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UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of

ZPR INVESTMENT MANAGEMENT, INC.,  
and MAX E. ZAVANELLI

Respondents.  
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Administrative Proceeding  
File No. 3-15263

**RESPONDENTS, ZPR INVESTMENT MANAGEMENT, INC.**  
**AND MAX E. ZAVANELLI**  
**POST-HEARING REPLY BRIEF**

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## **I. INTRODUCTION**

The Order Instituting Administrative and Cease and Desist Proceedings (“OIP”) issued against the Respondents, ZPR INVESTMENT MANAGEMENT, INC. (“ZPR”) and MAX E. ZAVANELLI (“Mr. Zavanelli”), involves a total of six (6) magazine advertisements placed in 2008 and 2011 by ZPR; two (2) issues of the ZPR client newsletter for the months of April and December 2009; and two (2) reports created by *Morningstar* for the quarters ending September 30, 2010 and March 31, 2011.

The Securities and Exchange Commission (the “Commission” or “SEC”) has falsely asserted that the Respondents used advertisements to mislead potential clients about ZPR’s performance results. The evidence clearly demonstrated that in 2008 and 2011 when the magazine advertisements were placed, ZPR disclosed on its website, and through direct mailings to potential investors’ performance results that complied with the Global Investment Performance Standards (“GIPS”). Thus, the absence of GIPS performance results from the magazine advertisements themselves did not render ZPR’s claim of GIPS compliance false in any way. The evidence presented during the final hearing also showed that the performance results contained within these magazine advertisements were truthful and accurate and that they were not placed by the Respondents intentionally or willfully to deceive any potential client.

The evidence also demonstrated that the Respondents in no way lied to their own GIPS verification firm or withheld any information that would have been requested including advertisements. Ashland Partners & Company, LLP (“Ashland”) assisted ZPR in creating an advertisement format and accompanying footnote disclosures in 2006. Evidence that the SEC plainly ignores or seeks to distort, overwhelmingly revealed that the Respondents were not aware that advertisements should have been provided to Ashland for its review. Furthermore, Ashland

never requested this information even after ZPR's Chief Compliance Officer ("CCO") questioned whether ZPR advertisements should have been reviewed by the verifier.

The evidence also demonstrated that the Respondents were cooperative during the SEC examination and investigation process and produced thousands of documents without objection; that they did not intentionally or willfully withhold any documents or information that were requested by the SEC; and did not attempt to obstruct any efforts of the SEC to review the business activities of ZPR.

There was also no evidence to support the SEC's contention that ZPR placed false advertisements in 2008 due to its financial condition. Again, GIPS performance results for ZPR that showed it was under performing its benchmark, the Russell 2000, were readily made available through its website and in direct mailings sent to interested persons during 2008.

In 2009, the evidence showed that the Respondents did not consider or utilize the ZPR client newsletter as an advertisement or as a means to solicit new clients and therefore, the GIPS Advertising Guidelines did not apply to the April and December issues of the ZPR client newsletter. Further, there was nothing false or misleading about the content within these client newsletters and to the extent Respondents should have followed the GIPS Advertising Guidelines, it was merely an oversight or neglect, since performance results required by GIPS were available to prospective clients through its website and other sources. A fully compliant GIPS disclosure statement was also made available by ZPR to all prospective clients as the evidence reflected, which refutes the SEC's assertion of wrongdoing by the Respondents.

With respect to magazine advertisements placed by ZPR in February, March and May 2011, the SEC, once again, distorts the evidence that was presented. The performance results contained in these magazine advertisements represented previously published information by a

financial magazine that the Respondents simply reprinted. There was nothing false or inaccurate about these advertisements including ZPR's claim of GIPS compliance. Throughout the final hearing, the SEC repeatedly suggested that a departure from the GIPS Advertising Guidelines prohibited ZPR from claiming compliance with GIPS in these ads. The evidence was clear, however, that the SEC's position was totally unfounded based, in part, on GIPS very standards, which include an error correction policy that ZPR followed by providing GIPS compliant performance results to individuals that responded to these advertisements.

The evidence also clearly revealed that the *Morningstar* reports were not advertisements nor were they used by ZPR to solicit prospective clients. The Respondents also did not misrepresent the nature of the SEC's investigation through these reports since no charges, as required by the *Morningstar* report itself were made against ZPR until April 4, 2013, the date that the OIP was issued.

The SEC's request that an adverse inference be made concerning ZPR "portal" documents should also be rejected. During the examination period in 2009, ZPR produced numerous e-mails sent between July and December 2008 that identified the portal as a means of communication between employees of ZPR. ZPR also disclosed the existence of the portal to the SEC and genuinely believed that all books and records it was required to keep and maintain under the Investment Advisors Act of 1940, as amended (the "IAA"), were stored through a database and other sources maintained by ZPR. Mr. Zavanelli also disclosed in his investigative testimony the e-mail address he used to communicate with ZPR employees, which included his "portal" address. These events show that the Respondents did not mislead or obstruct the SEC's examination or investigation process by withholding or destroying any portal documents. The evidence revealed that ZPR could not access or retain copies of communications that were sent

through the portal and ultimately due to the theft and misconduct of a former employee, had no ability to secure copies of any portal documents that existed prior to March 2011. Nevertheless, all books and records required to be maintained by ZPR under the IAA were available and produced to the SEC if a request was made.

In addition and in response to a trial subpoena that was issued to the Respondents during the final hearing, approximately 860,000 pages of portal documents from January 1, 2008 to October 11, 2013, the date of the trial subpoena, were produced to the SEC. The SEC introduced selective documents from this production as exhibits during the final hearing but these exhibits did not represent or support any violation of the IAA by the Respondents. Thus, it stands to reason that portal documents dated before March 2011 and which Respondents could not access would likewise have revealed no violations of the IAA.

The evidence presented during the final hearing showed that while the Respondents did not follow each and every requirement of the GIPS Advertising Guidelines in the six magazine advertisements it placed and possibly in two issues of the ZPR client newsletter, they did not act with any degree of scienter to intentionally or willfully violate Sections 206(1), 206(2), 206(4) or Rule 206(4)-160(5) of the IAA. The evidence further showed that the GIPS standards did not apply to the *Morningstar* reports and that the Respondents did not act with any degree of scienter to intentionally or willfully provide any false or inaccurate information to *Morningstar* that would violate any provisions of the IAA.

The Respondents have made significant corrections to ZPR's advertising and marketing policies and have taken appropriate corrective action to address each and every issue raised in the OIP regarding the magazine advertisements, the ZPR client newsletters and the *Morningstar* reports. Thus, the Respondents have demonstrated their good faith in attempting to comply with



the GIPS standards and other legal requirements that pertain to ZPR's business activities. These corrective actions and Respondents' acknowledgment of past mistakes and errors made in advertisements and possibly other publications together with the evidence presented during the final hearing do not support a permanent bar of Mr. Zavanelli, any cease and desist orders against the Respondents or any second tier penalties against either Respondent as the SEC is requesting.

## **II. BACKGROUND**

### **A. Respondents**

Mr. Zavanelli formed ZPR in 1994 as a registered investment advisor. TR pg 143, lines 20-22. When its assets under fell below \$25 million, the firm withdrew its SEC registration in June 2001. RX 1 at pg 2, ¶B.1. In 2006, ZPR again registered as an investment advisor with the SEC and has consistently maintained its registration since that date. RX 1.

Since ZPR's formation and until October 2011, Mr. Zavanelli was the sole shareholder of the firm and served as its President and a member of ZPR's Board of Directors. RX 1, pg 2, ¶B.2. In October 2011, Mark Zavanelli, Mr. Zavanelli's son, took over as the President and Chief Compliance Officer ("CCO") for ZPR and also became a 25% shareholder of ZPR. TR pg 1298, lines 11-14; TR pg 761, lines 12-17. On or about October 7, 2013, Mark Zavanelli received the remaining ZPR ownership from Mr. Zavanelli and is now the sole shareholder of ZPR. *Id.* at lines 18-21. Mr. Zavanelli remains as the Treasurer and serves on the Board of Directors of ZPR. Since stepping down as President, Mr. Zavanelli has continued to be involved in the trading strategy for ZPR, along with his son, Mark. TR pg 758, lines 14-23. However, since October 2011, when Mark Zavanelli became the CCO for the firm, he assumed control and decision making authority for ZPR compliance. TR pg 1786, lines 7-16.

**B. Related Individuals and Witnesses**

1. Mark Zavanelli has served as ZPR's President and CCO since October 2011. He is solely responsible for all ZPR compliance issues and consults with his father, Max Zavanelli, about other issues that affect the business of ZPR. TR pg 1785, line 5 through pg 1786, line 11. Mark Zavanelli does not "report" to his father. *Id.*

2. Theodore A. Bauchle ("Mr. Bauchle") worked at ZPR between September 1995 until April 2013 initially as a research analyst and then as the operations manager and Vice President for the firm. TR pg 144, line 1 through pg 145, line 7. Mr. Bauchle had primary responsibility for ZPR's GIPS compliance and was the primary contact with Ashland, ZPR's GIPS verifier from January 19, 2006 until July 9, 2010. TR pg 295, line 18 through pg 297, line 5, DX 37; DX 85. In April 2013, Mr. Bauchle was terminated by Mr. Zavanelli for several reasons that included (i) his decision to stop sending invoices for management fees to clients; (ii) his failure to accurately price Thai stocks due to currency fluctuations; (iii) his statement to Mr. Zavanelli that bar charts reflecting ZPR performance results against its benchmark were not sent to prospective clients in 2008 when, in fact, this information had been sent and was also included on ZPR's website; (iv) his failure to assist ZPR's legal counsel after the OIP was filed; and (v) Mr. Bauchle's statement that Ruth Ann Fay told Mr. Zavanelli that advertisements placed by ZPR between January and April 2008 (DX 21, Bate Stamped Nos. 00001-00004) were not GIPS compliant when, in fact, she never had that conversation. TR pg 1470, line 8 through pg 1478, line 21. Notwithstanding Mr. Bauchle's belief that he was terminated because of investigative testimony he provided to the SEC in October 2010, this was not the basis that Mr. Zavanelli testified about.

3. Ruth Ann Fay served as the CCO from April 2006 to approximately April 2009 and not during the period the SEC contends. TR pg 1229, lines 14-19. She currently serves as the firm's corporate secretary.

4. Nikola Feliz is a senior manager for Ashland and was the senior manager for the team responsible for GIPS verification of ZPR from January 2006 until July 2010. TR pg 1015, lines 9-14.

5. Jean Cabot was the lead examiner for the SEC during its examination of ZPR during 2009. TR pg 443, line 22 through pg 444, line 3.

6. David Sappir is the sole owner of ZPR Client Management, which has acted as an independent solicitor for ZPR since January 2007. TR pg 1133, line 18 through pg 1134, line 1; DX 59.

**C. Zavanelli's Regulatory History**

In 1987, Mr. Zavanelli entered into an Offer of Settlement with the SEC through which he omitted to state that investment results for the period from 1979 through 1985 included three years during which no actual trading occurred and the purported results of those three years were from Mr. Zavanelli's hypothetical portfolios. RX 32, ¶ IIIA(2).

During the final hearing in this matter. Mr. Zavanelli testified that before he registered his business, Zavanelli Portfolio Research, as an investment advisor, he was selling research to financial institutions from 1979 to 1982. TR pg 1363, lines 14-20. The performance results achieved by these institutions with Mr. Zavanelli's research, from 1979 through 1981, were included in a brochure used by Zavanelli Portfolio Research after it was registered with the SEC as an investment advisor in 1982 for both the research and investment management business. *Id.*

at lines 21-25. These performance results, therefore, represented actual, not hypothetical results and were not made up by Mr. Zavanelli. TR pg 1363, line 7 through pg 1364, line 2.

The Offer of Settlement also included a finding that Mr. Zavanelli listed on Form ADV filed by Zavanelli Portfolio Research with the SEC between September 30, 1981 through January 16, 1986, that he had a Doctor of Philosophy degree from Columbia University. RX 32, ¶ IIB. Mr. Zavanelli testified, however, that on the Form ADV for Zavanelli Portfolio Research, it was clearly disclosed he had “attended” [Emphasis Supplied] Columbia University but did not earn a degree. See RX 33, pgs 12, 13.

Based on these findings, Mr. Zavanelli and Zavanelli Portfolio Research were censured and prohibited from soliciting or accepting any new clients for a period of 180 days. RX 32, ¶ III.C.

