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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF MARIN

11 SUZIE ZUPAN, PAUL ZUPAN, LATITUDE) Case No. CIV 090939
12 CAPITAL MANAGEMENT INC., LCM HIGH)
13 INCOME FUND, LLC, LCM STRATEGIC)
14 INCOME FUND, LLC,)

15 Petitioners,)

16 vs.)

17 CALIFORNIA DEPARTMENT OF)
18 CORPORATIONS,)

19 Respondent.)

**JUDGMENT DENYING FIRST AMENDED
PETITION FOR WRIT OF
ADMINISTRATIVE MANDAMUS**

) Date: May 13, 2010
) Time: 8:30 a.m.
) Dept: J

) Judge: The Honorable Verna A. Adams
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23 This matter came regularly before this court on May 13, 2010 for hearing in Dept. J of the
24 Superior Court, County of Marin, the Honorable Verna A. Adams presiding. Paul Zupan appeared in
25 pro per for the petitioners. John R. Drews, Corporations Counsel, appeared as attorney for
26 respondent.

27 The record of the administrative proceedings having been received into evidence and
28 examined by the court, no additional evidence having been received by the court, arguments having

1 been presented, and the matter having been submitted for decision, the court makes the following
2 findings and order in support of its denial of the petition for a writ of administrative mandamus:

3 1. The administrative law judge’s (hereinafter referred to as “ALJ’s”) proposed decision
4 does not specify what standard of proof the ALJ applied in making her findings, and petitioners fail
5 to specifically allege this as a ground for relief in their first amended petition. As this court will be
6 independently reviewing the evidence and applying the weight of the evidence standard, the standard
7 of proof used in the original proceedings is immaterial. (See *Ettinger v. Board of Med. Quality*
8 *Assurance* (1982) 135 Cal.App.3D 853, 858.)

9 2. The Court finds that the ALJ’s finding that Paul Zupan had “executive management
10 authority” and was a person who should have been disclosed in the various applications is supported
11 by the applicable law. Petitioners do not demonstrate that Respondent failed to proceed in the
12 manner required by law because “control person” liability is not the governing standard in this
13 context. Petitioner’s source of authority for the proposition that “control” is key is the federal
14 Securities Exchange Act, not the California statutes and regulations relied on by the ALJ. The cases
15 cited by petitioners deal with federal substantive liability for fraud in the sale of securities, not
16 California permit application violations. (See *McFarland v. Memorex* (N.D.Cal. 1980) 493 F.Supp.
17 631; *Christoffel v. E.F. Hutton & Co.* (9th Cir. 1978) 588 F.2d 665, 667-668, note significant negative
18 treatment.) “Control person” liability is a key principle under the federal securities act, but it has
19 little application in the present case. Disclosure requirements under the California finance and
20 security permit application statutes and regulations are much broader than merely “control persons”
21 as strictly defined under the federal securities law. (See e.g. Cal. Code of Regs. Title 10, section
22 1422, Application Instructions.)

23 3. The Court finds that the ALJ’s exclusion of evidence regarding the pending lawsuits
24 between the Zupans and the investors falls within the ALJ’s proper discretion under Govt. Code
25 section 11513(f). It is clear the ALJ was well aware of the animosity and “recriminations back and
26 forth” between the Zupans and the investors (AR 00256) and the ALJ allowed direct evidence of
27 motivation and malice when it was presented. (See AR 00313) The excluded testimony would have
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1 been cumulative and its probative value substantially outweighed by the probability that its admission
2 would necessitate undue consumption of time.

