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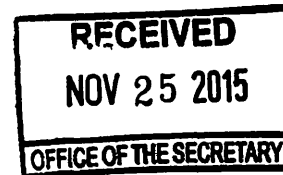
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15263

In the Matter of

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

Respondents.



**DIVISION OF ENFORCEMENT'S OPPOSITION TO
RESPONDENTS' MOTION TO STAY SANCTIONS**

Respondents ZPR Investment Management ("ZPRIM") and Max E. Zavanelli have failed to meet their burden for seeking the extraordinary remedy of a stay pending judicial review, and instead repeat the same arguments the Commission rejected in its October 30, 2015 opinion. As set forth in the Commission's thorough opinion, Respondents cannot meet their burden of demonstrating a likelihood of success on appeal. They offer no valid argument that they will suffer irreparable harm, and fail to address the harm that will occur if Zavanelli continues working in the industry. Respondents ignore the Commission's findings that the public interest is served by imposing a cease-and-desist order on Respondents, censuring ZPRIM, assessing a \$250,000 civil money penalty against ZPRIM and a \$570,000 civil money penalty against Zavanelli, and imposing an industry-wide bar against Zavanelli.

As set forth in the thorough and well-reasoned opinion, ZPRIM violated Sections 206(1), (2), and (4) of the Investment Advisers Act of 1940 ("Advisers Act"), and Advisers Act Rule 206(4)-1(a)(5), by misrepresenting compliance with the Global Investment Performance Standards ("GIPS") in magazine advertisements and investment report newsletters, and Zavanelli

aided, abetted, and caused each of ZPRIM's violations based on these misrepresentations and was primarily liable for violating Sections 206(1) and (2) of the Advisers Act. The Commission also correctly found that ZPRIM violated Sections 206(2) and (4) and Rule 206(4)-1(a)(5) by negligently claiming in a Morningstar report for the period ended September 30, 2010 that (a) an independent third party had verified ZPRIM's compliance with GIPS "to the present," and (b) ZPRIM was not under Commission investigation, and by repeating its false claim that it was not under Commission investigation in a Morningstar report for the period ended March 31, 2011, and that Zavanelli caused these violations.

Respondents' motion is bereft of the showing required for the issuance of a stay. Therefore, the Commission should deny Respondents' stay request.

1. Standard for Imposition of Stay

"[T]he imposition of a stay pending judicial review of an action by an administrative agency is an extraordinary remedy." *Richard L. Sacks*, Exchange Act Release No. 57028, at 3 (Dec. 21, 2007). As the parties seeking relief, Respondents carry "the burden of demonstrating that a stay is justified." *Steven Altman*, Exchange Act Release No. 63665, at 3 (Jan. 6, 2011). In determining whether to grant a stay, the Commission generally considers four factors: (i) whether the party seeking the stay is likely to prevail on appeal; (ii) whether the party seeking the stay is likely to suffer irreparable injury if the stay is not granted; (iii) whether any other party is likely to suffer substantial harm if the stay is granted; and (iv) whether the stay will serve the public interest. *Id.* Because Respondents fall far short of meeting any of those factors, the Commission should deny their stay request.

a. Respondents Cannot Demonstrate a Likelihood of Success on Appeal

For the reasons detailed in the Commission's October 30, 2015 opinion, Respondents cannot demonstrate a likelihood that they will prevail on appeal. In their stay motion, Respondents set forth two issues they submit support a "substantial indication of probable success." However, the Commission's opinion rejecting these arguments correctly applied the governing case law, and there is no chance, let alone a substantial likelihood, that these findings would be reversed on appeal.

First, Respondents argue the availability of information through other sources requires a finding that the misrepresentations and omissions in ZPRIM's advertisements are not material based on the total mix of information available to potential investors. Motion 2-6. The Commission considered the total mix of information standard for determining materiality and rejected Respondents' argument that the evidence supports a finding that the misrepresentations and omissions in the advertisements were not material. Opinion 16-21. On appeal, the Court will give deference to the Commission's findings as to the facts concerning materiality, as they are supported by substantial evidence. 15 U.S.C. § 78y(a)(4) ("The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.").

As the Commission correctly found, Respondents' premise, that the facts they disclosed later were enough to correct the misrepresentations, is incorrect. For example, the evidence Respondents rely on does not demonstrate that ZPRIM corrected the false statements that ZPRIM was GIPS compliant. Opinion 17-18. Even assuming the evidence does support Respondents' argument – and it does not – then it fails as a matter of law. As the Commission correctly found, Respondents' argument that investors could have found information through other sources "cannot be squared with a fundamental purpose of the Guidelines: requiring the

disclosure, in advertisements representing GIPS compliance and disclosing financial performance data, of information intended to assure comparability of performance numbers among financial advisors.” *Id.* 19. As the Commission explained, “[i]nvestors should not be required to search for additional information that a firm represents it has already provided through its claims of GIPS compliance.” *Id.* Further, even assuming Respondents had made available through other sources the exact same information omitted from the advertisements, ZPRIM failed to “adequately draw attention to it.” *Id.* 20 (citing *SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1250, 1252 (11th Cir. 2012)).

