WILLFULNESS IN A POST-ROBARE WORLD: EVIDENCE OF SUBJECTIVE INTENT, NOT NEGLIGENCE CONDUCT, IS NEEDED TO SHOW WILLFUL VIOLATIONS OF SECURITIES LAWS

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ABSTRACT

The D.C. Circuit's holding in *Robare Group, Ltd., v. SEC*, potentially marks the end of at least twenty years of permissive judicial interpretation of the term "willful," as found in various provisions of securities laws—including the Investment Advisers Act of 1940. Traditionally, willful violations of securities laws only required evidence that defendants were aware of their conduct, not that they knew that their conduct was unlawful. This low burden of proof operates in practice as a negligence standard. However, *Robare* makes a key distinction between evidence of negligent conduct and "subjectively intentional" violations under section 207 of the Advisers Act to prove that a defendant willfully violated securities laws. The Court's analysis has not yet been fully applied in decisions by the SEC and administrative law judges. In addition, a close reading of *Robare* reveals that evidence indicating a defendant's good-faith belief of compliance with securities laws is a viable defense against claims of willful violations under the Securities Act, the Exchange Act, and Advisers Act.

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INTRODUCTION

The D.C. Circuit's 2019 decision in *Robare Group, Ltd., v. SEC*[1] challenged the traditional notion of what constitutes a willful violation of securities laws in civil actions. To establish a willful violation of securities laws in a criminal case, the prosecution typically must prove a defendant had culpable intent.[2] However, in a civil case, a willful violation can be established with evidence that the individual

1. Robare Group, Ltd., v. SEC, 922 F.3d 468 (2019).
2. *See infra* footnotes 69–78.

"intentionally commit[ted] the act which constitutes the violation."[3] Throughout most of the 2000s, the U.S. Securities and Exchange Commission (SEC or "the Commission") has cited the *Wonsover* willfulness standard,[4] which was applied under the Securities Exchange Act of 1934 (Exchange Act)[5] and defined as "no more than that the person charged with the duty knows what he is doing."[6] In practice, that standard only required the SEC to find evidence of negligent conduct.[7] However, the D.C. Circuit in *Robare* specified that mere evidence of negligent conduct cannot establish a willful violation of section 207 of the Investment Advisers Act of 1940 (Advisers Act).[8] Furthermore, the court decided that the statutory text of section 207[9] signaled that defendants must have "subjectively intended" to omit information from a company

3. *See* Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965) (upholding the Securities and Exchange Commission's finding that a broker-dealer willfully violated anti-fraud and anti-manipulation provisions of section 17(a) of the Securities Act and section 15(c)(1) of the Securities Exchange Act, and various rules promulgated thereunder).

4. For SEC cases citing the willfulness standard as set forth in *Wonsover v. SEC*, 205 F.3d 408 (D.C. Cir. 2000), see Francis Parisi, Securities Act Release No. 10050, 2016 WL 878137 (Mar. 7, 2016) (applying *Wonsover*'s willfulness standard to the Securities Act of 1933); Moon Capital Management, LP, Exchange Act Release No. 2777, 2008 WL 4201760 (Sept. 15, 2008) (using *Wonsover* for a willful violation of the Securities Exchange Act of 1934); Marc N. Geman, Exchange Act Release No. 43963, Investment Company Act Release No. 1924, 2001 WL 124847 (Feb. 14, 2001) (applying *Wonsover* to a willful violation of the Advisers Act of 1940).

5. *See Wonsover*, 205 F.3d at 409 (concluding that a broker willfully violated section 15(b)(4) of the Securities Exchange Act of 1934 by failing to conduct a reasonable inquiry into the sources of the unregistered shares he sold despite several red flags).

6. *See id.* at 414.

7. *See id.* ("It is only in very few criminal cases that 'willful' means done with a bad purpose. Generally, it means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.") (citing Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949). The standard of the defendant simply knowing what she is doing in practice functions as a negligence standard. *See* discussion *infra* Part III.

8. Robare Group, Ltd., v. SEC, 922 F.3d 468, 478, 479 (D.C. Cir. 2019) (noting that there was no substantial evidence that petitioners willfully failed to disclose a conflict because the Commission determined that defendants acted negligently when filing Forms ADV, but not intentionally or recklessly).

9. 15 U.S.C. § 80b-7 (2012) ("It shall be unlawful for any person *willfully to make* any untrue statement of a material fact in any registration application or report filed with the Commission under section 80b–3 or 80b–4 of this title, or *willfully to omit* to state in any such application or report any material fact which is required to be stated therein.") (emphasis added).

filing to commit a willful violation.[10] In other words, proof of negligence cannot establish intent to willfully violate securities laws.

The current Chairman of the SEC, Jay Clayton, has cited *Robare* as a "significant new court decision . . . [that] requires us to carefully consider the appropriate standard for future [Advisers Act] cases in light of the specific language found in section 207. . . ."[11] However, Chairman Clayton also noted his personal view that *Robare* does not overrule decades of court-of-appeals precedent.[12]

The Commission has generally taken the position that the *Wonsover* standard applies not only to the Advisers Act, but also to other statutes that contain provisions requiring willfulness as an element of proof.[13] However, what constitutes a willful violation under various provisions of securities laws is a matter of great confusion.[14]

In a criminal context, the prosecution needs to prove mens rea (i.e., bad mind or evil intent).[15] However, in the civil context, courts have been deferential to the Commission's interpretation of "willful" by allowing evidence of negligence to satisfy the burden of proof.[16] Since *Wonsover* was decided, the negligence standard of "no more than that the person

10. *Robare*, 922 F.3d at 479.

11. SEC Chairman Jay Clayton, Keynote Remarks at the Mid-Atlantic Regional Conference, (June 6, 2019), https://corpgov.law.harvard.edu/2019/06/06/keynote-remarks-at-the-mid-atlantic-regional-conference/ [https://perma.cc/QJU3-HHKS?type=image].

12. *Id.* ("It is important to note that the *Robare decision did not disturb the decades-old standard that has been adopted by most courts of appeals*—that a willful violation of securities laws means that the person intentionally committed the act that constitutes the violation, with no requirement that the person also be aware that they are violating the law.") (emphasis added).

13. *See supra* parentheticals accompanying note 4; Wonsover v. SEC, 205 F.3d 408, 409 (D.C. Cir. 2000).

14. *See infra* Part II for a full discussion of lack of a singular meaning of what constitutes a "willful" violation of securities laws.

15. *See infra* Part II.A(i) for a discussion on the Second Circuit's application of "willful" in criminal violations of securities laws. In particular, the Second Circuit has applied a specific intent standard and a traditional criminal mens rea standard.