3 4. This Court further finds that the alleged failure to provide discovery and disclose
4 witnesses is a matter that should have been raised before the administrative law judge in the first
5 instance. Petitioners thus fail to demonstrate grounds for relief. Failure to seek redress while the
6 agency has jurisdiction may bar the issue from being raised successfully in a subsequent
7 administrative proceeding. (1 Cal.Admin. Mandamus, 3d Ed. (CEB 2009) section 4.12, page 125)

8 5. This Court finds that the agency's decision adopting the proposed decision and
9 findings by the ALJ meet both statutory and case law requirements of specificity and adequately
10 "bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Ass'n*
11 *For A Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515; Govt. Code section
12 11425.50(b); 1 Cal. Admin. Mandamus, 3D. Ed.(CEB 2009) section 6.110, page 247)

13 6. Petitioners do not demonstrate that the ALJ abused her discretion by failing to support
14 her credibility finding. Government Code section 11425.50(b) only applies to the extent that the
15 Agency's credibility finding rests on "the observed demeanor, manner, or attitude of the witness," in
16 which case the court shall give the Agency's determination great weight to the extent it is properly
17 supported. In the present case, the ALJ's finding that Paul Zupan's testimony regarding the Bright
18 matter was "not believable" was not based on his demeanor, manner or attitude, but rather because it
19 conflicted with and was not corroborated by other evidence. The ALJ's findings fully support her
20 conclusion and no abuse of discretion has been shown.

21 7. The Court finds that Petitioner's fail to meet their burden of demonstrating that the
22 Department of Corporation's finding are not supported by the weight of the evidence. With respect
23 to the licensing violations, Petitioner's focus on the wrong legal standard. As Respondent argues in
24 opposition, the ALJ carefully documented conclusions that Paul Zupan should have been disclosed
25 on the investment adviser Form ADV as an "Advisory Affiliate" (in addition to Schedule A as a
26 "Control Person") by virtue of his role as an operations manager or a financial manager and is
27 supported by the testimony of Stephanie Hollander, licensing specialist with the Dept. of
28 Corporations. (AR 00151, 00154) Petitioners argue, without authority, that Mr. Zupan's use of

1 several different job titles during the course of his employment at LCM is not determinative of
2 control authority. Even if this is true, the Court disagrees with Petitioner's suggestion that the
3 evidence fails to demonstrate that Mr. Zupan was "in charge" of the place of business. Mr. Zupan
4 was the primary contact person for investors and auditors and according to LCM's own CPA, Josh
5 Nevarez, the fund was managed as a "one man shop" for purposes of internal control evaluation.
6 (Decision, AR 0014.) It is clear that Mr. Zupan was not a mere "clerk" as disclosed in the investment
7 adviser Form U-4 dated July 18, 2006, and that if Petitioners had listed his position more accurately
8 as "Operations Manager," the Department would have rejected his application because of his
9 conviction, disbarment and bankruptcy. (Decision, AR 0008; 00161-00167)

10 8. The Court finds that with respect to the Allen Bright transaction, Petitioners also fail
11 to meet their burden of demonstrating the findings are not supported by the weight of the evidence. It
12 is clear from Bright's testimony that the promise of monthly income distributions was central to his
13 decision to invest in the High Income Fund (HIF). The Court disagrees with Petitioners that the ALJ
14 overemphasized the significance of the statements made in the July 27 letter and Sept. 18, 2007
15 update. Both the timing and contents of the written statements, conveyed to Bright's wife (Fields),
16 support that they played a significant role in Bright's decision to invest. As for Paul Zupan's central
17 claim that he specifically disclosed the fact that the High Income Fund (HIF) had stopped paying
18 dividends in his Sept. 19 phone conversation with Fields, the Court agrees with the well-reasoned
19 finding of the ALJ that this was "not believable." Although one may question why Bright's wife did
20 not testify at the hearing, the cumulative circumstantial evidence as cited by the ALJ supports the
21 conclusion that Bright was never specifically informed prior to his investment that the High Income
22 Fund (HIF) had stopped paying dividends in August, 2007.

23 THEREFORE, IT IS HEREBY ORDERED THAT:

24 1. The First Amended Petition filed in this action for a Writ of Administrative Mandamus is
25 denied.

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27 Date May 20 2010

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Hon. Verna A. Adams
Judge of the Superior Court, County of Marin