At the time the Offer of Settlement was entered into, Mr. Zavanelli testified he did not have the financial means to defend the SEC’s claims (TR pg 1367, lines 7-17) and given the nature of the issues set forth in the Offer of Settlement, the sanctions that were imposed and the passage of over 25 years between that proceeding and the current OIP, little, if any, consideration should be given to Mr. Zavanelli’s prior 1987 regulatory history.

In addition, there is insufficient evidence in the record to assess any relevance that a proceeding in Lithuania that did not name either of the Respondents could possibly have to this proceeding.

**D. ZPR’s Formation and Operations**

In 1994, Mr. Zavanelli converted Zavanelli Portfolio Research into three separate entities, one of which was ZPR Investment Management, Inc. TR pg 741, line 25 through pg 742, line 4. As previously noted, from 1994 until October 2011, Mr. Zavanelli was the sole shareholder of

ZPR and served as its President and Chief Operating Officer. During this period, Mr. Zavanelli was responsible for approving the advertisements that ZPR placed. TR pg 1487, lines 6-11. However, Mr. Zavanelli testified that he did not review or receive copies of the October, November or December 2008 *Smart Money* advertisements before they were published. TR pg 1414, lines 12-24. He also had no input in the creation of these advertisements. TR pg 1413, line 17 through pg 1414, line 8. He further testified that the first time he ever saw these advertisements was when Ms. Cabot showed him copies in February 2009 during the SEC examination. TR pg 1415, line 18 through pg 1417, line 17. Therefore, even though he had responsibility to approve advertisements for ZPR at this time, Mr. Zavanelli could not have carried out this obligation since no one including Mr. Bauchle, ever gave him the opportunity to review the October, November or December 2008 *Smart Money* advertisements.

After they were adopted and became effective on January 1, 2006, Mr. Zavanelli read and became familiar with the GIPS standards but did not consider himself to be an expert on GIPS. TR pg 1571, lines 14-17; pg 1572, lines 5-7. However, he testified that Ashland was ZPR's GIPS expert and that they, along with Mr. Bauchle, were making GIPS decision for the firm. TR pg 1557, line 19 through pg 1558, line 9; TR pg 1572, lines 5-7.

Further and despite being familiar with GIPS, Mr. Zavanelli was not aware prior to his SEC investigative testimony in June 2011 that by including a claim of GIPS compliance in an advertisement, the GIPS Advertising Guidelines needed to be followed. DX 89 at page 69, line 24 through pg 70, line 18. Thus, when the February, March and May 2011 advertisements identified in the OIP were placed by ZPR and since ZPR's claim of GIPS compliance had been verified at this time, Mr. Zavanelli thought that making this claim in the advertisements was accurate. TR pg 1505, lines 13-16.

The fact that Mr. Zavanelli thought that a claim of GIPS compliance was separate and independent from complying with the GIPS Advertising Guidelines provides further evidence to show he was not intentionally or willfully violating the GIPS standards or any other applicable laws.

In October 2011, Mr. Zavanelli resigned from his position as President of ZPR and was succeeded by his son, Mark Zavanelli. TR pg 1298, lines 11-14. After this date, Mr. Zavanelli did not make decisions on any compliance issues for the firm. TR pg 1762, lines 1-24. Advertising and GIPS compliance issues for ZPR also became Mark Zavanelli's responsibility. TR pg 1527, lines 16-25. Mr. Zavanelli was being informed about advertising and GIPS compliance issues for the firm and was providing input but Mark Zavanelli, as the CCO, makes the final decisions for ZPR on these issues. *Id.*, TR pg 1541, lines 2-16.

### **III. ZPR ELECTED TO BE GIPS COMPLIANT IN 2006 TO COMPARE ITS PERFORMANCE AGAINST OTHER MONEY MANAGERS**

#### **A. GIPS Standards**

GIPS is a set of voluntary standards for performance presentation of investment results achieved by money managers and investment advisors. RX 3. The objective behind GIPS is to ensure that full and fair disclosure is made by firms who claim compliance with GIPS to both existing and prospective clients. *Id.* at pg 2, ¶.D.10.g. The GIPS standards do not consist of a rigid, inflexible set of requirements and through its Error Correction Policy, recognize that firms claiming compliance will make mistakes in their attempts to follow GIPS. *See e.g.* RX 40. GIPS compliance mistakes and errors that are recognized and corrected by firms do not jeopardize an overall claim of GIPS compliance. TR pg 947, lines 4-8.

**B. ZPR Begins Its Claim of GIPS Compliance**

After the GIPS standards become effective on January 1, 2006, ZPR retained Ashland to conduct an initial verification of the firm's compliance with GIPS regarding its composite construction and to ensure that ZPR had policies and procedures in place to properly calculate performance results. DX 37, pgs 1, 2. The initial verification by Ashland covered a five year period from December 31, 2000 through December 31, 2005. *Id.* ZPR started to claim compliance with GIPS on or about March 23, 2006. DX 40. Thereafter, Ashland conducted GIPS verification services for ZPR on a quarterly basis until July 9, 2010. TR pg 919, lines 6-14; DX 85.

Despite the SEC's assertion that ZPR wanted to claim GIPS compliance to "lure institutional investors", the real reason that ZPR elected to retain Ashland and be verified under GIPS was to compare its performance results against those of other money managers. TR pg 1391, lines 14-19. Mr. Zavanelli testified that he did not expect a claim of GIPS compliance by ZPR to create any new business from institutional investors. *Id.* at lines 20-23. So, even though Greg Reed & Associates told him that complying with GIPS would be helpful for institutional business, Mr. Zavanelli testified that being GIPS compliant has never been helpful. TR pg 1391, line 24 through pg 1392, line 4. For example, the firm has never attracted any institutional investors who have access to ZPR reports that are created and prepared by *Morningstar*. TR pg 1587, lines 9-10; RX 25 and 26.

**C. Ashland Assisted ZPR to Create an Advertisement Format**

In 2006, Ashland assisted ZPR in creating a template that could be used to place advertisements that complied with the GIPS Advertising Guidelines. TR pg 187, lines 19-22.

Ashland also prepared footnote disclosures that were part of the advertisement template. TR pg 1397, lines 13-21. These footnote disclosures stated as follows:

Results are based on fully discretionary accounts categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on the size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commissions costs are included in all unrealized gains. Performance has been audited and verified by Ashland Partners for the period January 1, 2001 – June 30, 2007 according to the Global Investment Performance Standards (GIPS®). ZPR Investment Management, Inc. is a registered investment adviser managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®). Complete description of the policies and procedures for this composite and a list and description of all firm composites are available upon request.

The advertisement format that Ashland helped to create and footnote disclosures it prepared were used by ZPR to place advertisements in 2007 and from January to April of 2008. TR pg 1394, line 5 through pg 1397, line 21; DX 21 (Bate Stamped Nos. 00001 – 00004).

In April 2008, Ashland instructed Mr. Bauchle to remove the word “audit” from language contained in the footnote. DX 64. Ashland also suggested that additional changes to the footnote disclosure language be made by ZPR so that after April 2008 the footnote read as follows:

Results are based on fully discretionary accounts categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on the size adjusted basis. The returns in this composite are net of fees.



Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commissions costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm wide by Ashland Partners & Co LLP from December 31, 2000 through March 31, 2008. In addition, a performance examination was conducted on the fundamental Small Cap Value Composite beginning 12/31/2000. ZPR Investment Management, Inc. is a registered investment adviser managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®). Complete description of the policies and procedures for this composite and a list and description of all firm composites are available upon request.

See RX 47, pg 1, e-mails between Ted Bauchle and Carrie Hoxmeier dated April 14, 2008 and April 22, 2008 and "Fundamental Small Cap Value Composite Footnote" and "International Equity Global Composite Footnote"; DX 21, pg 00005-00011 and 00013-00021.

Thus, while Ashland was providing assistance to ZPR with its advertisements, Ms. Feliz testified that Ashland never requested ZPR to provide advertisements for Ashland to review. TR pg 1041, lines 10-25. Ms. Feliz also testified that she never told Mr. Bauchle, who was Ashland's primary contact, that the term "marketing materials" also included advertisements. TR pg 1040, line 20 through pg 1041, line 3. Her testimony is also consistent with the terms and conditions of not one, but two engagement letters that Ashland entered into with ZPR, which memorialized the GIPS verification services that it would perform. DX 38, DX 40. Neither of these agreements mentioned the word "advertisements" or suggested that ZPR was required to provide advertisements to Ashland as a part of its GIPS verification process. *Id.* In addition, the

“Representation Letter” that Ashland required ZPR to execute before a GIPS verification report would be issued, did not contain any obligation for ZPR to provide any advertisements to Ashland or even mention the word “advertisement.” DX 40. Thus, the SEC’s attempt to suggest that the quarterly GIPS verification process performed by Ashland included a review of ZPR advertisements is simply not supported by the evidence. Ms. Feliz testified that ZPR produced all information that Ashland requested for GIPS verification (TR pg 1040, line 9 through pg 1043, line 9) and the evidence is clear that Ashland verified ZPR’s claim of GIPS compliance between December 31, 2000 and December 31, 2009. RX 14. For these reasons, it is abundantly clear that if Ashland had requested Mr. Bauchle or anyone else at ZPR to provide it with copies of advertisements, the Respondents would have done so. The evidence, however, is overwhelming and reveals that Ashland never requested ZPR to provide copies of advertisements that were placed.

For these reasons, the SEC’s statement that “ZPR did not comply with its representations to Ashland” misstates the evidence that was introduced during the final hearing. In addition, there is no evidence or any logical inference to support the SEC’s bold contention that ZPR withheld magazine advertisements from Ashland so that it “could continue to obtain the GIPS compliance verification it needed to attract investors.” ZPR did not gain any new clients from the 2008 October, November and December *Smart Money* advertisements and did not place any magazine advertisements between January and November 2009 because it was informed by the SEC that its prior advertisements were not GIPS compliant. TR pg 1277, lines 7-13; RX 13.

**D. ZPR Did Not Conceal Advertisements From Ashland**

On January 11, 2008, Mr. Bauchle provided a copy of a magazine advertisement ZPR had run in January 2008. DX 55. Ms. Feliz testified that several months later in mid-2008, she

and Carrie Hoxmeier, an Ashland verifier, called Mr. Bauchle to discuss certain GIPS compliance issues regarding the January 2008 advertisement he had previously sent. TR pg 927, lines 9-24; pg 1020, lines 1-4. Mr. Feliz claims that she addressed three items regarding the advertisement, which needed to be addressed and were (i) disclosure of the currency used to express the returns; (ii) removal of the word “audited” from the advertisement; and (iii) disclose how an “interested investor” could receive a GIPS compliant presentation and a list of composites for the firm. TR pg 928, lines 6-21. Ms. Feliz also testified that during this call or in another call later that month, Mr. Bauchle told her that ZPR did not intend to run any more magazine advertisements. TR pg 934, lines 2-12.

Based upon this one alleged telephone conversation, the SEC argues that ZPR continued to place magazine advertisements after mid-2008 and withheld these advertisements from Ashland to gain its GIPS verification and thus, be able to “lure investors.” This contention, however, is baseless and flawed for a number of reasons. First and as previously raised by the Respondents in their Initial Post-Hearing Brief, the credibility of Ms. Feliz’s testimony about the existence or timing of her conversations with Mr. Bauchle in mid-2008 is highly questionable and suspicious. There is no written evidence to support Ms. Feliz’s testimony that she spoke with Mr. Bauchle mid-year 2008. TR pg 1020, line 9 through pg 1021, line 18. There was also no written evidence introduced during the final hearing to suggest that Ms. Hoxmeier ever spoke with Mr. Bauchle about the January 2008 advertisement he had sent to her on January 11, 2008. DX 55. This is a significant point since Ms. Hoxmeier had previously provided guidance to Mr. Bauchle through an e-mail concerning a marketing material that he had provided to Ashland for the 2007 fourth quarter verification period. DX 64. This e-mail was dated April 3, 2008, and addressed, among other issues, the use of the word “audited” by ZPR in a Flash Report for its

Small Cap Value (“SCV”) and International Equity Global (“International”) composites. *Id.* The absence of any written communication between Ashland and Mr. Bauchle to reflect the mid-year 2008 call is also inconsistent with Ms. Hoxmeier’s practice as an Ashland verifier, which was to send e-mails and provide written instructions on clients’ GIPS compliance issues. TR pg 1023, line 22 through pg 1024, line 2. If Ms. Hoxmeier had spoken to Mr. Bauchle about the January 2008 advertisement he sent to her, then there would be an e-mail or some other written correspondence to reflect that conversation similar to her April 3, 2008, e-mail to Mr. Bauchle regarding the use of the word “audited.” *See* DX 64. There is no written evidence, however, that documents any discussion about the ZPR January 2008 advertisement and it is, therefore, very unlikely that the conversation Ms. Feliz testified about ever took place.