16. *See infra* Parts II.A(ii), B, and C. Part II.A(ii) discusses Commission actions against defendants who claimed to be complying securities laws in good faith. Part II.B analyzes the D.C. Circuit's decision in *Wonsover* that inadequate inquiry into the sale of securities constituted a willful violation. Part II.C details the Commission's post-*Wonsover* enforcement actions.

charged with the duty knows what he is doing"[17] has been applied in a variety of SEC enforcement actions in an administrative setting.[18]

The Commission, as well as some administrative law judges, have now taken the position that *Robare* was a narrow decision that applies only to the Advisers Act.[19] However, the argument can be made that *Robare* stands for the proposition that proving a willful omission in a registration or report requires a proving that a defendant "subjectively intended to omit material information . . . ."[20] For example, if a securities professional in good faith does not disclose a material tax lien in a filing to the Commission, her conduct could be negligent, but not willful.[21] However, a defendant commits a willful violation of securities laws when she intentionally omits a material tax lien from a Commission filing to avoid scrutiny.[22]

This Note will first briefly examine securities-related civil and criminal case law based on willful violations. In particular, this Note examines how the term "willful" has been interpreted in various provisions of securities laws, including the Securities Act of 1933 (the "Securities Act"), the Exchange Act, and the Advisers Act.[23]

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17. *See infra* Part II.B.

18. *See infra* Part II.C.

19. *See infra* Part IV.A, which details the Commission's continued reliance on the *Wonsover* standard for willful violations, while narrowing *Robare*'s holding to merely section 207 of the Advisers Act (rather than to other provisions of securities laws).

20. *See* Robare Group, Ltd., v. SEC, 922 F.3d 468, 479 (D.C. Cir. 2019).

21. *See id.*

22. *See* Allen Holeman for Review of Disciplinary Action Taken by FINRA, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903, at *39–40 (July 31, 2019) (holding that a FINRA registered principal willfully omitted three material tax liens from his firm's annual compliance certification, partly because his explanations for the omission were not found to be credible by a FINRA hearing panel).

23. *See* 15 U.S.C. § 78o (2012) ("The Commission, by order, shall censure . . . or revoke the registration of any broker or dealer if it finds . . . [that] such broker or dealer . . . has *willfully* made or caused to be made in any application for registration or report . . . any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.") (emphasis added); *see also* 15 U.S.C. § 77x (2012) ("Any person who *willfully* violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who *willfully*, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both.") (emphasis added).

This Note argues that willfulness in a civil context requires evidence that a defendant subjectively intended to violate securities laws. The D.C. Circuit Court announced the subjective intent standard in *Robare* when analyzing section 207 of the Advisers Act. While such a standard does not overrule the *Wonsover* standard, it qualifies that negligent conduct is not willful.

Given the SEC's authority to bar individuals from participating in securities markets,[24] the standard for establishing a willful violation should be more than merely evidence of negligence. Indeed, Congress must have intended that provisions under securities laws that contain the term "willful" require a higher bar of proof than negligence,[25] or else the word serves as nothing more than statutory filler. Courts should be able to discern a standard which retains fidelity to the Advisers Act's statutory text, but also considers the immense importance of the SEC's mission of protecting investors, ensuring fair and efficient capital markets, and facilitating capital formation.[26]

This Note has four parts that analyze the judicial and administrative development of what is considered a willful violation of securities laws. Part I discusses the historical background of the SEC and how it works in parallel with the Department of Justice (DOJ) in developing cases. Part II surveys the case law addressing willful violations of securities laws in both civil and criminal contexts. Part III analyzes the landmark D.C. Circuit decision in *Robare*, which held that evidence of negligence cannot be used to prove a willful violation of section 207 of the Advisers Act. Finally, Part IV discusses how *Robare* has been applied in subsequent administrative decisions and how it should be applied in the future.

This Note argues that the courts and the Commission should look at evidence of a defendant's subjective intent—rather than evidence of negligence—when analyzing willful violations of securities laws. Good

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24. *See What We Do*, SEC, https://www.sec.gov/Article/whatwedo.html [https://perma.cc/NAG4-YVEZ] (last visited Mar. 5, 2020) ("[T]he Commission may bar someone from the brokerage industry in an administrative proceeding, but an order barring someone from acting as a corporate officer or director must be obtained in federal court. Often, when the misconduct warrants it, the Commission will bring both proceedings.").

25. *See Robare*, 922 F.3d at 479–80.

26. *Role of the SEC*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/basics/role-sec [https://perma.cc/9V9B-PQYF] (last visited Mar. 5, 2020) [hereinafter *Role of the SEC*].

faith attempts to comply with securities laws should not lead to a finding of a willful violation.

I. HISTORICAL BACKGROUND ON THE SEC AND SECURITIES ENFORCEMENT

A. THE SEC AND ITS ENFORCEMENT POWERS

The SEC is the primary administrative regulator of U.S. securities markets.[27] The creation of the SEC is the direct result of the Pecora Hearings in the U.S. Senate, which uncovered fraudulent practices and unchecked financial speculation that allegedly led to the Great Depression.[28] Those hearings resulted in the SEC's mission to compel disclosure by market participants, a practice that is now universally considered the appropriate method to regulate corporate finance.[29] Without full disclosure of the good, the bad, and the ugly, investors are unable to make informed investment decisions about the true value of companies.[30] The SEC is not a merit regulator[31] that decides which companies are good investments and which are not; rather, it compels companies to fully disclose material facts so investors in the market can decide on the merits of any individual company.[32]

Throughout the late twentieth century, the Commission gained the additional power to compel disclosure from market participants, including the use of administrative proceedings to impose civil penalties.[33] For example, the Penny Stock Reform Act of 1990[34] authorized administrative law judges to impose civil penalties through

27. *See id.* The other administrative agency is the CFTC, which oversees derivatives market. *See Missions, Values, & Vision*, CFTC.GOV, https://www.cftc.gov/About/Mission/index.htm [https://perma.cc/U9DD-VD73] (last visited Mar. 5, 2020).

28. *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION 1 (3d ed. 2003).

29. *See id.* at 39-40.

30. *See Role of the SEC*, *supra* note 26.

31. Note that the SEC does not specify making evaluations as to a company's worth as part of its mission. *See id.*

32. *See id.*

33. *See id.* ("The Division of Enforcement assists the Commission in executing its law enforcement function by recommending the commencement of investigations of securities law violations, by recommending that the Commission bring civil actions in federal court or as administrative proceedings before an administrative law judge . . . .").

34. *See* Pub. L. No. 101-429, § 202, 104 Stat. 931, 937 (1990).

SEC administrative proceedings.[35] Additionally, the Sarbanes-Oxley Act of 2002[36] gave the Commission the power to bar officers and directors of companies from the securities industry.[37] The passage of the Dodd-Frank Act expanded the SEC's penalty options to include civil penalties in administrative cease-and-desist proceedings under the Securities Act and the Exchange Act.[38]

The Commission also has the power to sanction individuals that violate securities laws.[39] Available sanctions include securities license revocation, disbarment from appearing before the Commission, and a permanent bar from associating with other securities professionals.[40] These are particularly harsh sanctions, since an individual who loses her securities license cannot act as a broker, dealer, or investment adviser.[41] In addition, licensed professionals (e.g., attorneys or accountants) who lose the right to appear before the SEC are unable to represent clients within the securities industry, thus ending their careers in that particular industry.[42] This is in contrast to state bar sanctions for attorney misconduct, which may result in the inability to practice law in a single state; whereas an SEC bar effectively bans the attorney from practicing securities laws throughout the United States.[43]

B. SEC AND DOJ PARALLEL INVESTIGATIONS

Although the SEC is the primary regulator of U.S. securities markets, it only has the authority to bring civil enforcement and administrative

35. Anna Currier, *The Rule of Lenity and the Enforcement of the Federal Securities Laws*, 5 AM. U. BUS. L. REV. 79, 85 (2017).

