

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4471 / August 4, 2016

Admin. Proc. File No. 3-15263

In the Matter of

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

ORDER GRANTING PARTIAL STAY AND DENYING MOTION TO ADDUCE
ADDITIONAL EVIDENCE

On October 30, 2015, the Commission issued an opinion and order finding ZPR Investment Management, Inc. (“ZPRIM”), and its former president and owner, Max E. Zavanelli (“Zavanelli”), liable for, among other things, ZPRIM’s false or misleading claims of compliance with the Global Investment Performance Standards (“GIPS”) in magazine advertisements and newsletters that failed to provide returns information required by the GIPS Advertising Guidelines. The Commission also found Respondents liable for ZPRIM’s false claim, made in a Morningstar report for the period ending March 31, 2011, that it was not under Commission investigation.¹ The Commission barred Zavanelli from the securities industry, censured ZPRIM, imposed cease-and-desist orders, and ordered ZPRIM and Zavanelli to pay, respectively, \$250,000 and \$570,000 civil money penalties. On June 9, 2016, the Commission denied Respondent’s motion for reconsideration.²

Respondents have filed a motion for a stay of the Commission’s order pending judicial review. They also have filed a motion for leave to adduce additional evidence under Rule 452 of

¹ *ZPR Inv. Mgmt., Inc.*, Advisers Act Release No. 4249, 2015 WL 6575683, at *2 (Oct. 30, 2015) (explaining that ZPRIM violated Advisers Act Sections 206(1), (2), and (4), and Advisers Act Rule 206(4)-1(a)(5) through its false or misleading claims of GIPS compliance and its false claim in the Morningstar report that it was not under Commission investigation and that, with respect to the magazine articles and newsletters, Zavanelli directly violated Sections 206(1) and (2) and aided and abetted and caused ZPRIM’s violations).

² *ZPR Inv. Mgmt., Inc.*, Advisers Act Release No. 4417, 2016 WL 3194778 (June 9, 2016).

the Commission's Rules of Practice.³ For the reasons set forth below, we order a partial stay of the Commission's October 30, 2015 order and deny the motion to adduce additional evidence.

I. Motion for a Stay

The Commission considers four factors in determining whether to grant a stay: (i) whether there is a strong likelihood that the moving party will succeed on the merits of its appeal; (ii) whether the moving party will suffer irreparable harm without a stay; (iii) whether any person will suffer substantial harm as a result of a stay; and (iv) whether a stay is likely to serve the public interest.⁴ The party seeking a stay has the burden of establishing that relief is warranted.⁵

In their stay motion, Respondents contend that they have shown a "substantial indication of probable success" with respect to two claims. But the Commission's October 30, 2015 opinion and June 9, 2016 order considered each of these claims and determined that these arguments were without merit.

Respondents argue that the "total mix" of information available through other sources requires a finding that the misrepresentations and omissions in ZPRIM's advertisements were not material. The Commission rejected this argument for three reasons. First, the Commission concluded that "[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."⁶ Second, the Commission found that ZPRIM "did not correct" those claims because it never publicly acknowledged that they "were false, distributed corrected advertisements addressing [them], or even directed recipients of its advertisement to the information required by the Guidelines that it omitted from the advertisements."⁷ Third, the Commission explained that "[e]ven if we were inclined to consider information outside the advertisements and found that the exact information omitted from the advertisements was available online or otherwise, we do not believe that ZPRIM adequately drew attention to it here."⁸

Respondents argue further that the First Circuit's decision in *Flannery v. SEC*,⁹ decided after the Commission's October 30, 2015 opinion, supports their argument that they are likely to succeed on appeal. The Commission rejected Respondents' arguments based on *Flannery* in its order denying reconsideration. The Commission found that *Flannery* has no bearing on liability

³ 17 C.F.R. § 201.452.

⁴ See, e.g., *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Steven Altman*, Exchange Act Release No. 63665, 2011 WL 520807, at *2 (Jan. 6, 2011).

⁵ *Nken*, 556 U.S. at 433-34; *Altman*, 2011 WL 52087, at *2.

⁶ *ZPR Inv. Mgmt.*, 2015 WL 6575683, at *14.

⁷ *Id.* at *13.

⁸ *Id.* at *14.

⁹ 810 F.3d 1 (1st Cir. 2015).

under the Advisers Act, that the information Respondents provided in subsequent disclosures or on their website does not render the misstatements in their advertisements immaterial, and that *Flannery* is distinguishable on its facts.¹⁰

Respondents also argue that they are likely to prevail on their claim that ZPRIM did not act with scienter when it falsely stated in the Morningstar report for the period ending March 2011 that there was no pending Commission investigation. The Commission rejected this argument, finding that the person who completed the Morningstar report “knew that ZPRIM was under investigation,” but “intentionally failed to disclose it.”¹¹

For these reasons, the Respondents have failed to establish a strong likelihood of success on the merits of their appeal.