Second, the testimony Ms. Feliz gave during the final hearing about the mid-year 2008 call with Mr. Bauchle contradicted her investigative testimony that she provided to the SEC on February 22, 2011. At that time, Ms. Feliz reviewed the same January 2008 advertisement that Ms. Bauchle sent to Ms. Hoxmeier on January 11, 2008 and claimed under oath that she did not recall ever having reviewed it. DX 88, “Testimony of Nikola Feliz,” pg 146, line 14 through pg 147, line 5. Ms. Feliz went on to state that this advertisement did not inform someone how to obtain a GIPS compliant presentation; did not identify the currency used for the performance results; and improperly used the word “audit”. *Id.* at pg 147, line 7 through pg 149, line 3. This was the same testimony that Ms. Feliz provided during the final hearing but with two significant differences.

In her investigative testimony, she never mentioned having any conversation in mid-year 2008 with Mr. Bauchle about the January 2008 advertisement and claimed that she could not recall ever having reviewed the January 2008 advertisement that Mr. Bauchle sent to Ms.

Hoxmeier. DX 55; DX 88. Nevertheless and over 30 months later during the final hearing, Ms. Feliz suddenly remembered that she had reviewed the ZPR January 2008 advertisement (DX 55) and spoke with Mr. Bauchle about it mid-year 2008. Her testimony is simply not credible especially when no written evidence was presented to corroborate Ms. Feliz's statements about this alleged conversation with Mr. Bauchle. In addition, there is no written document that Ms. Feliz could have reviewed to refresh her recollection about the conversation she claimed to have had with Mr. Bauchle in mid-year 2008 about the January 2008 advertisement.

The credibility of Ms. Feliz is further discredited by Mr. Bauchle himself who testified that no one from Ashland ever contacted him to discuss the January 2008 advertisement he sent to Ms. Hoxmeier on January 11, 2008. TR pg 290, line 22 through pg 291, line 9; DX 55. Also, during her investigative testimony before the SEC in February 2011, Ms. Feliz stated that before her first conversation with Mr. Zavanelli in early 2010 concerning the ZPR December 2009 client newsletter, Ashland had no concerns about Max [Zavanelli], Ruth [Ann Fay] or Ted's [Bauchle] noncompliance with GIPS in any marketing materials, presentation materials, advertisements or client newsletters. DX 88, "Testimony of Nikola Feliz", pg 36, line 1 through pg 37, line 18.

The SEC's attempts to suggest that ZPR concealed advertisements from Ashland after mid-year 2008 are also thoroughly refuted by the testimony of Ruth Ann Fay and an e-mail she sent to Ashland in February 2009. At this time, the SEC was conducting an on-site examination of ZPR and raised concerns that the 2008 October, November and December *Smart Money* advertisements were not GIPS compliant. TR pg 1257, lines 14-24; TR pg 1267, lines 18-22. Due to these concerns, Ms. Fay called Ashland to discuss the compliance issues that the SEC brought to her attention. TR pg 1276, line 22 through pg 1277, line 6. On February 17, 2009,

Ms. Fay also sent an e-mail to Geoff Hecht, a manager at Ashland who was under the supervision of Ms. Feliz, to explain that ZPR could not advertise until its advertisements were GIPS compliant. RX 13. Ms. Fay also asked Mr. Hecht in this e-mail if ZPR should be sending its advertisements to Ashland for review. *Id.* Mr. Hecht responded to Ms. Fay as follows:

Thank you for your e-mail. Currently, Nikola Feliz (Senior Manager on your engagement) and I are reviewing your e-mail [RX 13] and working on some comments. *Id.*

Ms. Fay also testified that no one from Ashland ever responded to her e-mail and did not recall ever having a conversation with Ashland or receiving any information that ZPR should be sending its advertisements to Ashland. TR pg 1274, lines 16-20; TR pg 1272, lines 5-10. Ms. Fay also testified that she was of the belief that Ashland's role was to verify performance numbers, not to review advertisements. *Id.* at lines 1-4.

When asked about Ms. Fay's e-mail to Greg Hecht, Ms. Feliz stated that she had no recollection of having any conversation with Mr. Hecht about it, and also did not know if he ever responded to Ms. Fay's request about the need for ZPR to provide its advertisements to Ashland. TR pg 1035, lines 8-22.

After communicating with Ashland about the non-compliant GIPS ads, Ms. Fay testified that ZPR decided to stop running magazine advertisements until November 2009 because ZPR wanted to make sure the advertisements were compliant with GIPS. TR pg 1270, line 22 through line 11; TR pg 1277, lines 7-13.

Therefore, while ZPR informed Ashland that it was going to stop placing magazine ads, this decision was made in February 2009 due to concerns raised by the SEC about certain non-compliant GIPS advertisements and did not relate to any mid-year 2008 conversation that Ms. Feliz claims to have had with Mr. Bauchle.

The evidence that was presented during the final hearing clearly indicates that the Respondents did not withhold any advertisements from Ashland and would have provided the advertisements had Ms. Feliz, Mr. Hecht, Ms. Hoxmeier or anyone else at Ashland requested that copies be sent. However, Ms. Feliz testified that to her knowledge, no one at Ashland ever instructed its primary contact, Mr. Bauchle, that ZPR should provide such ads. TR pg 1041, lines 10-17.

#### **IV. ZPR DID NOT KNOWINGLY PLACE ADVERTISEMENTS WITH DEFECTS THAT ASHLAND HAD IDENTIFIED**

The only possible deficiency that Ashland ever pointed out to ZPR regarding its advertisements related to the use of the word “audit”. DX 64; TR pg 291, line 2 through pg 294, line 3; TR pg 1396, line 25 through pg 1397, line 10. After April 2008 and consistent with Ashland’s instructions, ZPR removed the word “audit” from all future magazine advertisements it placed. DX 21, DX 64.

The evidence presented refutes Ms. Feliz’s testimony that she told Mr. Bauchle in mid-2008 that a ZPR January 2008 advertisement was deficient because it did not identify the currency used to express returns and did not inform an interested party how to obtain a GIPS<sup>1</sup> disclosure presentation as required by the GIPS Advertising Guidelines. RX 3; pg 34, ¶ B, items 2 and 8. Mr. Bauchle testified that no one from Ashland ever informed him that there was anything wrong with the January 2008 advertisement he sent to Ms. Hoxmeier. TR pg 291, lines 2-9; DX 55.

This position is consistent with testimony from both Mr. Bauchle and Mr. Zavanelli who both stated that Ashland had assisted ZPR in creating an advertisement template that the January

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<sup>1</sup> The advertisement did provide information about how an interested party could obtain a list or description of ZPR’s composites. DX 21, pg 00001; RX 3, pg 34, ¶ B, item 2.

2008 advertisement had followed. TR pg 187, line 17 through pg 188, line 17; TR pg 1393, lines 17-19; TR pg 1394, line 22 through pg 1395, line 12. In addition, Mr. Zavanelli testified that the footnote language contained in ZPR's January 2008 advertisement actually was drafted by Ashland. TR pg 1397, lines 13-21; DX 21, pg 00001. This footnote was repeated in subsequent advertisements placed by ZPR in the 2008 January and February issues of *Kiplinger* magazine and the 2008 April issue of *Smart Money*. DX 21, pg 00002-00004. As previously discussed, the footnote language was modified by Mr. Bauchle in April 2008 at the suggestion of Ashland. RX 47. This version of the footnote, which omitted the use of the word "audit" was then included in magazine advertisements that ZPR placed between October 2008 and April 2010 with the exception of the 2010 January issue of *Smart Money* (DX 21, page 00012). DX 21, pgs 00005-00011 and 00013-00021.

The disclosure in each of these footnotes, which were prepared by Ashland and relied on by ZPR to be GIPS compliant, did not describe how an interested person could obtain a presentation from ZPR that complied with the requirements of GIPS. Ms. Feliz, however, testified that these ZPR advertisements, which were created, in part, by her own firm, did not satisfy section 5B, item 2 of the GIPS Advertising Guidelines. TR pg 936, line 22 through pg 937, line 25.

She also made this statement knowing that it was ZPR's policy to provide a GIPS' disclosure presentation to every prospective client. TR pg 1065, lines 22-25. Ms. Feliz was also aware that a GIPS disclosure presentation was available to anyone on ZPR'S website and that each advertisement included in DX 21 she testified about with the exception of DX 21, pg 00012, included a reference to the ZPR website under the heading "For More Information." TR pg 1058, lines 10-13; DX 21, pgs 00001-00011 and 00013-00021.



The SEC disingenuously tries to suggest that Mr. Zavanelli told Ms. Feliz that he did not want to distribute ZPR's GIPS compliant presentation and, therefore, ZPR knowingly omitted this disclosure from advertisements. This assertion, however, completely distorts the content of Ms. Feliz's testimony and distorts the evidence. It is evident from Ms. Feliz's testimony on this subject that Mr. Zavanelli did not want to include ZPR's GIPS compliant presentation in the "client newsletter."<sup>2</sup> [Emphasis Supplied] TR pg 978, lines 6-14. However, she never testified that Mr. Zavanelli omitted ZPR's GIPS compliant presentation from magazine advertisements, which is not a requirement of the GIPS Advertising Guidelines. *See e.g.* RX 3, pg 34, ¶ 5.B., items 1-10. Once again, the SEC attempts to misconstrue the evidence by suggesting the Respondents failed to comply with GIPS when the GIPS standards themselves completely contradict this position.

Further and notwithstanding Ms. Feliz's inconsistent testimony, no one at Ashland ever objected to or raised any concerns about the January 2008 advertisement that Mr. Bauchle sent to Ms. Hoxmeier on January 11, 2008. TR pg 290, line 22 through pg 291, line 9. The January 2008 advertisement as well as every other advertisement that is included in DX 21, with the exception of DX 21, pg 00012, contained a dollar sign next to the composite minimum investment that was required to open an account with ZPR. DX 21, pgs 00001-00011, 00013-00021. This reference clearly indicated that the performance returns contained in these advertisements were expressed in U.S. currency as required by section 5.B., item 8 of the 2005 and section 5.B., item 10 of the 2010 GIPS Advertising Guidelines. RX 3, pg 34; RX 4, pg 30. In addition, any prospective client would have received a GIPS compliant presentation from

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<sup>2</sup> During the time Ashland served as ZPR's GIPS verifier, Mr. Zavanelli did not consider ZPR's client newsletter to be an advertisement and did not use this publication to solicit prospective clients. TR pg 1439, lines 4-15.

ZPR, which expressed the performance results for both of its SCV and International composites in U.S. currencies. TR pg 1454, line 20 through pg 1455, line 23; RX 14, “Annual Disclosure Presentation” for both SCV and International Composites.

The Respondents relied on the guidance and feedback that Ashland provided and there is no credible evidence to support the SEC’s argument that the advertisements placed by ZPR between January 2008 and April 2010 (with the exception of the January 2010 ad, DX 21, pg 00012) did not comply with items 2 and 8 of the 2005 GIPS Advertising Guidelines or items 2 and 10 of the 2010 GIPS Advertising Guidelines. The evidence is clear that ZPR did not withhold any advertisements from Ashland and that Ashland never requested ZPR to provide it with any advertisements for purposes of the GIPS verification process. TR pg 1041, lines 10-25. Thus, ZPR did not and could not have knowingly published advertisements with defects Ashland identified as the SEC contends since no defects, other than the use of the word “audit” which ZPR did correct, were ever brought to ZPR’s attention by Ashland. The evidence clearly established that Ms. Feliz was not a credible witness and either fabricated her testimony all together about the call with Mr. Bauchle in mid-year 2008 or simply could not recall the substance or timing of numerous dealings between her own staff at Ashland and ZPR, which included Ms. Fay’s e-mail to Greg Hecht in February 18, 2009. RX 13. In addition, it is simply illogical to conclude that ZPR followed Ashland’s instructions and removed the word “audit” from its magazine advertisements after April 2008 but knowingly failed to address the currency notification and disclosure about how to obtain a GIPS compliant presentation items under the GIPS Advertising Guidelines and then withheld these advertisements from Ashland so it could continue to obtain GIPS compliance verification. No evidence presented during the final hearing supports the SEC’s farfetched and outlandish assertion.

The SEC also conveniently fails to mention that with the exception of the October, November and December 2008 *Smart Money* ads, the OIP does not allege that any other advertisements contained in DX 21 failed to comply with GIPS requirements or that the Respondents concealed any information from Ashland so that it could continue to claim compliance with GIPS.