36. *See* Pub. L. 107-204, § 305, 116 Stat. 745, 778-79 (2002).

37. Currier, *supra* note 35, at 86.

38. After the passage of Dodd Frank, the SEC began to bring more insider trading cases in an administrative forum. *See id.* (citing a Reuters article which discussed "Enforcement Director Andrew Ceresney's comments that the SEC intends to bring more insider trading cases in the administrative forum").

39. Gordon K. Eng, *The Burden of Proof in SEC Disciplinary Proceedings: Preponderance and Beyond*, 49 FORDHAM L. REV. 642, 648 (1981).

40. *Id.*

41. *Id.* Without an applicable securities license, a broker can neither execute trades nor buy/sell securities for their customers. An unlicensed dealer would be unable to buy and sell securities to customers on their own account. Finally, an unlicensed investment adviser would be prohibited from managing their client's investments.

42. *See id.*

43. *See id.* at 650.

actions.[44] Per federal statute, it must refer criminal cases to the DOJ.[45] Because of this restriction, the SEC and DOJ are encouraged to work cooperatively and to coordinate their investigations in developing cases against securities violators.[46] Indeed, Congress intended for the SEC and the DOJ work in parallel[47] to enforce anti-fraud securities laws.[48] For example, the SEC might share with the DOJ information it gathers in interviews or depositions.[49] In some cases, representatives from the SEC and DOJ may jointly interview a witness.[50]

However, the DOJ and the SEC must satisfy different burdens of proof in criminal and civil actions.[51] While the SEC must prove civil charges based on a preponderance standard,[52] the DOJ must prove

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44. *See generally* SEC. & EXCH. COMM'N DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL 1 (Nov. 28, 2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf [https://perma.cc/HCU3-PDFC].

45. *See generally id.*

46. *Id.* at 84 ("Parallel civil and criminal proceedings are not uncommon. In furtherance of the SEC's mission and as a matter of public policy, the staff is encouraged to work cooperatively with criminal authorities, to share information, and to coordinate their investigations with parallel criminal investigations when appropriate."); *id.* at 84 n.4 ("The Supreme Court recognized in United States v. Kordel, 397 U.S. 1, 11 (1970) that parallel civil and criminal proceedings are appropriate and constitutional. As the Court of Appeals for the D.C. Circuit put it in the leading case of SEC v. Dresser, 628 F.2d 1368, 1377 (D.C. Cir. 1980), 'effective enforcement of securities laws require that the SEC and [the Department of] Justice be able to investigate possible violations simultaneously.' Other courts have issued opinions to the same effect.").

47. However, the SEC and DOJ cannot work jointly, meaning that they must independently develop their investigations. *See generally id.*

48. Currier, *supra* note 35, at 83.

49. *Form 1662: Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena*, SEC, https://www.sec.gov/about/forms/sec1662.pdf [https://perma.cc/A92D-EGKY].

50. Former SEC Chair Mary Jo White, All-Encompassing Enforcement: The Robust Use of Civil and Criminal Actions to Police the Markets (Mar. 31, 2014), https://www.sec.gov/news/speech/2014-spch033114mjw [https://perma.cc/T4CG-3X3W] ("When [the Commission] find[s] sufficient evidence of a serious violation to justify criminal involvement, we alert the criminal authorities, and we may conduct parallel investigations . . . . As many of you here know, we also often interview witnesses together.").

51. *See infra* Part II.A.

52. *See* Steadman v. SEC, 450 U.S. 91, 104 (1981).

criminal charges beyond a reasonable doubt.[53] Furthermore, the SEC and DOJ must establish different mental states to prove a violation.[54] For example, in criminal proceedings under the Exchange Act, the DOJ often must prove that the defendant knew that her actions constituted a crime.[55] However, prior to *Robare*, the SEC merely needed to prove that the defendant was aware of the conduct that constitutes the violation.[56]

II. SURVEYING THE CASE LAW ON WILLFULNESS

A. WILLFULNESS PRIOR TO WONSOVER

Despite over a hundred years of American securities case law on the meaning of "willful" as an element of the statutory violation, there is no singular meaning for the term.[57] The lack of uniformity is partially the result of Congress drafting statutes that use the term "willful" in both civil and criminal violations of, for example, the Exchange Act.[58] In the seminal U.S. Supreme Court decision, *United States v. O'Hagan*, the Court determined that for the government to prove that a defendant has criminally violated Rule 10b-5,[59] promulgated under the Exchange Act,[60] it must establish a willful violation of that provision.[61] To prove a willful violation of Rule 10b-5, the government must prove evidence of the defendant's mens rea when committing the violation.[62] However, for the government to prove that a defendant willfully violated the Exchange Act

53. U.S. ATTORNEYS' MANUAL § 9-27.300 SELECTING CHARGES—CHARGING MOST SERIOUS OFFENSE (updated Feb. 2018), https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.300 [https://perma.cc/8WS5-7SJ7].

54. *See infra* Part II.A.

55. Joan McPhee, *"Willfulness" Under the Federal Securities Laws and Intent Based Defenses To Federal Securities Prosecutions*, ROPES & GREY 2 (Jan. 1, 2001), https://www.ropesgray.com/en/newsroom/alerts/2001/01/willfulness-under-the-federal-securities-laws-and-intent-based-defenses-to-federal-securities-prosecutions [https://perma.cc/ARP2-A58V].

56. *See* Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000).

57. *See* McPhee, *supra* note 55, at 6.

58. *Id.*

59. 17 C.F.R § 240.10b-5 ("It shall be unlawful for any person . . . to make any untrue statement of material fact or to omit to state a material fact . . . in connection with the purchase or sale of any security.").

60. 15 U.S.C. § 78j (2012).

61. United States v. O'Hagan, 521 U.S. 642, 665–66 (1997).

62. *See* McPhee, *supra* note 55.

in a *civil* proceeding, it merely needs to prove that the individual knew what she was doing.[63]

The SEC has extended *Wonsover's* Exchange Act interpretation[64] to include willful violations of both the Securities Act and the Advisers Act.[65] In other words, proving a willful violation in a civil context requires proof that the defendant had knowledge or awareness of her actions, without any intent to violate a rule or law.[66] This functions as a negligence standard, because in practice it is enough to show that the defendant committed the unreasonably risky action that resulted in a violation of the law.[67]

1. Criminally Willful Violations

One of the earliest U.S. Court of Appeals to interpret "willful" was the Second Circuit in *United States v. Peltz*,[68] which held that the prosecution in a criminal case must prove a realization on the defendant's part that she was engaging in a wrongful act.[69] In other words, the defendant must have specific intent to violate the law. However, in *United States v. Schwartz*,[70] the Second Circuit in a criminal case decided—without referring to *Peltz*—that willful under section 32(a) of the Exchange Act required "satisfactory proof . . . that the defendant intended to commit the act prohibited."[71] That standard does not require proof that

63. *See* Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (citing Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949).