Thus, Respondents cannot show a likelihood of success on the merits of their appeal on the issue of whether the availability of information through other sources renders the misrepresentations and omissions in ZPRIM’s advertisements not material.

Similarly, the Commission rejected the second issue Respondents argue in support of a stay – namely, that ZPRIM did not act with scienter when it falsely stated in the March 2011 Morningstar report that there was no Commission investigation. Respondents claim the form submitted to Morningstar was confusing, and therefore they will succeed on appeal. Motion 6-7. The Commission rejected this argument, finding the evidence was clear that ZPRIM and Ted Bauchle, who completed the Morningstar submission form, knew when he completed it that there was a Commission investigation, and any contrary view is “objectively unreasonable.” Opinion 34. As the Commission correctly found, the record is clear that Zavanelli, and not Bauchle, advanced the theory at the final hearing that the submission form was confusing, and because Zavanelli disclaimed any involvement in preparing the form, his testimony is irrelevant. *Id.* 35. As the Commission found, Bauchle testified that in completing the form he was influenced by ZPRIM’s internal attempts to minimize the importance of the investigation, and he

did not claim to have issues with the submission form. *Id.* The Commission's factual determinations on this issue are supported by substantial evidence and there is little chance they will be reversed on appeal. 15 U.S.C. § 78y(a)(4) (Commission's factual findings, if supported by substantial evidence, are conclusive).

Accordingly, Respondents' argument that ZPRIM lacked scienter because the submission form is wholly without merit, unsupported by the record evidence, and, as the Commission found, cannot succeed.

b. Respondents Fail to Establish a Likelihood of Irreparable Injury

Respondents have also failed to establish a likelihood of irreparable injury. Respondents speculate that they will suffer financial detriment. However, as the Respondents concede in their motion, the fact that a Respondent may suffer financial detriment does not give rise to the level of irreparable injury warranting issuance of a stay. Mot. 8. *See also Donald L. Koch and Koch Asset Mgmt., LLC*, Exchange Act Release No. 72443, at 3 (June 20, 2014) (Holding mere speculation is insufficient to warrant a stay; the injury must be "certain," "actual," and "not theoretical."); *Sacks, supra*, at 4 (Dec. 21, 2007). Respondents provided no evidence that they will suffer such financial detriment as to be irreparably harmed. The Commission should reject this argument as grounds for imposing a stay. This is particularly true, where as here, the record reflects that the Respondents operate overseas and Zavanelli resides in Lithuania, thereby likely complicating any collection efforts, which should not be delayed.

c. Respondents Cannot Show There Will be no Injury to Other Parties

Respondents cannot show that granting a stay will not result in injury to other parties. Mot. 9. The Commission has already rejected the argument that Zavanelli poses no future threat. As the Commission found, Zavanelli's conduct was egregious, he has not recognized the

wrongful nature of his conduct, and there is a risk of future violations. Opinion 39-42. Respondents' request for relief – despite the Commission's findings and Respondents' disregard of the Commission's rules – should be rejected.

d. Respondents Ignore the Commission's Findings That Sanctions are in the Public Interest

Respondents have failed to demonstrate why a stay is in the public interest when the Commission has determined that the remedial sanctions it ordered were tailored to protect investors from Respondents' serious, repeated, and willful misconduct. Respondents offer only the hollow assertion that a stay would be in the best interests of ZPRIM's clients, without any evidence or support for this contention. The Commission should reject this argument, for the reasons set forth in the Opinion. Opinion 39-42.

2. Conclusion

Respondents have failed to carry their burden of demonstrating that a stay is warranted, and cannot satisfy any of the four stay factors. Accordingly, the Commission should deny their request for the extraordinary relief of a stay pending appeal.

November 24, 2015

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that an original and three copies of the foregoing were filed with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Washington, D.C. 20549-9303, and that a true and correct copy of the foregoing has been served by overnight, on this 24th day of November 2015, on the following persons entitled to notice:

Securities and Exchange Commission
Office of Secretary
100 F Street, N.E.
Washington, D.C. 20549

And a true and correct copy of the foregoing has been served via e-mail, facsimile and/or UPS on this date to:

The Honorable Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

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