Finally and contrary to the SEC's claims, ZPR does, in fact, provide its advertisements to its current GIPS verification firm, Alpha Performance Verification Services ("Alpha") and its outside consultant, National Consulting Services ("NCS") for their collaborative review. TR pg 1776, lines 2-19.

**V. ZPR DID NOT CONCEAL ITS PERFORMANCE RETURNS FROM POTENTIAL INVESTORS**

These advertisements that ZPR placed in the 2008 October, November and December issues of *Smart Money* magazine did not include certain performance results required by the GIPS Advertising Guidelines, but there was no intent by the Respondents to publish false or misleading information through these advertisements as the SEC has argued. DX 21, pgs 00005-00007; RX 2, pg 3, ¶5 through pg 5, ¶8. However, and as the evidence presented clearly showed, all ZPR performance results that were required by the GIPS Advertising Guidelines were disclosed and made available to prospective clients between October and December 2008 when the *Smart Money* advertisements at issue were published. *Id.*; RX 8 through RX 11. Thus, the non-compliant GIPS deficiencies that appeared in the *Smart Money* advertisements were corrected by ZPR through other GIPS compliant disclosures being made at the same time both through ZPR's public website and direct mailings that were made to prospective clients in 2008. *Id.* These additional GIPS compliant disclosures revealed that ZPR's SCV composite, which was advertised in *Smart Money*, was underperforming its benchmark during 2008. RX 8 through

RX 11. The disclosure of these performance results presented full and fair disclosure to prospective clients as contemplated by GIPS and completely refutes the SEC's contention that the Respondents intentionally or willfully omitted ZPR performance results from these advertisements to conceal its performance results.

The evidence also did not support the SEC's allegations that due to poor performance results in the market during 2008, ZPR changed the format of its advertisements starting in October 2008 to hide this information. Mr. Zavanelli testified the ZPR advertisements that were placed in the fall of 2008 with *Smart Money* magazine had nothing to do with the financial condition of the firm. TR pg 1427, lines 12-15. Mr. Zavanelli also testified that from time to time it was necessary for him to make loans to ZPR. TR pg 1215, line 22 through pg 1216, line 4. He also testified that even though ZPR was not doing well financially in 2008, this was not an unusual situation. TR pg 1217, lines 14-22. For example, during 2009, Mr. Zavanelli made loans to ZPR of approximately \$135,000, which were repaid to him in June 2010. DX 80, 81. No loans were made in 2008. *Id.*

The advertisement format Ashland helped to create was followed by ZPR until October 2008 when it was changed by David Sappir and other independent advertising representatives he worked with. *See* DX 47. These changes to the format were made without Mr. Zavanelli's knowledge. The changes were also inconsistent with specific instructions Mr. Zavanelli had provided to Mr. Bauchle, which was to follow the same format that ZPR had used to run its previous 2008 April advertisement in *Smart Money* magazine. TR pg 1413, line 25 through pg 1414, line 4; DX 21, pg 00004.

In fact, the first time that Mr. Zavanelli ever saw the 2008 October, November and December *Smart Money* advertisements was on February 2, 2009, when Mr. Cabot showed them

to him during the SEC's on-site examination of ZPR. TR pg 1415, line 18 through pg 1417, line 17. Mr. Zavanelli, therefore, did not approve these advertisements as they were never provided to him prior to publication in *Smart Money*.

The SEC contends that Mr. Bauchle had discussions with both Mr. Zavanelli and Ms. Fay in September 2008 that in order to comply with the GIPS Advertising Guidelines, the new advertisement format needed to include 1, 3 and 5 year annual performance returns because the format used in prior advertisements was not going to be followed. Once again, however, the SEC has misstated the evidence and ignores other important facts that were brought out during the final hearing.

First, Mr. Bauchle testified that he discussed with Mr. Zavanelli and Ruth Ann Fay that an advertisement ZPR was going to run in September 2008 was not GIPS compliant because it did not include 1, 3 and 5 years of annualized years that GIPS required. TR pg 193, lines 1-18. According to Mr. Bauchle, this discussion dealt with a September 2008 advertisement but it is uncertain when the alleged conversation took place. *Id.* Also, ZPR never placed an advertisement in September 2008. DX 21. In addition, Mr. Zavanelli testified that at no time in 2008 did Mr. Bauchle ever express any concerns to him that any advertisement ZPR was going to run was not GIPS compliant. TR pg 1479, lines 1-5. Ms. Fay also testified that before the SEC's examination in February 2009, she had never discussed any GIPS compliance issues with Mr. Bauchle regarding the October, November or December 2008 *Smart Money* advertisements. TR pg 1264, line 24 through pg 1267, line 22. Therefore, the suggestion that Mr. Zavanelli was aware these advertisements were not GIPS compliant but chose to run them anyway is completely false and not supported by the evidence.

In addition, Mr. Bauchle's knowledge about the GIPS Advertising Guidelines in 2008 was limited and oftentimes misguided. For example, during his investigative testimony before the SEC in October 2010, he testified that he did not believe the January 2008 *Smart Money* advertisement was GIPS compliant since it did not contain 1, 3, and 5 years of annualized returns. DX 155, pg 103, lines 12-25. During the final hearing, however, Mr. Bauchle contradicted himself and agreed that the 5 annual year by year performance results contained in prior advertisements placed by ZPR, which included the same January 2008 advertisement were GIPS compliant. TR pg 402, lines 9-24.

Mr. Bauchle was also unaware of and did not raise any concerns about GIPS compliance in July 2008 when Mr. Sappir sent him a proposed advertisement that Sappir had created and which was inconsistent with the advertisement format ZPR had previously been using. RX 46; DX 21. When asked by Mr. Sappir what he thought of the new proposed advertisement, Mr. Bauchle replied as follows:

Easy to read. . . . Footnote needs some updating. When you guys decide on a final ad, make sure Amy gets a doc version to update the footnote. P.S. Ruth Ann will want you to add "Inc." to the end of our company name. [Emphasis Supplied] RX 46

On July 18, 2008, Mr. Bauchle then sent Mr. Sappir the corrected footnote language to include in the new advertisement but never mentioned the need to include 1, 3 and 5 years of annualized performance returns in this ad. RX 46, "Email from Ted Bauchle to David Sappir dated July 18, 2008, Re: New Footnote for 2008." The advertisement format that Mr. Sappir created and not the format Mr. Zavanelli had instructed Mr. Bauchle to follow was then used for the October, November and December 2008 advertisements. DX 21, pgs 00005-00007. It is also important to note that when these advertisements were placed and purchased, Mr. Zavanelli was out of the country. TR pg 1418, line 12 through pg 1420, line 19. Upon his return to the

ZPR office in October 2008, Mr. Zavanelli testified that there were no discussions with Mr. Bauchle about these advertisements or any GIPS issues regarding the advertisements. *Id.*, lines 20-22.

Clearly, in September 2008, Mr. Bauchle was unaware of the need for 1, 3 and 5 year annualized returns to be included in advertisements for GIPS compliance and, therefore, could not have spoken with Mr. Zavanelli or Ms. Fay about this. If Mr. Bauchle had been aware of this requirement, he would have raised the issue with Mr. Sappir in July 2008 when questioned about the proposed advertising format, which was obviously different than the format ZPR had previously used.

Mr. Bauchle's recollection of dates, events and conversations regarding the October, November and December 2008 advertisements is simply inaccurate and, therefore, cannot be relied on by the SEC.

**A. ZPR Disclosed GIPS Performance Results When the 2008 Smart Money Advertisements Were Placed**

As discussed in Respondents' Post-Hearing Brief, ZPR's website, which is identified in each advertisement under the heading "To Learn More," contained performance results for the firm's SCV Composite that showed it was under performing its benchmark, the Russell 2000. RX 8, Bate Stamp "ZPR Website Pages Old", pgs 00058-00059. Mr. Bauchle also testified that it was his responsibility to update ZPR's performance results for ZPR's composite disclosure so these figures could be uploaded on the website. TR pg 366, lines 3-8. He further testified that ZPR's annual GIPS compliant presentation was also available on the website to any prospective client or interested party. TR pg 367, line 20 through pg 368, line 4. As a matter of policy and to comply with the GIPS standards, ZPR also provided every prospective client with a copy of its most recent annual GIPS compliant presentation, which contained 1, 3 and 5 years of

annualized performance results and other information about the firm. TR pg 1065, lines 11-25. Ms. Feliz testified that as a GIPS expert, the performance results disclosed by ZPR on its website complied with the GIPS requirements. TR pg 1056, line 18 through pg 1057, line 4. She also testified that she believed the ZPR website was itself an advertisement.<sup>3</sup> TR pg 1080, lines 5-23.

Consequently, ZPR was placing advertisements through both *Smart Money* magazine and its website at the same time between October and December 2008. Although the *Smart Money* advertisements did not contain the performance results required by the 2005 GIPS Advertising Guidelines, they did provide the ZPR website address which included GIPS compliant performance returns and showed the SCV composite to be under performing its benchmark. Thus, the availability of this information on the ZPR website to any prospective client dispels any contention that the Respondents were trying to use the *Smart Money* advertisements in a false or misleading way.

Further and in the event someone responded to the October, November or December 2008 advertisements, ZPR would have sent that person a package of information, which described the firm, the composites being advertised and their performance results. RX 11 sets forth an example of the type of information ZPR was sending to prospective clients or interested parties in 2008. The information contained in RX 11 included a performance chart and bar graph that showed ZPR's SCV composite was under performing both the Russell 2000 and S&P 500 indexes for the prior one year period and for the first quarter period ending March 31, 2008.

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<sup>3</sup> GIPS defines an Advertisement to "include any materials that are distributed to or designed for use in newspapers, magazines, firm brochures, letters, media or written or electronic material addressed to more than one prospective client. Any written material (other than one on one presentations and individual client reporting) distributed to maintain existing clients or solicit new clients for an advisor is considered an advertisement." RX 3, pg 33.



Prospective clients who received a copy of the ZPR client newsletter during the fourth quarter of 2008 would have also read Mr. Zavanelli's commentary about the poor performance of the ZPR composites. For example, the November 2008 issue of the client newsletter that was also available on the ZPR website at that time indicated that:

We were off 21.988% for October [2008] for Small Cap value with the Russell 2000 down 20.90%. The S&P 500 was down 16.85%  
DX 71, pg 2.

If the Respondents were truly attempting to conceal the performance of the SCV composite relative to its benchmark, the Russell 2000, through the *Smart Money* advertisements at issue, this type of information would not have been published and made available through the client newsletter.

This information as well as the performance results that ZPR disclosed on its website and the testimony given during the final hearing clearly indicate that the Respondents were not attempting to willfully or intentionally conceal its 2008 performance results from any existing or prospective clients. Ms. Cabot, Ms. Feliz and Mr. Bauchle were called as witnesses by the SEC and all testified that the ZPR performance results were accurate. TR pg 681, lines 7-15 (Cabot); TR pg 1041, lines 13-24 (Feliz); and TR pg 363, lines 8-24 (Bauchle). Thus, the performance results contained in the October, November and December 2008 *Smart Money* advertisements were truthful and the advertisements themselves were not false or misleading. Mr. Bauchle also testified he believed prospective clients were always provided with a good presentation of ZPR's performance. TR pg 407, lines 14-25 through pg 408, lines 1-4. He further stated that during his 18 years as an employee of ZPR, he had never seen Mr. Zavanelli do anything that was dishonest. Finally, ZPR did not obtain any clients from the *Smart Money* advertisements placed

between October and December, 2008 and according to Mr. Zavanelli, running the advertisements was a “disaster.” TR pg 1427, lines 12-20; TR pg 1429, lines 2-4.