64. *See id.*

65. *See Hughes*, 174 F.2d at 972; *see also* Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965); *Wonsover*, 205 F.3d at 414; Robare Group, Ltd., v. SEC, 922 F.3d 468, 479 (D.C. Cir. 2019).

66. *See Wonsover*, 205 F.3d at 414 ("In the context of [willfulness under the Exchange Act], we have rejected the knowledge and the reckless disregard standards . . . .").

67. *See* DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, THE LAW OF TORTS § 31 (2d ed. 2019) ("Intent and negligence are entirely different concepts. Negligence entails unreasonably risky conduct; the emphasis is on risk as it would be perceived by a reasonable person, not on the defendant's purpose or on the certainty required to show intent. The defendant may create risks of harm without having either a purpose or a certainty that harm will result. Indeed, negligence does not require a state of mind at all but focuses instead on outward conduct.").

68. United States v. Peltz, 433 F.2d 48, 55 (2d Cir. 1970).

69. *See* McPhee, *supra* note 55.

70. United States v. Schwartz, 464 F.2d 499 (2d Cir. 1972).

71. McPhee, *supra* note 55 (quoting *Schwartz*, 464 F.2d at 501); *see Peltz*, 433 F.2d at 55.

the defendant had specific intent (i.e., a realization that her conduct was wrongful or that she had "evil motive[s]").[72]

The Second Circuit subsequently set a classic criminal mens rea standard for willfulness. In *United States v. Dixon*,[73] the Second Circuit interpreted "willful" as used in section 14(a) of the Exchange Act.[74] In *Dixon*, the defendant, the president of a company, was charged with violating SEC proxy-disclosure rules by omitting material information in reports to the Commission and making false statements in his company's books and records.[75] Dixon claimed that "he could not be [found] criminally liable . . . because he had misunderstood the S.E.C. rules . . . and had not intentionally [made the false disclosures]."[76] The Second Circuit held that Dixon's conduct was wrongful and that his "'intent to deceive' was sufficient to satisfy the standard of willfulness" under section 32(a) of the Exchange Act.[77]

2. Willful Violations in a Civil Context

The D.C. Circuit's decision in *Wonsover* used the standard of no more than "the person charged with the duty [knowing] what [she was] doing" for proving willful violations under the Exchange Act.[78] The SEC subsequently extended the application of the D.C. Circuit's standard[79] to other statutory schemes that contained "willful" as an element of an offense, such as the Securities Act and the Exchange Act.[80]

The D.C. Circuit's decision in *Hughes v. SEC*, which preceded *Wonsover*, is one of the earliest civil cases announcing a standard for willful violations of securities laws.[81] Arleen Hughes was registered as a broker-dealer under section 15 of the Exchange Act and as an investment adviser under the Advisers Act.[82] The Commission instituted proceedings

72. *Id.* at 3.
73. United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976).
74. *See* McPhee, *supra* note 55, at 3.
75. *Id.*; *Dixon*, 536 F.2d at 1392–94.
76. *Id.*; *Dixon*, 536 F.2d at 1395–96.
77. *Id.* (quoting *Dixon*, 536 F.2d at 1395–96).
78. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (citing Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949).
79. *See id.*
80. *See supra* text accompanying note 4.
81. *See* Hughes v. SEC, 174 F.2d 969 (D.C. Cir. 1949).
82. *See id.* at 971.

to suspend the petitioner's registration status, because she failed to disclose conflicts of interests to her clients in breach of her fiduciary duties.[83]

To avoid the Commission's entry of an order of revocation,[84] Hughes responded in writing that she adapted her business practices to be in full compliance with the letter and the spirit of the law by, inter alia, additional disclosure via a memorandum of agreement with her clients.[85] The Commission found the changes, including the additional disclosure, to be inadequate.[86]

Arleen Hughes appealed the Commission's decision, which revoked her registration status as a broker-dealer.[87] Upon review, the D.C. Circuit found that Hughes willfully violated the law because she was advised by Commission staff that her business practices were insufficient to satisfy her fiduciary obligations.[88] The court noted that:

> Petitioner thus intentionally and deliberately chose to continue her methods of operation in spite of repeated advice that those methods were unlawful. This was willfulness. In the recent case of Dennis v. United States, 1948-U.S. App. D.C., 171 F.2d 986, 990, this court, in quoting from one of its earlier decisions, set forth the following familiar doctrine: "It is only in very few criminal cases that 'willful' means 'done with a bad purpose.' Generally, it means 'no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law."[89]

The D.C. Circuit's willfulness standard of "the person charged with the duty [knowing] what he is doing"[90] was subsequently applied by the Second Circuit in *Tager v. SEC*.[91] Petitioner Signey Tager appealed a decision that revoked his registration as a broker-dealer and expelled him from the National Association of Securities Dealers.[92] The SEC found that Tager willfully violated multiple anti-fraud provisions of section 17(a) of

83. *See id.* at 969.
84. *See id.* at 972.
85. *See id.* at 976-77.
86. *See id.* at 976.
87. *See id.* at 971.
88. *Id.* at 976.
89. *Id.* at 977.
90. *Id.*
91. Tager v. SEC, 344 F.2d 5, 6 (2d Cir. 1965).
92. *See id.* at 7.

the Securities Act, sections 10(b) and 15(c)(1) of the Exchange Act, and the various rules promulgated thereunder.[93]

The SEC alleged that Tager had unlawfully manipulated the market by inserting price quotations in an issue he was underwriting and by failing to disclose the unlawful practice to his customers.[94] In addition, the Commission alleged that Tager unlawfully purchased one hundred shares of the issue while he was acting as an underwriter.[95] Tager argued that his violations were not willful because the Commission had not proved that he understood that his actions were manipulative.[96] The Second Circuit held that "'willfully' in this context means intentionally committing the act which constitutes the violation. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts."[97] Furthermore, the court noted that in several recent cases, a finding of actual knowledge of the violation had not been "necessary" to establish "criminal liability" under the Securities Act.[98]

B. THE *WONSOVER* STANDARD

The D.C. Circuit in *Wonsover* subsequently applied the *Tager* Court's 1965 interpretation of "willful."[99] Jacob Wonsover's career in the securities industry began in 1981.[100] He had a business relationship with Shimon Gibori, the founder and CEO of Gil-Med.[101] Gil-Med went public in early 1988 and had previously sold stock to raise capital.[102] While Gil-Med traded publicly on the NASDAQ, some of its shareholders had difficulty trading their shares because the "market [for Gil-Med shares] was thin."[103] So Gibori and Henry Vogul, a Gibori associate and investor in Gil-Med, directed those shareholders to some brokerage firms for

