based on our preliminary review, and given the potentially important matters of public interest this case presents, summary affirmance does not appear appropriate. Instead, we have determined to consider the record and the parties' arguments as part of the normal appellate process rather than the abbreviated process involved with summary affirmance.⁵ We will therefore deny Respondents' motion and grant the Division's petition for review.⁶

* * * *

Accordingly, IT IS ORDERED that the motion for summary affirmance by The Robare Group, Ltd., Mark L. Robare, and Jack L. Jones, Jr., be and it hereby is, denied; and it is further

ORDERED, pursuant to Rule of Practice 411,⁷ that the petition for review of the Division of Enforcement, be and it hereby is, granted; and it is further

ORDERED, pursuant to Rule of Practice 450(a),⁸ that a brief in support of the petition for review shall be filed by September 11, 2015. A brief in opposition shall be filed by October 12, 2015, and any reply brief shall be filed by October 26, 2015.⁹ Pursuant to Rule of Practice

⁵ Our denial of Respondents' motion should not be construed as suggesting any view as to the merits of the case.

⁶ *See, e.g., David F. Bandimere*, Exchange Act Release No. 71333, 2014 WL 198175, at *3 (Jan. 16, 2014) (denying motion for summary affirmance and granting petition for review where "the submission of briefs, with discussion of relevant parts of the record and analysis of the issues, w[ould] aid . . . in reaching a decision in this case").

⁷ 17 C.F.R. § 201.411.

⁸ 17 C.F.R. § 201.450(a). We note that Rule 450(a) provides that no briefs in addition to those specified in this schedule may be filed without our leave. We further note that Rules of Practice 450(b) and (c) provide content and length limitations governing the parties' pleadings and Rules 150-153 govern form and service. 17 C.F.R. § 201.150-53.

⁹ The parties are directed to Rule 450(b) which provides, among other things, that "[e]xceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions and other authorities as may be relevant," and reply briefs "shall be confined to matters in opposition briefs of other parties." 17 C.F.R. § 201.450(b).

180(c),¹⁰ failure to file a brief in support of the petition may result in dismissal of this review proceeding as to that petitioner.¹¹

By the Commission.

Brent J. Fields
Secretary

¹⁰ 17 C.F.R. § 201.180(c).

¹¹ Requests for extensions of time for filing briefs are disfavored.