**B. ZPR’s Claim of GIPS Compliance in Advertisements Was Not False**

The SEC continuously ignores the Error Correction Policy adopted by GIPS and instead mistakenly argues that ZPR’s claim of GIPS compliance made in advertisements was false because every single requirement in the GIPS Advertising Guidelines was not satisfied. RX 40; RX 41. The SEC would impose a standard of strict liability under GIPS on any firm that made a mistake or an error when advertising, and create a chilling effect for firms to follow the GIPS standards, which are voluntary. Mr. Feliz testified that the very cornerstone of GIPS was for firms to provide full and fair disclosure to existing and prospective clients. TR pg 1064, lines 4-9. Ms. Feliz also testified that if a firm made a mistake in an advertisement and provided compliant supplemental information to prospective clients which corrected the mistake, the GIPS compliant requirements would be satisfied. *Id.* at lines 10-20. All prospective clients of ZPR also received a GIPS compliant annual disclosure presentation in addition to other information about the firm and its performance results. TR pg 1065, lines 22-25; RX 9 – 11. When a firm takes corrective action to address mistakes that appear in its advertisements as ZPR did, the prior mistakes or errors made do not affect an overall claim of GIPS compliance. TR pg 1069, lines 2-10. Therefore, the omission of certain performance results by ZPR in the October, November and December 2008 *Smart Money* advertisements did not jeopardize its claim of GIPS compliance since compliant information was made available and provided to prospective clients during the relevant period of time, which served to cure and remedy the mistakes contained within these advertisements. *See e.g.*, RX 8, RX 11. In addition, the Ashland verification reports for ZPR were not “bogus” as the SEC contends. As previously noted, the evidence established that the

Respondents did not intentionally or willfully withhold any advertisements from Ashland and Ashland never requested that ZPR provide advertisements for GIPS verification purposes. TR pg 1041, lines 10-25; TR pg 1040, line 24 through pg 1041, line 25.

**VI. ZPR CORRECTED ITS ADVERTISEMENTS AFTER BEING NOTIFIED BY THE SEC**

After the on-site SEC examination of ZPR had concluded in February 2009, Ms. Cabot discussed certain deficiencies that had been discovered with Mr. Bauchle and Ms. Fay. TR pg 431, line 2 through pg 432, line 5. Ms. Cabot told Ms. Fay that the October, November and December 2008 *Smart Money* advertisements did not contain performance results as required by GIPS. TR pg 1264, lines 13-23. Prior to this conversation, Ms. Fay was not aware that there were any GIPS compliance issues with the advertisements and had never had any discussions with Mr. Bauchle about GIPS. TR pg 1265, lines 7-11. In addition, Mr. Zavanelli testified that during 2008, he did not have any conversations with Mr. Bauchle about GIPS compliance issues and any advertisements that ZPR was running. He also testified that he did not have any input regarding the October, November or December 2008 advertisements and did not even see them until Ms. Cabot showed him copies on February 2, 2009. TR pg 1414, line 5 through pg 1417, line 20. Therefore, Mr. Zavanelli did not know the advertisements had any GIPS compliance issues until after they were published. He also testified those advertisements were not created by him. TR pg 1414, lines 5-18.

When she learned from Ms. Cabot about the GIPS non-compliant advertisements, Ms. Fay immediately contacted Ashland to seek direction. TR pg 1267, line 23 through pg 1268, line 12; RX 13. The firm then stopped running advertisements for approximately nine months because ZPR wanted to make sure the advertisements were right. TR pg 1270, line 22 through pg 1271, line 4; RX 13. In November 2009, when it started placing advertisements again, ZPR

included the 1, 3 and 5 years of annualized performance results that Ms. Cabot had indicated were missing. From the October, November and December 2008 *Smart Money* advertisements, ZPR had previously addressed the issue of using the word “audit” and after April 2008 that term did not appear in any other magazine advertisement that ZPR placed. *See* DX 21. Therefore, ZPR believed it had addressed the two GIPS related issues that had been brought to its attention by the SEC. TR pg 1278, lines 5-21; TR pg 1446, line 14 through pg 1447, line 4.

As noted, Ashland approved the footnote disclosure language that ZPR included in its advertisements and never specifically mentioned the need to describe the benchmark for its ZPR composites or state the currency of the returns. TR pg 1397, lines 13-21. Therefore, ZPR’s remarks to the SEC that it was puzzled as to why Ashland did not mention those issues were accurate and understandable since it had relied on Ashland to create the original advertisement format and the footnote disclosure language. *Id.*; TR pg 1393, lines 17-19; TR pg 1434, line 24 through pg 1435, line 3.

ZPR had also taken corrective action to remove the word “audit” from its advertisements but inadvertently did not remove that word from a chapter in a book Mr. Zavanelli had written in 2008 and then sent to certain clients in 2010. TR pg 1254, line 22 through pg 1255, line 16; DX 22. In addition, Mr. Bauchle neglected to remove the word “audit” from a *Morningstar* report in September 30, 2010, but later corrected this mistake in another *Morningstar* report dated March 31, 2011, which deleted that word. RX 25 and 26. In both of these instances, ZPR simply overlooked this issue and did not intentionally or willfully disclose that Ashland had audited its results for GIPS compliance. These were innocent mistakes on the part of ZPR and Ms. Feliz testified that the use of the word “audit” by ZPR in these types of circumstances was not material. TR pg 1067, line 20 through pg 1069, line 4.

## **VII. ZPR CLIENT NEWSLETTERS WERE NOT MISLEADING**

ZPR has prepared and distributed a monthly newsletter to the firm's clients, business associates and friends of Mr. Zavanelli. TR pg 1438, lines 16-24. Mr. Zavanelli did not consider the client newsletter to be an advertisement since it was not used to solicit new clients. TR pg 1438, lines 16 through pg 1439, line 15. Mr. Zavanelli testified that the newsletter was used as a means to provide information about why the firm was making or losing money and its strategies. TR pg 1442, line 5-9. While the newsletters were uploaded onto the ZPR website, so were ZPR's composite performance results and its GIPS compliant disclosure presentation. TR pg 1454, lines 2-7. Where a claim of GIPS compliance is made in a document that may be considered as an advertisement, the GIPS Advertising Guidelines can be satisfied by providing the GIPS compliant disclosure presentation. *See* DX 47, Bate Stamp No. 00074. To the extent that issues of the client newsletter were advertisements and contained a claim of GIPS compliance, ZPR satisfied the GIPS Advertising Guidelines through its policy of providing a GIPS compliant presentation to all prospective clients and by making its GIPS compliant presentation publicly available through its website. *Id.* TR pg 1453, line 19 through pg 1454, line 7. In addition, there is no allegation made by the SEC that any content or information within the client newsletters themselves was false or misleading. *See* RX 1.

### **A. April and December 2009 Newsletter**

Sometime in 2010, Ms. Feliz testified that she spoke with Mr. Zavanelli about the December 2009 issue of the client newsletter. TR pg 990, line 14 through pg 991, line 21. . Prior to this time, she testified that there had been no issues with ZPR regarding GIPS compliance. TR pg 1028, lines 2-18. . However, she felt the ZPR client newsletter was an advertisement and that ZPR should comply with the GIPS Advertising Guidelines or attach a

copy of its GIPS compliant presentation to each client newsletter. TR pg 956, line 21 through pg 957, line 5. Mr. Zavanelli did not see the need to do that because ZPR was complying with the GIPS requirements and providing its GIPS compliant presentation to prospective clients as required by section O.A.11 of the 2005 GIPS manual. TR pg 1449, lines 9-17; RX 3, pg 8. Mr. Zavanelli also testified that in light of all the information that ZPR sent to prospective clients about its performance results and since the GIPS compliant presentations were on ZPR's website, he did not see the point of attaching it again to the client newsletter. TR pg 1453, line 20 through pg 1455, line 23.

Following this conversation, Ms. Feliz contacted Mr. Zavanelli again in March 2011 and had one of Ashland's partners speak with him about the client newsletter issue. TR pg 1456, lines 7-13. After this call and his explanation about ZPR's policy to provide all prospective clients with a copy of ZPR's GIPS compliant presentation as required by paragraph O.A.11 of the GIPS standards, Mr. Zavanelli believed the issue raised by Ashland about the client newsletter had been addressed and that no corrective action by ZPR was required. *Id.* at lines 14-17. A letter from Ashland was subsequently sent to Mr. Bauchle by Ms. Feliz that outlined certain options for ZPR to follow regarding GIPS compliance issues and its newsletter. DX 52. Mr. Zavanelli, however, did not see this letter until June 2011 and did not discuss the letter with Mr. Bauchle. TR pg 1457, lines 2-21.

Had Mr. Zavanelli been provided with the Ashland letter on a timely basis, he testified that ZPR would have simply removed all references to GIPS as was suggested by Ashland in the letter. TR pg 1458, lines 10-19. Therefore and despite the SEC's argument, the Respondents did not refuse to take corrective action regarding its newsletter and the applicability of the GIPS standards. Mr. Zavanelli did not consider the newsletter to be an advertisement; he felt that ZPR

was complying with GIPS by providing prospective clients with its GIPS compliant presentation; and was not timely advised to drop all references to GIPS in the client newsletter as an option to address Ashland's concern. He was acting reasonably and in good faith under the circumstances and was not intentionally or willfully refusing to follow GIPS or any other applicable laws.

In addition, ZPR did not make a claim of GIPS compliance in its April or December 2009 newsletters in the context of thereby being required to follow the GIPS Advertising Guidelines. As noted in Respondents' Initial Post-Hearing Brief, Mr. Zavanelli had written an article in the April 2009 newsletter that discussed the impact of the SEC's uptick rule on ZPR's performance results. TR pg 1441, lines 20 through pg 1442, line 9. This article was not attempting to promote ZPR or solicit any new clients and was simply designed to illustrate a point that was totally unrelated to marketing or advertising. RX 23, pg 3. This newsletter also revealed that the ZPR's SCV composite underperformed the Russell 2000 and the S&P 500 indices in 2008, an issue the SEC has over and over again falsely accused ZPR of concealing.<sup>4</sup>

Regarding the December 2009 client newsletter, ZPR affirmatively stated that this publication is not GIPS compliant. TX 24, pg 4. Also, Mr. Zavanelli's comments and opinions about GIPS that are contained in this newsletter do not violate the GIPS Advertising Guidelines as Ms. Feliz testified. TR 1083, lines 9-14.

Regardless of the SEC's attempt to narrowly view certain mistakes and errors in selected advertisements ZPR placed, the Respondents provided full and fair disclosure of its performance results to existing and potential clients through performance results made publicly available on its website (RX 8); provided directly through packages of sent information to prospective clients

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<sup>4</sup> Ashland reviewed the April 2009 newsletter as part of its verification process and had no concerns with it. TR pg 990, lines 1-13; pg 991, lines 13-18.

(RX 9, 10 and 11; TR pg 1454, line 20 through pg 1455, line 17); and when someone qualified as a prospective client (TR 1455, lines 18-23).

As the evidence showed, these performance results also included the 2008 period when ZPR was under performing its benchmark index. Taking all of the information that ZPR was disclosing and not just an isolated part as the SEC wants to focus on, ZPR did not conceal or withhold any information from potential or existing clients.

**B. Other Misleading Statements**

There are no allegations made in the OIP that ZPR made claims about potential profits through its newsletter without disclosing the possibility of losses. *See* RX 1. Therefore, it is inappropriate for the SEC to raise these issues for the first time in its Initial Post-Hearing Brief. Nevertheless and despite the belated timing of its argument, the SEC has conveniently overlooked the “Disclaimers” section of the ZPR newsletter, which provides, in pertinent part, the following:

It should not be assumed that any of the securities transactions or holdings discussed were or will prove to be profitable; or that the investment recommendations or decisions we make in the future will be profitable or will equal the investment performance of the securities discussed herein. [Emphasis Supplied] *See e.g.* RX 23, pg 13.

Thus, there is no basis for the SEC’s claim that ZPR only made statements in newsletters about “profits”.

**VIII. ZPR’S 2011 MAGAZINE ADVERTISEMENTS WERE NOT FALSE OR MISLEADING**

The February and May 2011 advertisements that ZPR ran in *Smart Money* magazine and the March 2011 advertisement it placed in *Barron’s* contained reprinted performance results that had been previously published through *Pensions and Investments* magazine. TR pg 1460, lines 8-



14. To gain permission to reprint this information, ZPR entered into an agreement with *Pensions and Investment*, which specifically prevented ZPR from changing any of the performance results. RX 21.

Each of these advertisements contained a claim by ZPR of GIPS compliance. *See e.g.* RX 15. At this time, Mr. Zavanelli did not understand that by including a claim of GIPS compliance in an advertisement that showed performance results, the GIPS Advertising Guidelines needed to be followed. DX 89, pg 70, lines 8-18. During the final hearing, he also testified that a claim of GIPS compliance was included in these advertisements because ZPR had been verified for GIPS compliance and the firm's numbers were also GIPS compliant. TR pg 1505, lines 9-16. These statements by Mr. Zavanelli were truthful and these advertisements did not contain any false or inaccurate information.

ZPR also provided interested persons that responded to these advertisements with information that included GIPS compliant performance results for the ZPR International and All Asian composites. RX 16, 18 and 20. This information remedied the deficiencies in the 2011 advertisements under the GIPS standards, which Ms. Feliz testified to. TR 1079, lines 9-25. According to Ms. Feliz, ZPR could have also avoided having to comply with the GIPS Advertising Guidelines all together by simply removing the clam of GIPS compliance from the advertisements. TR pg 940, lines 11-20.