93. *See id.*
94. *See id.* at 8.
95. *See id.*
96. *See id.*
97. *Id.*
98. *Id.* (Criminal liability as it is defined under section 24 of the Securities Act for "willful" violations of sections 5(a), 5(c), and 17(a)).
99. *See* Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000).
100. *See id.* at 410.
101. *See id.*
102. *See id.*
103. *Id.*

assistance.[104] After the shareholders continued to struggle to dispose of their shares, Gibori directed them to Wonsover.[105]

A short time later, Gibori gave Wonsover the names of nineteen purported Gil-Med shareholders, and Wonsover proceeded to open accounts for them.[106] Some of these nineteen shareholders either "did not exist" or were individuals who had already sold their Gil-Med shares.[107]

The shares of the nineteen purported shareholders were restricted stock sold through a private placement,[108] which cannot be resold unless an exemption is used.[109] Wonsover claimed that he "reasonably believed" that the sales of restricted Gil-Med stock held by the purported shareholders were "covered" by section 4(4) of the Securities Act because he relied upon his own due diligence and his company's restricted stock department, which cleared the trades.[110] In addition, Wonsover claimed that Gibori and Vogul had concocted an elaborate scheme to "dupe[]" him into making the sales, and thus, that his violations of the Securities Act were not "willful."[111] In essence, Wonsover claimed that he could not be found to have willfully violated the law because he had acted in good faith.[112]

However, the SEC pointed out a number of "red flags" that should have alerted Wonsover that Gibori controlled the shares and that the shares were not sellable.[113] For example, Gibori had "control" over two of the accounts through "trade[] authorization[s]" in his name.[114] In addition, fourteen of the nineteen shareholders listed Gil-Med headquarters as their "official address."[115] Furthermore, the nineteen shareholders sought to collectively sell 920,000 shares, substantially all of the company's 1,050,000 public float.[116] Finally, Wonsover did not give his company's restricted stock department executive worksheets

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104. *See id.*

105. *See id.*

106. *See id.*

107. *Id.*

108. *See id.* at 410–11.

109. *See* Securities Act §4(a)(2), 15 U.S.C. §77d(2) (exempting from the registration obligation of §5 of the Securities Act "transactions not involving any public offering" of securities).

110. *Id.*

111. *Id.* at 411.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *See id.*

detailing how and when shares were acquired, even though these were "ordinarily" produced for clearance requests.[117] The Commission alleged that Wonsover was aware of the difficulty in gaining approval for the sales without the worksheets because he made "repeated" calls to the restricted stock department when it "hesitat[ed]" to grant approval.[118] When pushing for the sales to go through, Wonsover lied by claiming that "the shareholders were poor and needed the money immediately."[119]

The SEC determined that Wonsover had "inadequate[ly]" inquired into whether the shares were sellable, and thus, that his inadequate inquiry "willful[ly]" violated section 15(b)(4) of the Exchange Act.[120] The Commission ultimately affirmed an administrative law judge's decision that Wonsover's violation of both sections 5(a) and 5(c) of the Securities Act were "willful under Section 15(b)(4) of the Exchange Act."[121]

Wonsover petitioned for review of the Commission's order, which imposed a six-month suspension from associating with any broker or dealer and ordered him to cease-and-desist violations of sections 5(a) and 5(c) of the Securities Act.[122] He challenged the Commission by asserting that it "applied the incorrect standard in determining willfulness."[123] Specifically, he argued that the Commission needed to prove that he had acted with knowledge that his conduct was unlawful or that he had acted with "subjective recklessness."[124] The court, citing *United States v. O'Hagan*,[125] rejected the notion that knowledge of a violation of the law was required for a finding of willfulness.[126] The D.C. Circuit further asserted that willfulness is to be understood in "context," and in the context of section 15 of the Exchange Act, the court had already "rejected . . . knowledge and . . . reckless disregard" as elements of proof.[127] The

117. *Id.*
118. *Id.* at 411–12.
119. *Id.* at 412.
120. *See id.* at 409 (section 15(b)(4) of the Exchange Act prohibits brokers from willfully violating the Securities Act).
121. *Id.* at 412.
122. *See id.* at 409.
123. *Id.* at 413.
124. *Id.* at 413–14 (noting that *Wonsover* relied on the subjective recklessness standard in Saba v. Compagnie Nationale Air France, 78 F.3d 664 (D.C. Cir. 1996)).
125. *See* United States v. O'Hagan, 521 U.S. 642, 665–66 (1997).
126. *See Wonsover*, 205 F.3d at 414 (noting that "[t]he Supreme Court [in *O'Hagan*] rejected by implication Wonsover's assertion that one must know of the relevant legal requirements for his act to willfully violate that requirement.").
127. *Id.*

court arrived at the standard proposition that willfulness, in the context of section 15(b)(4) of the Exchange Act, means "no more than that the person charged with the duty [to not violate the law] knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law."[128]

C. SUBSEQUENT ADMINISTRATIVE COURT DECISIONS EXPANDED THE APPLICATION OF THE *WONSOVER* STANDARD TO OTHER PROVISIONS OF SECURITIES LAWS

The SEC has applied *Wonsover* to various provisions of the Securities Act,[129] the Exchange Act,[130] and the Advisers Act,[131] where willfulness is an element of a cause of action.[132] The Commission has broadly applied *Wonsover* to cases where the defendant's conduct is better described as negligent rather than intentional.

A year after *Wonsover* was decided, the SEC cited it in a Commission review of a decision by an administrative law judge.[133] Marc Geman, a former CEO of a registered broker-dealer and investment adviser of Portfolio Management Company ("PMC"), was barred from the securities industry for violating section 17(a) of the Securities Act, sections 10(b) and 17(a) of the Exchange Act, and sections 206(1) and 206(2) of the Advisers Act.[134] He was barred for "(i) fraudulent misrepresentations and omissions . . . in connection with the purchase and sale of securities . . . (ii) [the] failure to disclose [conflicts] . . . and (iii) [the] failure to make and keep required books and records."[135]

Geman argued that he could not be found to have willfully aided and abetted violations of securities laws with respect to recordkeeping

128. *Id.* (quoting Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949)).

129. *See* Francis Parisi, Securities Act Release No. 10050, 2016 WL 878137, at *6 n.2 (Mar. 7, 2016).

130. *See* Marc N. Geman, Exchange Act Release No. 43963, Investment Company Act Release No. 1924, 2001 WL 124847 (Feb. 14, 2001); *see also* Moon Capital Management, LP, Exchange Act Release No. 2777, 2008 WL 4201760 (Sept. 15, 2008).

131. *See* Marc N. Geman, Exchange Act Release No. 43963, Investment Company Act Release No. 1924, 2001 WL 124847 (Feb. 14, 2001).

132. *See supra* cases accompanying note 4.

133. Marc N. Geman, Exchange Act Release No. 43963, Investment Company Act Release No. 1924, 2001 WL 124847 (Feb. 14, 2001).

134. *See id.* at 1–2.