Furthermore, Respondents have failed to show that they will suffer irreparable injury absent a stay. While Respondents acknowledge that “financial detriment” does not rise to the level of irreparable harm, they argue that the civil money penalties assessed against Respondents coupled with the bar of Zavanelli “could result in the demise of the firm.” But to warrant a stay, “the injury must be both certain and great; it must be actual and not theoretical.”¹²

The possible harm to others and the public interest also weigh against granting a stay. As explained in the Commission’s opinion, the sanctions imposed on the Respondents are in the public interest. The Commission found that “[d]espite his knowledge and familiarity with GIPS, Zavanelli flouted the requirements of the GIPS Advertising Guidelines.”¹³ His misconduct was therefore “egregious and he acted with a high degree of scienter.”¹⁴ His misconduct also “harmed the market generally because he disseminated false information regarding his firm’s GIPS compliance and denied investors the ability to make direct comparisons between ZPRIM’s performance and that of other investment advisers.”¹⁵ Accordingly, Zavanelli’s “serious misconduct demonstrate[d] his unfitness for the securities industry in general.”¹⁶ Because the “risks to customers from misrepresentations of the sort in which Zavanelli engaged exist throughout the industry,” the Commission determined that an industry bar was necessary “to protect investors from future violations by Zavanelli.”¹⁷ Likewise, the Commission found a sufficient risk of future violations necessary to impose cease-and-desist orders.¹⁸ Given these

¹⁰ *ZPR Inv. Mgmt.*, 2016 WL 3194778, at *4-10.

¹¹ *ZPR Inv. Mgmt.*, 2015 WL 6575683, at *24.

¹² *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

¹³ *ZPR Inv. Mgmt.*, 2015 WL 6575683, at *27.

¹⁴ *Id.*

¹⁵ *Id.* at *28.

¹⁶ *Id.* at *30.

¹⁷ *Id.*

¹⁸ *Id.*

findings, the public interest supports keeping these sanctions in place during the pendency of any appeal.

Nonetheless, the Commission “has at times stayed monetary sanctions pending appeal without reference to the applicant’s likelihood of success on the merits” or the other components of the four-factor test.¹⁹ Under the circumstances and in our discretion, we elect to stay the civil penalties pending the filing of a petition for review with a United States Court of Appeals and, upon the timely filing of such a petition, pending determination of that appeal.

II. Motion to Adduce Additional Evidence

Respondents also seek leave to adduce additional evidence pursuant Rule 452 of the Commission’s Rules of Practice. Specifically, Respondents seek to admit a summary of records “that reflect the names of prospective clients and dates when information was forwarded to them by the firm.” Respondents contend that this evidence would show that “information containing performance data of ZPRIM was sent ‘immediately’ to each prospective client that responded to an advertisement” Rule 452 does not apply under these circumstances. A party to an administrative proceeding may, pursuant to Rule 452, move for leave to adduce additional evidence “at any time prior to the issuance of a decision by the Commission.”²⁰ That time has passed.²¹

Accordingly, IT IS ORDERED that the requirement in the Commission's October 30, 2015 order that ZPRIM and Zavanelli pay, respectively, \$250,000 and \$570,000 civil money penalties is stayed for sixty days from June 9, 2016; and it is further

ORDERED that, if ZPRIM and Zavanelli file a timely petition for review with a United States Court of Appeals, the stay of the civil money penalties shall continue pending the determination of that appeal and the issuance of the court’s mandate; and it is further

¹⁹ *Raymond J. Lucia Cos.*, Exchange Act Release No. 76241, 2015 WL 6352089, at *1 n.7 (Oct. 22, 2015).

²⁰ 17 C.F.R. § 201.452.

²¹ *Mitchell M. Maynard*, Advisers Act Release No. 2901, 2009 WL 2082893,*3 n.7 (July 16, 2009) (denying motion to adduce additional evidence and motion for reconsideration); *Feeley & Willcox Asset Mgmt. Corp.*, Exchange Act Release No. 48607, 2003 WL 22316308, at *2 n.17 (Oct. 9, 2003) (same). Respondents also do not establish that there were reasonable grounds for failing to adduce this evidence previously. 17 C.F.R. § 201.452.

ORDERED that the motion for a stay of the Commission's October 30, 2015 and June 9, 2016 orders is in all other respects denied; and it is further

ORDERED that ZPRIM and Zavanelli's motion to adduce additional evidence is denied.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Brent J. Fields
Secretary