The Respondents certainly did not intentionally or willfully disregard the GIPS standards by placing these advertisements. TR pg 1729, lines 7-11.

## **IX. MORNINGSTAR REPORTS**

The evidence clearly demonstrated that the *Morningstar* reports, which contained information ZPR had voluntarily provided, were not publicly available. TR pg 1798, line 5

through pg 1800, line 12; RX 37. ZPR never used or authorized the use of *Morningstar* reports to solicit clients. TR pg 1633, lines 3-11 and pg 1687, lines 12-21. Mr. Zavanelli also had testified that the reason ZPR had provided information to *Morningstar* was to compare its performance results against other money managers and not to attract new business. TR pg 1580, line 19 through pg 1581, line 14. He also testified that ZPR had not received any clients through *Morningstar*. TR pg 1587, lines 3-10.

Mr. Bauchle was responsible for providing data to *Morningstar* and also testified that Mr. Zavanelli did not access the *Morningstar* website and never reviewed the information that was provided by ZPR. TR pg 271, lines 2-14; pg 270, lines 1-9. He also testified that Mr. Zavanelli did not provide any information on behalf of ZPR to *Morningstar*. TR pg 277, lines 1-19.

Mr. Bauchle provided information to *Morningstar*, which listed Ashland as ZPR's verifier for GIPS compliance for the period December 31, 2000 to the present. TR pg 277, lines 1-13. Mr. Bauchle also testified that the information relating to Ashland kept repeating itself in future *Morningstar* reports. *Id.* at lines 14-16. Through an e-mail he sent to Mr. Zavanelli on April 5, 2013, Mr. Bauchle stated that he used this language on *Morningstar* to describe Ashland so that he would not have to update the verification periods with specific dates each quarter since he was afraid he would forget to do that. *See* RX 27; OIP pg 6, ¶11.

Through oversight and inadvertence, Mr. Bauchle forgot to modify the September 30, 2010, *Morningstar* report for the dates that Ashland served as ZPR's GIPS verifier. Ashland had previously resigned in July 2010 and the last GIPS verification report it issued for ZPR was dated for the period ending December 31, 2009. DX 36.

Mr. Bauchle later corrected this mistake, which is reflected on the *Morningstar* report for ZPR dated March 31, 2011. This report contains accurate information for the period that Ashland served as ZPR's verifier for GIPS compliance. See RX 26, pg 2 of 13.

Although the information provided in the *Morningstar* September 30, 2010 report regarding the date that Ashland served as ZPR's GIPS verification firm was not accurate, the evidence presented during the final hearing clearly established that the Respondents did not intentionally or willfully provide this information to *Morningstar* to mislead anyone. Mr. Bauchle simply forgot to change and update language on the *Morningstar* database after Ashland had resigned in July 2010. See DX 85. The inclusion of the word "audit" in this report should also have been removed by Mr. Bauchle earlier than it was, but again, was simply overlooked by him. This mistake was also not considered by Ms. Feliz to be material. TR pg 1067, line 20 through pg 1069, line 4.

The SEC also argues that ZPR did not disclose a pending SEC investigation in two *Morningstar* reports dated September 30, 2010 and March 31, 2011. Mr. Zavanelli, however, was not aware that *Morningstar* required this information until May 2012 when ZPR received a Wells notice from the SEC in this matter. TR pg 1466, line 18 through pg 1467, line 9. Mr. Bauchle also testified that ZPR did not believe the SEC investigation was formal until the OIP was filed on April 4, 2013. TR pg 256, lines 11-18. He also testified that he was aware of the section on the *Morningstar* database that requested a firm to indicate if it was under investigation by the SEC. TR pg 285, lines 13-16. However, the pending investigation item on the *Morningstar* report was checked "no" because according to Mr. Bauchle, ZPR "didn't feel it was a real investigation until this April 4<sup>th</sup>", referring to the date the OIP was issued. *Id.* at lines 6-12. The *Morningstar* report specifically requested an effective date that related to a "Litigation

Charge” or a “Pending SEC Investigation Charge.” RX 38, pgs 3, 4. Since no charges were filed against ZPR before the date of the OIP, Mr. Bauchle did not need to disclose to *Morningstar* that there was a pending SEC investigation. Therefore, ZPR did not provide or withhold any false information to *Morningstar* as the SEC claims.

In addition, when ZPR received the Wells notice from the SEC in May 2012, Mark Zavanelli, who had become the President and CCO for the firm, testified that he spoke with National Consulting Services (“NCS”) about the *Morningstar* disciplinary section. TR pg 1815, line 9 through pg 1816, line 6. NCS told him that the *Morningstar* report was unclear but since ZPR had disclosed the Wells notice on its Form ADV (RX 28, pgs 21 and 27), no other disclosures were required. TR pg 1815, line 9 through pg 1816, line 22. Therefore, any guidance that Mark Zavanelli provided to Mr. Bauchle about disclosing the SEC investigation to *Morningstar* was based upon the advice he had received from NCS. In addition, for purposes of accurately reporting information to *Morningstar*, there had to be a “pending SEC investigation charge.” [Emphasis Supplied], not merely a “pending SEC investigation.” RX 38, pgs 3, 4. Since no charges were filed against ZPR until April 4, 2013, there was no requirement or ability by ZPR to accurately change the *Morningstar* report. After the OIP was issued, Mark Zavanelli took corrective action and updated the *Morningstar* report to now disclose there is a “Pending SEC Investigation Charge” against ZPR. TR pg 1322, line 1 through pg 1323, line 13; RX pgs 3, 4.

#### **X. NO ADVERSE INFERENCE FROM MISSING PORTAL DOCUMENTS**

The SEC seeks an adverse inference against the Respondents for two reasons. First, the Respondents intentionally withheld documents in the form of e-mail communications requested

during the examination and secondly, the spoliation of those documents when requested during the hearing.

The SEC's request should be denied based upon the actual facts relating to this matter and under existing decisional law while keeping in perspective that no client of the firm lost any money, no misleading statements were ever made to any client, the firm was not enriched from the advertisements, the firm did produce thousands of pages of e-mails during the examination, the firm also produced over 860,000 pages of e-mails during the final hearing, the firm has been GIPS compliant from 2000 to the present and **all ZPR performance numbers for the past 20 years were proven to be 100% accurate. TR pg 681.** In seeking an adverse inference, the SEC has grossly distorted the evidence by focusing on the equivalent of a tree but refusing to acknowledge it is part of the forest.

A. **The Old Portal and New Portal**

During the examination of the firm in 2009, the SEC requested e-mail traffic for a six month period of time (July 2008 through December of 2008) between Ruth Ann Fay, Max Zavanelli and Ted Bauchle. The firm complied with the request and provided a disk to the SEC with thousands of e-mails between these parties that has been admitted into evidence. *See* DX 95. Those e-mails contain hundreds of pages with addresses from ZPR International mail system ("Old Portal"). During the examination of the firm in 2009, in response to another request from the Commission, the firm identified the Old Portal and advised the SEC that the Old Portal was not used for books and records that are required to be maintained under the IAA. RX 43, pg 009. In addition, when Mr. Zavanelli testified during the investigation, he also identified his e-mail address on the Old Portal. DX 89, pg 9, lines 18-22.

The SEC in its brief contends that Mr. Zavanelli lied during his testimony in the investigation regarding his e-mail address. *See* SEC brief, pg 63-65. Once again, the SEC distorts the evidence by focusing on a single point but not the big picture. The Old Portal e-mail system was disclosed by ZPR to the SEC in March of 2009. *See* RX 43, pg 009. The response of the firm stated that “ZPR International, Inc. owns a password protected Internet portal. . . . Mr. Zavanelli found this portal to be an efficient method of communication from all locations in his travels. In recent years, he added ZPR Investment Management, Inc. employees.... There are no clients, prospects, brokers, or custodians with access to the ZPRNET Portal. The portal is not used for any of the categories covered by Rule 204-2.” *Id.* So after disclosing the Old Portal to the SEC in March of 2009, the firm also provided six months of e-mails between Mr. Zavanelli, Ruth Ann Fay and Mr. Bauchle. *See* DX 95. Those e-mails contain numerous e-mails from the Old Portal with the address “max@zprinternational.com”. So by the time of Mr. Zavanelli’s testimony, in June 13, 2011, the SEC knew there was an Old Portal and knew that Mr. Zavanelli used the Old Portal to e-mail employees at the firm. When Mr. Zavanelli testified he immediately disclosed the Old Portal address and the investment advisory e-mail system: zprim.net. The following dialogue was omitted by the SEC in its brief. *See* DX 89, pg 10, line 13:

Q: Do you use the address (zprim.net)?

A: Only to receive e-mails from my employees on what’s going on and sometimes we have - - so do I - - yes, I do use the e-mail address but I don’t use it as a course. I try to send as few e-mails as possible.

Q. Do you access that e-mail address to read e-mails?

A. I can, but I don’t normally do it.

Q. Who normally does?

A. Ted – well, we have Ted Bauchle. My entire office accesses these mails.

When the total facts are viewed regarding the e-mail address, it is clear that Mr. Zavanelli did not lie during the investigation.

During the hearing, Mr. Zavanelli testified that he had established other investment related companies that operated in Lithuania and Thailand. Max Zavanelli testified that a primary reason for going to Lithuania was that computer programmers with Ph.D. skills could be hired for \$10,000 to \$12,000 a year while the same programmers in the U.S. were commanding salaries in excess of \$100,000. Tr. Pg 1372, 1373. As a result, Max Zavanelli relocated the research operations to Lithuania which were not a part of the advisory firm in Florida. While the cost of producing research dropped drastically due to the cost of programmers, the cost of building an infrastructure to communicate with the various companies remained. Due to internet communication issues with these companies while overseas, Mr. Zavanelli testified that he hired a former student at Stetson to oversee the construction of the research database and a messaging system that could be used to communicate between the various companies in 2002. TR pg 1380, line 21 through pg 1381, line 22. The database and messaging system were constructed overseas at a cost of over \$1,000,000 and was expensive to maintain. The technology was similar to “cloud” technology used today in regard to storage of information but had infirmities as explained further. TR pg 1383, line 7. Mr. Zavanelli testified that this database and messaging system were not to be used as the sole repository for books and records that were required to be maintained under the IAA for the advisory firm and, more importantly, investment adviser communications with clients were prohibited on the Old Portal. TR pg 1380-1381. While the Old Portal would often transport trading information, this documentation also resided at the advisory firm. Sometime late in 2010 or early 2011, Mr. Zavanelli testified that the former

student, Richard Bigot (“Mr. Bigot”), who maintained the Old Portal overseas, took control of the Old Portal and extorted money for the use of the system. TR pg 1384, line 8 through pg 1385, line 6. The real danger was that the various ZPR companies no longer had access to investment research which included the advisory firm, ZPR, in Deland, Florida. By losing control of the research, the various companies, including the advisory firm, had lost control of their life-line----the investment research. As a result of losing control of the Old Portal, Mr. Zavanelli then constructed a new database and communication system in Lithuania that became operational in March of 2011 (“New Portal”). *Id.* at lines 7-10. When Mr. Bigot took control of the Old Portal, Mr. Zavanelli testified it had become technologically obsolete in that transportation of digital data was limited, retrieval of documents was limited or impossible and storage of documents was cumbersome. TR pg 1383, line 19 through pg 1384, line 1. The New Portal (which is operational today) eliminated those deficiencies as evidenced by the 860,000 pages of e-mails that were produced in less than 10 days when the SEC requested the Administrative Law Judge to issue a trial subpoena at the commencement of the hearing for all e-mails from January 2008 to the present between Ruth Ann Fay, Ted Bauchle, Mark Zavanelli, Max Zavanelli, David Sappir, and Amy Bauchle. The 860,000 pages of e-mails were limited primarily to those e-mails after March of 2011 when the New Portal became operational since the firm had lost control of the Old Portal. It is important to note that e-mails were only requested for the six month window in 2008 and for that period alone during the SEC’s examination in February 2009.