135. *See id.* at 1.

violations.[136] He argued that he could not be found to have acted willfully because he had acted in good faith and in a reasonable manner at all times.[137] The SEC rejected this argument, as Geman was a securities professional who was required to know the law. Thus, the SEC reasoned, it made no sense to permit an ignorance-of-the–law defense.[138] The Commission also noted that the structure of the Exchange Act and "the regulatory framework it establishes, and Congressional ratification [of the law] . . . counter the view that willfulness requires a finding of knowledge or reckless disregard of the law."[139] In a footnote, the SEC affirmed its position that *Wonsover's* interpretation of "willful" under the Exchange Act was applicable to the Advisers Act.[140]

In 2008, the SEC continued to rely on *Wonsover* when interpreting the Exchange Act. In an administrative proceeding, the SEC found that Moon Capital, a Delaware limited partnership, had sold securities shortly after a follow-on offering, in violation of Rule 105 of Regulation M of the Exchange Act.[141] In holding that Moon Capital willfully violated Regulation M, the Commission cited the *Wonsover* standard that the individual charged knows or knew what she was doing.[142]

In addition, during 2017, the Commission determined in a cease-and-desist proceeding that Palestra Capital Management LLC, a New York-based investment adviser, willfully violated Rule 105 of Regulation M of the Exchange Act.[143] The SEC alleged that Palestra had short-sold stock in a fund it managed and had acquired shares of the same stock in an

136. He was alleged to have violated Exchange Act § 15(b)(4) and Advisers Act § 203(f). *See id.* at 14, 17.

137. *See id.* at 14.

138. *See id.* at 15.

139. *See id.*

140. *See id.* at 22 n.77 ("While Wonsover dealt with the meaning of willfulness in the context of the Exchange Act, we believe its reasoning is also applicable to the term's use in the Advisers Act. None of the cases cited by Geman in support of his argument regarding willfulness interprets the term in the context of securities laws.").

141. *See* Moon Capital Management, LP, Exchange Act Release No. 2777, 2008 WL 4201760, at *1 (Sept. 15, 2008).

142. *See id.* at *4 n.1 ("A willful violation of [] securities laws means merely 'that the person charged with the duty knows what he is doing.' Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor 'also be aware that he is violating one of the Rules or Acts.' *Id.* (quoting Gearhart & Otis, Inc., v. SEC, 348 F.2d 798, 803 (D.C. Cir. 1965)).").

143. *See* Palestra Capital Management LLC, Advisers Act Release No. 4625, 2017 WL 371945, at *1 (Jan. 26, 2017) (quoting Gearhart & Otis, 348 F.2d at 803).

offering during a restricted period.[144] In support of this standard for a willful violation of Rule 105, the SEC relied on *Wonsover*.[145]

Furthermore, the SEC continued its reliance on *Wonsover* by applying it to the Advisers Act. In a 2018 cease-and-desist proceeding, the SEC charged Tarpinian, a former associate of a dually-registered broker-dealer and investment adviser, with willfully aiding and abetting and causing the firm's violations of section 206(3) of the Advisers Act.[146] In interpreting section 206(3), the Commission used its boilerplate *Wonsover* footnote.[147]

Finally, in 2016, the SEC further extended the *Wonsover* standard's application to the Securities Act. In an administrative and cease-and-desist proceeding, the Commission alleged that that Parisi, an employee of Standard & Poor Rating Services, had willfully failed to disclose material facts when publishing an article to support the firm's "then-new criteria for rating conduit/fusion Commercial Mortgage Backed Securities," in violation of section 17(a)(2) of the Securities Act.[148]

III. NEGLIGENCE IS NOT INTENT: THE D.C. CIRCUIT'S DISTINCTION IN *ROBARE* BETWEEN NEGLIGENCE AND SUBJECTIVE INTENT

A. *ROBARE'S* LEGAL BACKGROUND

Prior to 2019, the standard interpretation for willful violations of securities laws in civil actions was that the defendant merely knew what

144. *See id.*

145. *See id.* at *3 n.1 ("A willful violation of [] securities laws means merely 'that the person charged with the duty knows what he is doing.' Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor 'also be aware that he is violating one of the Rules or Acts.'").

146. *See* John Tarpinian, Advisers Act Release No. 4844, 2018 WL 460210, at *2–3 (Jan. 17, 2018).

147. *See id.* at *4 n.2 ("A willful violation of [] securities laws means merely 'that the person charged with the duty knows what he is doing.' Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949))."); *see also* Keybanc Capital Markets Inc., Exchange Act Release No. 3750, 2016 WL 786445 (Feb. 29, 2016).

148. *See* Francis Parisi, Securities Act Release No. 10050, 2016 WL 878137, at *6 n.2 (Mar. 7, 2016) ("The use of the word willful does not reflect a finding that the actor intended to violate the law or knew that he was doing so. A willful violation of [] securities laws means merely 'that the person charged with the duty knows what he is doing.'") (quoting *Wonsover*, 205 F.3d at 414; *Hughes*, 174 F.2d at 977).

she was doing. In practice, that standard operated as a negligence standard. While that standard has existed in some form since the inception of securities laws, the SEC has used *Wonsover* as the standard-bearer for that position for nearly twenty years.

It was not until a recent decision by a Court of Appeals that the SEC's interpretation of willful violations of the Advisers Act was questioned. The D.C. Court of Appeals in *Robare* held that without evidence of intent or recklessness, negligent conduct is insufficient to establish a willful violation of section 207 of the Advisers Act.[149] In particular, the court determined that the statutory text of section 207 specified that a willful omission of information from a company filing requires evidence of subjective intent to omit that information.[150]

B. *ROBARE'S* FACTUAL BACKGROUND

The petitioners in *Robare* consisted of the Robare Group ("TRG")—an investment adviser—and its principals Mark Robare and Jack Jones.[151] TRG used Fidelity Investments (Fidelity) for "execution, custody, and clearing services for its advisory clients."[152] In 2004, TRG entered into a revenue-sharing arrangement with Fidelity, where the latter would pay TRG whenever its clients invested in funds offered on Fidelity's platform.[153] Over an eight-year period, TRG received approximately $400,000 in fees through this arrangement.[154] During that time, TRG failed to disclose this potential or actual conflict of interest to its clients.[155]

TRG, as an investment adviser, had a fiduciary obligation to its clients to disclose all conflicts of interest.[156] However, both Robare and Jones reviewed and signed off on the firm's Forms ADV,[157] which made

149. *See infra* Part III.C.
150. *See* Robare Group, Ltd., v. SEC, 922 F.3d 468, 479 (D.C. Cir. 2019).
151. *Id.* at 473.
152. *Id.*
153. *See id.*
154. *See id.*
155. *See id.*
156. *See id.* at 473.
157. Investment Advisers submit Form ADV's, which is a disclosure document, to the SEC. On this form, there is a section that requires advisers to disclose conflicts of interest. *Form ADV*, SEC, available at https://www.sec.gov/fast-answers/answersformadvhtm.html.

no mention of the revenue-sharing arrangement with Fidelity.[158] TRG only disclosed the arrangement when Fidelity threatened to stop making the revenue-sharing payments.[159]

C. The Difference between Negligence and "Subjective Intent"

The D.C. Circuit noted that it had yet to "address the meaning of 'willfully' in section 207 [of the Advisers Act] but the parties agree[d] that the standard set forth in *Wonsover* . . . applie[d] . . . ."[160] The court specified that it would use the *Wonsover* standard without deciding that it applied to section 207.[161] Section 207 provides that:

