

## In Rare Victory, Texas Advisory Firm Slips SEC Admin Suit

By **Stephanie Russell-Kraft**

*Law360, New York (June 5, 2015, 1:43 PM ET)* -- A U.S. Securities and Exchange Commission administrative judge on Thursday tossed a case alleging that a Houston-based investment advisory firm recommended its client invest in certain mutual funds without disclosing that it was being paid by the broker offering the funds, a rare win for a defendant in the SEC's in-house court.

Administrative Law Judge James E. Grimes said that the agency failed to show that The Robare Group Ltd. and co-owners Mark L. Robare and Jack L. Jones Jr. violated the Investment Advisers Act when they failed to tell some of their clients in a Form ADV about commission that the firm received from Fidelity, the custodian for its clients' assets, when the clients invested in certain non-Fidelity mutual funds.

Judge Grimes said that even though The Robare Group did not disclose the potential conflict in its Form ADV, it told clients about it in other forms. He also rebuffed the SEC's claims that Robare and Jones acted with scienter, recklessly or negligently or that they made decisions for their clients simply to earn commissions from Fidelity.

"In listening to Mr. Robare and Mr. Jones testify and observing their demeanor under cross-examination, it is difficult to imagine them trying to defraud anyone, let alone their investment clients," Judge Grimes wrote in his initial decision. "They came across as honest and committed to meeting their disclosure requirements."

The fact that the defendants relied on multiple outside firms to ensure that The Robare Group was compliant with all of its disclosure obligations "belies any argument" that they were trying to manipulate or defraud anyone, Grimes added.

As an initial decision, Grimes' ruling is still subject to commission approval and appeal by either party.

A spokeswoman for the SEC said on Friday that the commission is reviewing the decision.

The SEC filed its case against The Robare Group in September as part of its asset management unit's initiative to "shed more light" on undisclosed compensation agreements between brokers and investment advisers. The agency alleged that The Robare Group received approximately \$440,000 in improper payments from Fidelity over the course of eight years.

The firm's counsel, Alan Wolper of Ulmer & Berne LLP, told Law360 on Friday that he believes the case might have been a "knee-jerk" reaction to calls for greater enforcement muscle from the agency.

“In my opinion, if the SEC wanted to send a message to the industry, this is not the case to pick,” Wolper said. “These guys really tried their hardest to do things right.”

Wolper said that he was “thrilled” with Thursday’s ruling, especially given the agency’s near-perfect win record in administrative court. The forum has come under heightened scrutiny since it was opened up to nonregistered defendants by the Dodd-Frank Act, and many on the defense bar believe it is inherently biased in favor of the commission.

“I always thought that this was a very good case for my client, but any time that you’re in that circumstance, being on the right side of the law doesn’t necessarily guarantee a good outcome,” Wolper said.

The SEC is represented by Janie Frank.

The Robare Group is represented by Alan Wolper of Ulmer & Berne LLP.

The case is In the matter of The Robare Group Ltd. et al., file number 3-16047, before the U.S. Securities and Exchange Commission.

--Editing by Stephen Berg.