**B. All Books and Records Required by the IAA Have Been Maintained by the Firm**

During the examination by the SEC of the firm, which lasted over one year and included the SEC being on-site at the firm for approximately two weeks with the firm producing



thousands of pages of documents based upon additional requests, **there is not one scintilla of evidence that the firm's books and records were not in compliance with the IAA.** For that matter, the exit letter from the SEC dated January 28, 2010, makes no mention of any issues regarding the books and records of the firm or any finding that the firm's books and records were deficient in any manner whatsoever. Other than creating order memoranda that identified the person who placed the order and whether that person had discretion and adequate documentation regarding the construction of the Small Cap composite. DX 77. The OIP relates exclusively to 10 advertising issues and makes no mention of the firm having deficient books and records. DX 1. Jean Cabot, the SEC examiner who conducted the examination of the firm and who was involved in the investigation, acknowledged the firm's books and records were compliant under the IAA. TR pg 682, line 14 through pg 683, line 1; DX 77. Ms. Cabot also testified that after being examined regarding each provision of the IAA relating to books and records, there was no requirement to have e-mails or to maintain e-mails unless the e-mail related directly to one of the related books and records requirements set forth in Rule 204-2 of the IAA. TR pg 683, line 14 through pg 690, line 11. This becomes critically important since Mr. Zavanelli and Mr. Bauchle both testified that neither the Old Portal nor the New Portal was to be used to conduct advisory business, and as noted earlier, the firm did maintain all books and records required under the IAA.

**C. The Respondents Have Not Intentionally Withheld Documents and Obstructed the SEC's Examination or Investigation**

The SEC contends that documents were withheld during the examination and the investigation in the form of e-mails on the Old Portal for the six month window (July 1 – December 31) in 2008. When the examiner, Jean Cabot, was questioned regarding the cooperation of the firm during the examination she testified as follows (TR pg 523, lines 7-24):

Q. During the course of the two weeks that you were there with the firm during the examination, was the staff of the firm cooperative in providing documents to you?

A. Yes.

Q. Did you ever get a sense from them at any time when you were asking for documents, while you were there or in subsequent requests, that they were pushing back and didn't want to give you documents?

A. No, I didn't experience that.

Q. When you interviewed or talked with Ruth Ann about questions about what was going on in the examination, did she seem like she was being forthright in answering your questions?

A. Yes.

Q. How about with Ted?

A. Yes.

The claim of the SEC that information regarding the Old Portal was withheld is totally contradicted by the documentary evidence. The firm disclosed in 2009 the existence of the Old Portal when responding to an additional information request by the Commission and stated that books and records required by the IAA **were not** maintained on that system. TR pg 1284, lines 19-22; RX 43, pg 009. Testimony was provided that while duplicate information may have been transported through the Old Portal, that same information relating to investment performance was being maintained at the firm. TR pg 1284, line 23 through pg 1285, line 4. This explains why there is no charge in the OIP or any mention in the SEC's exit letter that the firm was not complying with the books and records requirements of the IAA. Additionally, when e-mails from the firm were requested for the six month period in 2008 during the examination, **e-mails from the Old Portal were produced.** See Exhibit 95, disk of e-mails. There is not **one shred of evidence that any document maintained by the advisory firm was ever withheld from the**

**SEC.** The only issue relates to e-mails on the Old Portal during the six month window of 2008 that were not produced. The Old Portal was owned by ZPR International and was used to conduct business for the companies in Lithuania and Thailand that provided investment research and investment advice to non-U.S. clients. ZPR International **is not registered with the SEC and the SEC has no jurisdiction over this entity.**

This distinction is important since the SEC's own documents draw a line between entities over which the SEC has jurisdiction and those in which it does not. *See* RX 42, Form 1661 (RX 42, pg 015) provides as follows: The term "Regulated Entity" means entities subject to registration with, and/or regulations and inspection by, the Commission, including securities exchanges; brokers or dealers; municipal securities dealers; national securities associations; investment advisors; investment companies; transfer agents, and clearing agencies.

For those entities over which it has jurisdiction, compliance is mandatory but for those in which it does not have jurisdiction, **compliance with a request for information is voluntary.** RX 42, pg 015, ¶B.2.

The SEC has made much ado about the e-mails but in reality the e-mails during the six month window that were provided were never reviewed with any type of scrutiny. TR pg 532, line 21 through pg 533, line 2. During the hearing, the SEC repeatedly stated that the e-mails of Amy Bauchle ("Ms. Bauchle") ZPR PortAdmin had been withheld as Old Portal documents. TR pg 465, lines 20-23. Ms. Cabot testified she had never seen these e-mails during the examination and the investigation. When pressed on cross-examination if the Amy Bauchle e-mails had been provided on the disk containing the six months of e-mails (DX 95), Ms. Cabot testified as follows (TR pg 536):

Q. Listen, I understand. Do you understand that the firm is contending in this particular proceeding that the PortAdmin e-mails are part of the ZPR Investment Management e-mail system? It has nothing to do with this portal, this Lithuania?

A. That I don't know.

Q. But you would agree with me that if we go back and search that disk and this e-mail is on it, this documentation was in fact provided to you pursuant to the request. Would you agree with me?

A. If that is true, then yes.

Q. I am sorry?

A. I said if that is true, then yes.

When the hearing resumed, Ms. Cabot on cross-examination was asked if she had reviewed the disk and she then acknowledged that there were e-mails on the disk from Ms. Bauchle and the e-mails in question were not Old Portal documents. TR pg 576, lines 19-23. This testimony demonstrates the SEC never reviewed the e-mails contained on DX 95 thoroughly and, more importantly, **the e-mails were not needed for the SEC to prosecute this case.** This point was acknowledged by the Administrative Law Judge ("ALJ") at the beginning of the hearing when the SEC was requesting the production of additional e-mails from ZPR. A dialogue ensued wherein the ALJ questioned why the e-mails were important since the SEC was prepared to prosecute the case without the benefit of the e-mails. TR pg 22. It was suggested by the ALJ that if records of the firm were missing then charges should be brought for a books and records violation under the IAA. *Id.* As a result the entire issue regarding missing e-mails, from an entity over which the SEC has no jurisdiction, is simply a **red herring.**

#### **D. The Law on Adverse Inference**

The SEC must prove three elements in order to have the benefit of an adverse inference. First, the party who destroyed the evidence must have had a duty to preserve that evidence at the time it was destroyed. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F. 3d 99, 107 (2d Cir. 2002). Second, the evidence must be relevant to the litigation. Residential Funding, *supra*,

at 107. And third, the party must have destroyed the evidence with a “culpable state of mind”. Residential Funding at 107. In applying this test the Fifth, Seventh, Eighth, Tenth and Eleventh Circuits, all require the spoliator to act with bad faith. See Vick v. Tex. Emp’t Comm’n., 514 F. 2d 734,737 (5<sup>th</sup> Cir. 1975); Faas v. Sears, Roebuck & Co., 532 F. 3d 633, 644 (7<sup>th</sup> Cir. 2008); Greyhound Lines, Inc. v. Wade, 485 F. 3d 1032, 1035 (8<sup>th</sup> Cir. 2007); Turner v. Pub. Serv. Co. of Colo., 563 F. 3d 1136, 1149 (10<sup>th</sup> Cir. 2009); Mann v. Taser Int’l, Inc., 588 F. 3d 1291, 1310 (11<sup>th</sup> Cir. 2009). While other Circuits have employed a negligence standard, the Eleventh Circuit decision in Mann, *supra*, should be controlling since any appeal of this matter would be resolved by that Court.

In applying the test, it is clear the SEC cannot sustain its burden of proof. First, the Respondents had no duty to preserve e-mails on a system owned and controlled by an entity that is not subject to the jurisdiction of the SEC and which were not books and records required to be maintained by the advisory firm under Section 204-2 of the IAA. Second, the e-mails in question for the six month window in 2008 on the Old Portal were not needed to prosecute any claim raised in the OIP. The SEC was prepared to prosecute this matter the night before the hearing commenced when it learned of the Old Portal e-mails. More importantly, the Respondents have acknowledged in their answer that the advertisements at issue, standing alone, did not comply with the GIPS advertising guidelines. As a result, the Old Portal e-mails were not relevant to prosecute the SEC’s claims. Finally, the Respondents did not destroy the e-mails. The e-mails in question were misappropriated by a third party over whom the Respondents had no control. Therefore, the Respondents did not act with a culpable state of mind and absent the misappropriation of the e-mails by the third party, these documents would exist today. It is clear that the SEC cannot sustain its burden of proof for an adverse inference.

The SEC, in its brief, has misconstrued the law regarding the test for an adverse inference. First and most importantly, the SEC **failed to acknowledge or even refer to the decisions that require the spoliator to act with a culpable state of mind when the documents were destroyed.** The SEC simply suggests the Respondents acted with “gross negligence” without explaining how they acted in this fashion. More importantly, “gross negligence” is not the standard in the Eleventh Circuit. The SEC has no proof that the Respondents destroyed any documents on the Old Portal. Secondly, the SEC has failed to explain why the missing e-mails would be relevant to prove that Respondents failed to comply with the GIPS Advertising Guidelines **since the Respondents have admitted the advertisements in question did not comply with all of the GIPS Advertising Guidelines, which is a voluntary standard.** At the end of the day, the SEC has misapplied the law and cannot sustain its burden of proof for an adverse inference.

## **XI. REMEDIES**

### **A. A Cease-And-Desist Order is Not Required**

The SEC argues that a cease-and-desist order against the Respondents is warranted under the facts of this case. The SEC, however, has misconstrued the evidence when applying the Steadman v. SEC, 603 F. 2d 1126, 1140 (5<sup>th</sup> Cir. 1979), factors. The SEC contends the acts of the Respondents were highly egregious regarding the 10 advertisements. The reality is that if the Respondents had not disclosed in a footnote that the firm was GIPS compliant, there was no violation of the IAA, which assumes a voluntary standard is material under the IAA. Contrary to the position in the SEC’s Initial Post Hearing Brief, the initial advertisement was provided to Ashland, the GIPS verifier, and changes were made and then followed. DX 55; DX 64. For example, when Ashland indicated that the term “audited” should not be included in the footnote

disclosure to the advertisement, the language was deleted and never used again. DX 21. In a desperate attempt to prove motive, the SEC argues the advertisements were placed because the firm was in dire financial straits. While the firm's revenues were down in 2008 and a portion of 2009 during the height of the financial crisis, Mr. Zavanelli made loans to the firm which were repaid in June 2010. DX 81. Importantly, the firm stopped running advertisements in 2009 for a period of nine months. If the firm was attempting to defraud the investing public through false or misleading advertisements due to its financial condition, it would never have voluntarily halted the advertisements. The motive story advanced by the SEC simply makes no sense in light of the actual evidence that was presented.

The advertisements were isolated at best and not recurrent as argued by the SEC. There are 10 advertisements spanning a period of three years but if the two newsletters and the *Morningstar* reports are excluded, the actual print magazine advertisements drops to six over the same period of time. The dispute with Ashland focused exclusively on the December 2009 client newsletter and not the magazine advertisements, which Ashland never asked to review. Mr. Zavanelli testified that if he had been told that one of the options was to make no claim of GIPS compliance in the newsletter, he would have done so since it was simple to comply with. TR pg 1458, lines 10-19. But he was never told by Mr. Bauchle that Ashland had provided options for compliance. TR pg 1457, lines 2-20; DX 52. When the advertisements are viewed in the totality of the circumstances, the Respondents' conduct cannot be construed as recurrent.

The SEC's claim that Mr. Zavanelli acted with the highest degree of scienter is simply incorrect. Mr. Zavanelli testified that the protocol of the firm was to make sure a marketing package with all of the firm's monthly, quarterly, and annual history for the past 20 years was provided to each prospective client, which was in addition to information contained on ZPR's

website. **In addition, each prospective client received a fully GIPS compliant presentation,** which Ashland was also aware of. TR pg 1453, line 19 through pg 1455, line 23; TR pg 1065, lines 22-25. By inundating a prospective client with this financial information, the firm's performance was clearly transparent and nothing was being hidden or misrepresented about the performance of ZPR's composites. This evidence rebuts any inference that Mr. Zavanelli was acting with the highest or any level of scienter. To the contrary, Mr. Zavanelli was making sure that full and fair disclosure of all material facts regarding the firm and its' performance was being provided to every investor before they became a client of the firm.

The firm has taken appropriate action to ensure that future violations will not occur regarding advertising. First, all advertisements have to be approved by its GIPS verifier. Secondly, all advertisements have to be approved by ZPR's independent investment advisor consulting firm. Third, all advertisements have to be approved by the new compliance officer, Mark Zavanelli, a CFA member. As a result of these remedial measures, it is impossible to conclude that the firm or Mr. Zavanelli will engage in future violations of the issues raised in the OIP. TR pg 1764, line 14 through pg 1778, line 5.