> [i]t shall be unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under section 80b-3 or 80b-4 of this title, or willfully to omit to state in any such application or report any material fact which is required to be stated therein.[162]

Based upon the language of section 207, the D.C. Circuit distinguished between a willful omission in a filing to the Commission and a willful filing that turns out to contain an omission of a material fact. The Commission alleged that the petitioners had acted intentionally—rather than involuntarily—because they had intentionally chosen the language contained in their Forms ADV and intentionally filed those forms.[163] Thus, the Commission argued, the petitioners' intention to file Forms ADV without disclosing the conflict proved a willful omission.[164] However, the court stated that "[t]his misinterprets section 207, which *does not proscribe willfully completing or filing a Form ADV that turns out to have a material omission but instead make it unlawful 'willfully to omit* . . . any material fact' from a Form ADV."[165] The court decided that the "statutory text [of section 207] signals that the Commission had to find, based on substantial evidence, that at least one of TRG's principals *subjectively intended to omit* information from TRG's Forms ADV."[166]

158. *See Robare*, 922 F.3d at 476.
159. *See id.*
160. *See id.* at 479.
161. *See id.*
162. 15 U.S.C. § 80b-7 (2012).
163. *See Robare*, 922 F.3d at 479.
164. *See id.*
165. *See id.* (emphasis added).
166. *See id.* (emphasis added).

The distinction the D.C. Circuit made is subtle. Section 207 prohibits an intentional omission of a conflict from a filing, but that provision does not prohibit intentionally filing a Form ADV that happens to contain a material omission. In the first case, the filer has mens rea to perform a wrongful act by intentionally omitting a material disclosure (e.g., the Fidelity payment arrangement) from a Form ADV. In the second case, the filer has no such mens rea but is negligent when omitting mention of the conflict from a Form ADV filing, which is the conclusion the D.C. Circuit reached about TRG. Thus, either Robare or Jones must have had intent to omit the conflict to support a finding of willful violation of section 207.

Support for this distinction, between intent to omit a material conflict—thus willfully omitting mention of a conflict—and negligently omitting a conflict in a document one intentionally files with the Commission, can be found in the court's analysis of the Commission's reasoning. The court proceeded to distinguish between intent and negligence and how any given act cannot be both.[167] In particular, Judge Rogers highlighted the Commission's conclusion that TRG's principals did not act with scienter and did not attempt to defraud their customers.[168] Furthermore, there was no evidence to suggest that their decisions were influenced by Fidelity's fees.[169] The court held that "[b]ecause the Commission found the repeated failures to adequately disclose conflicts of interest on TRG's Forms ADV were no more than negligent for the purposes of Section 206(2), the Commission could not rely on the same failures as evidence of 'willful' conduct for the purposes of Section 207."[170] In other words, evidence of an adviser's negligent conduct alone is not evidence of willfulness under section 207 of the Advisers Act; the standard to be met is subjective intent, not negligence.[171]

The D.C. Circuit's distinction between negligence and wrongful intent under section 207 of the Advisers Act may have a substantial impact on the SEC's decision-making with respect to approving enforcement actions and settlement negotiations.[172] For example, a higher

167. *See id.*
168. *See id.* at 480.
169. *Id.*
170. *Id.*
171. *Id.*
172. *See* Mary P. Hansen, James G. Lundy & Taylor N. Mullaney, *The Robare Ruling Regarding "May" Disclosures and "Willfulness"*, NATIONAL L. REV. (May 7, 2019) https://www.natlawreview.com/article/robare-ruling-regarding-may-disclosures-and-willfulness [https://perma.cc/XSS9-STK7] (noting that the decision may have an impact

burden of proof to establish willful violations under section 206(1) of the Advisers Act would likely increase the SEC's reliance on section 206(2) of the Advisers Act against defendants that allegedly omit material information in their Form ADV filings. It is unclear what exactly the D.C. Circuit meant by the phrase "subjective intent to violate the law" and whether that standard is different from a criminal mens rea standard. Part IV of this Note outlines how *Robare's* subjective-intent standard should be applied to a case involving a broker's omission of material information in a filing to FINRA.

IV. BUSINESS-AS-USUAL IN A POST-*ROBARE* WORLD

In the months since *Robare* was decided, the SEC has used it as authority in some administrative proceedings, but has narrowed the D.C. Circuit's interpretation of "willful." For example, the SEC initiated cease-and-desist proceedings against Mitchell Friedman under sections 203(f) and 203(k) of the Advisers Act and section 9(b) of the Investment Company Act of 1940.[173] The Commission also charged Friedman for willfully violating sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder.[174] The SEC alleged that Friedman failed to disclose a material conflict of interest—arising from his arrangement with a private foreclosure fund—to a separate private fund he advised.[175]

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on the SEC's charging decisions with respect to section 207 and other provisions of securities laws which have willfulness as an element of a cause of action); *see also* Mark D. Cahn, et al., *SEC Enforcement Alert: D.C. Circuit Rules Negligent Conduct is Not "Willful"*, WILMERHALE (May 17, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190517-dc-circuit-rules-negligent-conduct-is-not-willful [https://perma.cc/LRY5-9XG8] (specifying that because the Commission has relied upon the permissive *Wonsover* standard in cases of negligent conduct alone, *Robare* may substantially affect cases beyond the Advisers Act. Robare could make it more difficult for the SEC to impose charges or remedies based upon willful conduct. The decision may also make it harder to reach "amicable settlements, particularly where the Commission insists on charges, sanctions, or remedies that contain a 'willfulness' component."); *see also* Joan E. McKnown, et al., *Raising the Bar on "Willfulness" Securities Laws Violations*, JONES DAY (May 2019) https://www.jonesday.com/en/insights/2019/05/raising-the-bar [https://perma.cc/K4CH-DRXT] (speculating that SEC staff may shift toward settling or litigating in a cease-and-desist context where there is no statutory requirement to show willfulness.).

173. *See* Mitchell J. Friedman, Advisers Act Release No. 5338, 2019 WL 4189456, at *1 (Sept. 4, 2019).

174. *See id.* at *2.

175. *See id.* at *3.

Friedman also allegedly misled two investors into purchasing his own investment in the foreclosure fund.[176] In footnote two of the SEC's release, the Commission asserted that the *Wonsover* standard applies to sections 203(f) and 203(k) of the Advisers Act and section 9(b) of the Investment Company Act, but noted that:

> the decision in *The Robare Group*, Ltd. v. SEC, which construed the term 'willfully' for purposes of a differently structured statutory provision [i.e., Section 207 of the Advisers Act] does not alter that standard. 922 F.3d 468, 478-79 (D.C. Cir. 2019) (setting forth the showing required to establish that a person has 'willfully omit[ted]' material information from a required disclosure in violation of Section 207 of the Advisers Act).[177]

Notably, *Wonsover* only interpreted willfulness in the context of the Exchange Act, and yet it has been broadly applied to many other provisions of securities laws.[178] Thus, the SEC is asserting that the *Wonsover* standard is broadly applicable, but also maintaining that *Robare* should be narrowly applied to only section 207 of the Advisers Act.

Administrative Proceedings. Administrative law judges in post-*Robare* decisions have not given full effect to the D.C. Circuit's distinction between negligent conduct and subjectively intentional conduct. In essence, these judges have continued to rely on *Wonsover's* standard of "willful." For example, the SEC instituted an administrative proceeding against investment adviser Ascension Asset Management, LLC, for violations of the Advisers Act and the Investment Company Act of 1940.[179] Ascension was charged with willfully violating section 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-2 thereunder.[180] An administrative law judge found that all violations were proven except the alleged journal violations under Rule 204(2)(a)(1).[181] The court cited the *Wonsover* standard for willful violations by noting that "[a] finding of willfulness does not require an intent to violate, but merely an intent to do

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176. *See id.* at *2.
177. *See* Mitchell J. Friedman, Advisers Act Release No. 5338, 2019 WL 4189456, at *9–10 (Sept. 4, 2019).
178. *See* cases cited *supra* note 4.
179. *See* Ascension Asset Management, LLC, and Grenville, Advisers Act Release No. 5230, SEC Lexis 2290, at *1 (Aug. 29, 2019).
180. *See id.* at *16.
181. *See id.* at *15.

the act which constitutes a violation."[182] However, *Robare* was merely cited as "assuming, without deciding, that the *Wonsover* standard applies to Section 207."[183]

In another SEC administrative proceeding against an investment adviser, an administrative law judge held that the *Wonsover* standard applied to a willful aiding and abetting charge under the Advisers Act, but the judge only cited *Robare* as support for *Wonsover*.[184] Thus far, administrative law judges have supported the SEC's narrowing of *Robare's* holding to section 207 of the Advisers Act, and not to other provisions of securities laws.

However, it is unclear why the *Wonsover* willfulness standard should be interpreted broadly to various provisions of securities laws, while *Robare* should be narrowed to a single provision of the Advisers Act. Both cases were decided by the D.C. Circuit Court of Appeals. In addition, there is scant textual evidence that the Court intended, directly or indirectly, to narrow its holding to be applied exclusively to section 207 of the Advisers Act. Consistent application of case law should compel application of *Robare's* willfulness standard to other provisions of securities laws.

A. SUGGESTED APPLICATION OF *ROBARE'S* SUBJECTIVE INTENT STANDARD

The *Robare* willfulness standard appropriately distinguishes between negligent and intentional violations of securities laws. Defendants who in good faith make material omissions in their filings should not be deemed to have willfully violated the law. The D.C. Circuit's distinction shielded Jones and Robare from liability for willfully violating section 207 of the Advisers Act, but it did not shield them from punishment in accordance with section 206(2) for negligently failing to disclose a material conflict to their clients. A faithful application of *Robare* should follow the structure of the D.C. Circuit's analysis, but this has not been the case with respect to another post-*Robare* administrative decision.

In July 2019, the Commission upheld a FINRA finding that Allen B. Holeman, a registered principal of a FINRA member firm, willfully omitted material tax liens in several filings. Holeman was subject to a

182. *See id.* at *16.
183. *See id.*
184. *See* Saving2Retire, LLC, and Marian P. Young, Advisers Act Release No. 1384, 2019 SEC LEXIS 2230, at *46 (Aug. 26, 2019).

FINRA disciplinary action and imposition of a statutory disqualification,[185] because he willfully failed to update his FINRA Form U4 filings with three material federal tax liens.[186] Form U4 requires that "associated persons of FINRA member firms" disclose any unsatisfied liens.[187] Particularly, Question 14M on Form U4 asks "[d]o you have any unsatisfied judgements or liens against you?"[188] to which Holeman replied "no" on at least eight occasions, despite having three outstanding tax liens worth $116,545.71.[189]

The Commission upheld FINRA's finding and the resulting disqualification.[190] It agreed with FINRA's National Adjudicatory Council that the information Holeman omitted was material and that he had acted willfully.[191] The Commission relied upon the Second Circuit's decision in *Mathis v. SEC*,[192] which considered the meaning of willful in section 3(a)(39) of the Exchange Act, and held that willfulness does not require awareness that one is violating the law.[193] In this case, according to the Commission, Holeman acted with extreme recklessness by not disclosing the liens.[194]

But while the Commission in *Holeman* cited the D.C. Circuit's analysis of the subjective intent requirement for willful violations in *Robare*,[195] it failed to mention the court's distinction between intent and negligence.[196] A clearer application of *Robare's* analysis to *Holeman*

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185. Under Securities Exchange Act § 3(a)(39)(F), a person is subject to statutory disqualification from a self-regulatory organization, like FINRA, if that person has "willfully omitted to state in [a U4 filing] any material fact required to be stated in the application." *See* Allen Holeman for Review of Disciplinary Action Taken by FINRA, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903, at *33 (July 31, 2019).

186. *See id.* at *1.

187. *See id.* at *16.

188. *See id.* at *6.

189. *See id.* at *5.

190. *See id.* at *1.

191. *See id.* at *33.

192. Mathis v. SEC, 671 F.3d 210, 216 (2d Cir. 2012).

193. *See* Allen Holeman for Review of Disciplinary Action Taken by FINRA, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903, at *37 (July 31, 2019). An individual is subject to statutory disqualification under section 3(a)(39) so long as the FINRA member intentionally submits an application to register with FINRA knowing that the application contains false information. *See id.*

[194] *See id.* at *41.

[195] *See id.* at *38.

[196] *See* Robare Group, Ltd., v. SEC, 922 F.3d 468, 480 (D.C. Cir. 2019).

would take that distinction into account. For example, Holeman had knowledge that the tax liens against him existed because they occurred around the time his Form U4 amendments were submitted to FINRA. Holeman's response of "no" to question 14M—regarding whether he had "any judgments or liens" against him—was willful because he had knowledge of the liens and failed to answer the question truthfully. The FINRA panel's decision that Holeman was not credible demonstrates that the panel did not believe he made a good-faith mistake,[197] unlike in *Robare*, where the administrative law judge and the SEC both believed that Robare and Jones were credible.[198]

Thus, willful violations of securities laws—or at least willful violations of the Advisers and Exchange Acts—allow a good-faith credibility defense. If a civil defendant is credible in her mistaken belief about what should be disclosed in filings, then willfulness cannot be proven.

CONCLUSION

Courts and administrative law judges have grappled with the task of interpreting "willful" throughout the various statutory schemes that govern securities laws. The D.C. Circuit's opinion in *Robare* shifts the landscape by giving additional weight to the argument that a defendant's negligent conduct is not sufficient to establish a willful violation. In light of the shift, the Commission may have an additional incentive to settle cases involving a willful violation of securities laws, given that the evidentiary burden has been raised.

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[197] In other words, that a tax officer told him that the liens were against his property and so he inferred that the question was talking about him and not his property. *See* Allen Holeman for Review of Disciplinary Action Taken by FINRA, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903, at *30 (July 31, 2019).

[198] *See Robare*, 922 F.3d at 480.