The Respondents have acknowledged in both the answer to the OIP and in testimony by Mark Zavanelli and Max Zavanelli the advertisements themselves did not comply with the GIPS Advertising Guidelines. This was a candid admission and recognition that the advertisements were not GIPS compliant under the GIPS Advertising Guidelines.

There is no likelihood of future violations. As noted above, an advertising protocol and review policy have been implemented, which is controlled by outside advisors and consultants. Secondly, control of the firm has been transferred from Max Zavanelli to his son, Mark, who has impeccable credentials to operate the firm.



The Steadman, supra, factors dictate that no cease-and-desist order is warranted in this matter against the Respondents. At best, a censure for failing to comply with the GIPS Advertising Guidelines may be appropriate.

**B. There Should Be No Permanent Bar for Max Zavanelli**

The SEC also argues that based upon the fraudulent conduct of Mr. Zavanelli, he should be permanently barred from the industry. However, in order to assess such a draconian penalty, the SEC was required to prove that Mr. Zavanelli engaged in fraudulent conduct. No matter how the evidence in this case is viewed, Mr. Zavanelli did not engage in fraudulent conduct regarding the advertisements and publications at issue.

If clients of the firm had been defrauded by the advertisements or other publications, this would warrant a bar but no evidence was produced that any client had been misled or lost any money as a result of the advertisements. If the performance numbers in any of the advertisements were proven to be false, this would also warrant a bar but all of the performance numbers were proven to be **100% accurate**, which the SEC itself has acknowledged. TR pg 681, lines 7-25. If the firm generated new clients from fraudulent advertising, this would warrant a bar but the evidence demonstrated there were no new clients obtained by ZPR from the advertising. If evidence of poor performance was being withheld from clients, this would warrant a bar but the evidence showed that **full and fair disclosure of all material facts** was given to every client of the firm with no exceptions.

The evidence in this case demonstrated that there was some “ball dropping” at various times and while the firm stumbled in its attempts to comply with the GIPS Advertising Guidelines, but this is not fraud. If Mr. Zavanelli was engaging in fraudulent conduct, it would seem that the number two man in the firm, Mr. Bauchle, would have observed such conduct. But

Mr. Bauchle, who was a hostile witness, testified that in observing Mr. Zavanelli over a period of 18 years while employed with ZPR that Mr. Zavanelli was an honest person who did not engage in any illegal activity. TR pg. 266-268. A permanent bar is not warranted since Mr. Zavanelli did not engage in any fraudulent conduct. One should also keep in mind of the old adage that the spots of a leopard never change. During his 31 year career with stellar performance as a money manager, no client or regulatory organization has ever suggested that Max Zavanelli has ever acted in a fraudulent manner. More importantly, the SEC was unable to prove that any performance number utilized in the advertisements was fraudulent. It would seem that if Max Zavanelli was out to defraud investors through false advertisements, he would have made statements that were not true. But the SEC was unable to produce any evidence that the advertisements were fraudulent other than the fact there was a claim of GIPS compliance and the evidence showed the firm was GIPS compliant from 2000 through today.

C. **A Civil Penalty Against ZPR and Mr. Zavanelli is Not Warranted**

The SEC seeks a penalty against the firm for \$375,000 based upon a second tier penalty and a \$795,000 penalty against Max Zavanelli, again, based upon a second tier penalty. These penalties do not remotely correspond to the Respondents' conduct. The Respondents have admitted that the six magazine advertisements in question did not comply with the GIPS Advertising Guidelines; that two issues of the client newsletter may have improperly contained a claim of GIPS compliance; and that one *Morningstar* report contained an incorrect date with respect to the period Ashland served as ZPR's GIPS verifier. However, the Respondents have also demonstrated that remedial measures have been implemented to ensure that the issues raised in the OIP never happen again. Respondents agree with the SEC's position that a penalty is warranted to provide a "financial disincentive to engage in securities fraud..." but as noted

earlier, the Respondents have not engaged in securities fraud, and therefore, a second tier penalty is simply not appropriate.

The ALJ questioned Mr. Zavanelli at the conclusion of his testimony on three separate and distinct topics that are at the heart of this matter. First, the ALJ questioned Mr. Zavanelli regarding the box on the *Morningstar* report that was checked “no” when asked if there was a pending SEC investigation. The evidence had established that Mr. Bauchle had responsibility for completing this information. The following dialogue ensued at TR pg 1714, lines 11-\_\_\_:

Judge Elliot:                   What would your answer have been without asking your lawyers or asking National Compliance Service?

Witness:                         I would also say no because it said there is no—what I know now is that if you actually say yes to this, up pops—I never accessed the system at all myself, but I was told and shown that, when you say yes, up pops the screen that asks what are the charges, what’s the date.

And we had no charges and no date. And I also know that my son asked the Morningstar analysts in 2013, after we saw the charges that—you know, how would we respond to this.

Well, if you don’t have charges, you say no.

This dialogue is important since it establishes that Mr. Zavanelli did not have access to the *Morningstar* information and he could not answer the question “yes” since there were no pending charges. But more importantly, it shows that he would attempt to be compliant.

Secondly, the ALJ questioned Mr. Zavanelli on why he thought he might be the best money manager around. Tr. pg 1715, lines 12-\_\_\_:

Judge Elliot:                   Why do you think that?

Witness:                         My performance numbers are spectacular. I’ve led—I’ve been on Morningstar—or Pensions & Investments—Morningstar doesn’t do lists, but Pensions & Investments’ top 10 lists on different products 110 times.

We did a 20-year, back in 2007, we did a 20-year performance analysis, and only Peter Lynch had already numbers than me, but he didn't have as long a track record.

Judge Elliot: And Peter Lynch was the former manager for Fidelity?

Witness: Right. He was fantastic.

Mr. Zavanelli is proud of his performance over the past 20 years and would never do anything to fraudulently inflate that performance as demonstrated by the evidence in this case. While Max Zavanelli wanted to measure his performance against his peers regarding his capabilities as a money manager, there was absolutely no reason whatsoever for him to engage in fraud or any other intentional or willful misconduct. His performance record speaks for itself.

Finally, the ALJ questioned Max Zavanelli about the portal. Mr. Zavanelli testified the portal was used to communicate with his six different companies and all the employees were instructed that investment advisor client matters were never to be discussed on the portal. Mr. Zavanelli admitted there were no written policies regarding this point and that the matter was not policed by anyone at the firm. TR. pgs 1716 through 1718. This was again a candid admission that procedures to ensure compliance with the policy were weak but the policy attempted to ensure there would be accurate records maintained under the IAA. This in turn, mitigates any inference that Mr. Zavanelli was acting fraudulently.

Based upon the answers Max Zavanelli provided to the ALJ, which go to the heart of this matter, a second tier penalty is simply not warranted.

## **XII. CONCLUSION**

At the end of the day, the SEC is attempting to make a mountain out of mole hill. The SEC's brief paints with a broad brush making generalized statements of fraud without providing any evidentiary documentation of the misconduct. Facts that absolve the Respondents of

misconduct are simply ignored. The big picture, the forest, is blurred beyond recognition. No client of ZPR has lost any money and no client of ZPR has been misled about the performance of their account. For that matter, all of the clients have had a spectacular run on their investments. Max Zavanelli has been given the highest rating by Morningstar ---5 stars--- as a money manager. The composites of the firm have consistently exceeded the performance of comparable peers. There have been no customer complaints, no arbitrations, and no civil suits by any clients during a 20 year period of time. For whatever the reason, the SEC has tried to elevate Max Zavanelli to the company of Bernard Madoff by seeking to bar him from the securities industry and assess the Respondents over \$1,000,000 in penalties. The great irony of this case is the SEC's rabid desire to bar an investment advisor who makes money for his clients honestly Is this really in the public interest? Is the SEC mandate in this case to get rid of investment advisors that make money for clients and who do it honestly? There is no allegation of insider trading or manipulation of any securities and the SEC has acknowledged all of the performance numbers for ZPR were accurate.

So what is the SEC's logic in seeking a bar for Max Zavanelli and assessing substantial penalties against him and the firm. Six magazine advertisements that were accurate in disclosing the performance of the firm but not formatted according to the GIPS Advertising Guidelines, which is a voluntary standard, two client newsletters that may have possibly contained a technical GIPS error and one *Morningstar* report that was not timely corrected due to an employee oversight. So if you understand the logic of the SEC, you are a good investment advisor if you never comply with a voluntary standard under GIPS and run an accurate advertisement. But if you say you are GIPS compliant in an advertisement, you are a bad guy if you don't comply with the voluntary advertising guidelines although all of your numbers on

performance are 100% accurate in the advertisement and the advertisement is not misleading in any way whatsoever. This logic does not serve to protect the investment public.

Some of the advertisements in the OIP required a minimum investment of \$350,000 and common sense dictates that no one is going to invest \$350,000 based upon an advertisement. Any further inquiry by a prospective investor would have mandated under the firm's protocol far more reaching information to be provided to the candidate regarding the financial performance of the firm before an account was opened. This information was provided readily by the firm through marketing packages and website information and nothing was withheld from the investors. Full and fair disclosure of all material facts regarding the firm and its performance was clearly provided.

So if you buy into the SEC fraud theory, where does that take us? The clients are deprived of the spectacular investment returns they have been accustomed to over the past 20 years by barring Max Zavanelli from the industry and placing the firm in financial jeopardy with the penalties. All for the purpose of protecting the investing public. Does this make any sense?

The sad part about this whole matter is that if the SEC had simply told the firm to clean up the GIPS issue on advertising, during the exit interview, it would have done so. The firm has always attempted to be compliant as demonstrated by the record. You don't follow the advice of your verifier, modify your advertisements based upon their recommendations, keep accurate books and records and then hire independent consultants if you're a renegade.

The SEC questioned witnesses about the accuracy of the performance results of ZPR (including the Ashland verifier) and when the witnesses testified the numbers were accurate, the SEC checked those numbers and concluded the numbers were indeed accurate. Ignoring this evidence, the SEC pursued the matter clinging to any allegation that would stick in order to

justify the investigation. The cupboard was bare and the only thing that remained were the GIPS related advertising violations. The SEC has ignored the fact the numbers used in the advertisements are 100% accurate. So a mountain was built out of a mole hill. The ALJ should give no credence to the SEC arguments and summarily dismiss the claims of the SEC.

This result is clearly warranted. The Respondents have expended an enormous amount of resources by flying to Washington D.C. with lawyers and witnesses on numerous occasions to defend this action. Hotels and meals are not cheap in our Capitol and dailey transcripts of the testimony are likewise expensive. If the Respondents prevail in this proceeding, they will nevertheless have been financially punished for having to defend this action. ZPR is a small advisory firm with less than \$200 million in assets under management. It maintains one office in Deland, Florida with less than seven employees. Meanwhile the SEC with unlimited resources has pummeled the Respondents in the hope they will eventually cave to this onslaught. A message should be delivered to the SEC that expending its resources on this type of questionable litigation should not be condoned. More than a slap on the face, it should be a wake-up call that the SEC should chase the real "bad" guys and not pursue questionable litigation under the guise of protecting the investment public.

In conclusion the following facts warrant dismissal of this case:

1. There are no losses suffered by any client of the firm from the advertisements. For that matter, no client has ever complained about losing money due to the advice of the firm.
2. There has been no misrepresentation of any client's performance.
3. There has been no complaint filed by any customer over the past 20 years.
4. The firm acquired no assets or clients from the advertising it placed.
5. The firm has not been enriched in any way from the advertising.

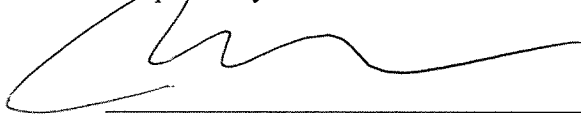
6. The performance numbers of the firm over the past 20 years are 100% accurate as used in the advertisements.

7. There is nothing, absolutely nothing, to suggest the advertisements were misleading.

8. The firm has been GIPS complaint since 2000 to the present.

There is no basis to sanction ZPR or Max Zavanelli. To impose **any** sanction would be a travesty of justice. If you do something wrong as an investment advisor your clients will scream foul. They file lawsuits and arbitrations which are absent. The silence of the investors in this case is the standard by which to judge ZPR and Max Zavanelli. The clients read the advertisements, they read their monthly statements, they read the newsletters, they looked at the website, and they read the GIPS compliant presentation that was given to them and **knew the performance of the firm had been stellar**. But according to the SEC, we should bar Max Zavanelli as an advisor and punish the firm financially for fulfilling their duty as a fiduciary to these clients. Common sense mandates that draconian sanctions are not appropriate in this case and the SEC's requests for relief should be denied.

Respectfully submitted.



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