INITIAL DECISION RELEASE NO. 1042
ADMINISTRATIVE PROCEEDING
FILE NO. 3-17020

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of DIANE D. DALMY, ESQ.	INITIAL DECISION July 29, 2016

APPEARANCES: Richard M. Humes, Thomas J. Karr, Karen J. Shimp, and Eric A. Reicher for the Office of Litigation and Administrative Practice, Securities and Exchange Commission

Howard J. Rosenburg of Kopecky Schumacher Bleakley Rosenburg PC for Diane D. Dalmy, Esq.

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

Background

On September 30, 2015, the United States District Court for the Northern District of Illinois granted the Securities and Exchange Commission's motion for partial summary judgment and found Diane D. Dalmy, Esq., liable for selling unregistered securities in violation of Section 5 of the Securities Act of 1933. *See SEC v. Zenergy Int'l, Inc.*, 141 F. Supp. 3d 846 (N.D. Ill. 2015). Based on the district court's finding and acting pursuant to Rule of Practice 102(e)(3)(i)(B), on December 22, 2015, the Commission temporarily suspended Dalmy from appearing and practicing before the Commission as an attorney and initiated this administrative proceeding.[1] *Diane D. Dalmy, Esq.*, Exchange Act Release No. 76740, 2015 SEC LEXIS 5298.

On December 28, 2015, Dalmy filed a petition, pursuant to Rule 102(e)(3)(ii), to lift the temporary suspension.[2] On January 27, 2016, the Commission issued an order denying Dalmy's

[1] Rule 102(e)(3)(i)(B) empowers the Commission to temporarily suspend from practicing before the Commission any attorney found by a court to have "violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder." 17 C.F.R. § 201.102(e)(3)(i)(B).

[2] Rule 102(e)(3)(ii) provides that any person temporarily suspended from appearing and practicing before the Commission may, within thirty days of service of the temporary suspension order, petition the Commission to lift the temporary suspension. 17 C.F.R. § 201.102(e)(3)(ii).

petition and directed a public hearing before an administrative law judge. *Diane D. Dalmy, Esq.*, Exchange Act Release No. 76980, 2016 SEC LEXIS 354.

Summary Disposition

On February 16, 2016, with the agreement of the parties, I granted leave to the Office of Litigation and Administrative Practice (OLAP) to file a motion for summary disposition on a schedule the parties proposed. *See* 17 C.F.R. § 201.250; *Diane D. Dalmy, Esq.*, Admin. Proc. Rulings Release No. 3607, 2016 SEC LEXIS 567. Although Dalmy disagrees with the sanction sought by OLAP, it is undisputed that the district court found she violated a provision of the federal securities laws, and she fails to overcome the evidence against her. As such, there is no genuine issue with regard to any material fact and summary disposition is appropriate. *See* 17 C.F.R. § 201.250(b); *Jay T. Comeaux*, Securities Act Release No. 9633, 2014 SEC LEXIS 3001, at *8 (Aug. 21, 2014).

On April 8, 2016, OLAP filed a motion for summary disposition requesting an order disqualifying Dalmy from appearing or practicing before the Commission (Motion), with exhibits 1-30. On May 19, 2016, Dalmy filed her opposition with exhibits A-G, and on June 3, 2016, OLAP filed its reply with exhibits 31-34.

Findings of Fact

The factual findings and legal conclusions are based on the entire record which consists of the pleadings and the attached exhibits. I take official notice of the filings in *SEC v. Zenergy*. *See* 17 C.F.R. § 201.323.

Diane D. Dalmy, Esq., is an "extremely busy" corporate and securities attorney in solo practice with a home office in Colorado, who advertised herself as "a recognized leader in advising and representing issuers in all methods of achieving public company status." OLAP Ex. 4 at 29, 192-93, 206; OLAP Ex. 26 at 1, 4. Dalmy's work includes assisting privately owned companies to go public by reverse merging with public shell companies.[3] OLAP Ex. 4 at 218; OLAP Ex. 26 at 1. Dalmy's clients are generally issuers of penny stock. OLAP Ex. 24 at 9.

[3] According to Dalmy's website:

> A reverse merger is a method by which an active privately-owned operating company goes public by completing a transaction with a public shell company, with the public company surviving the transaction but having issued a controlling share of the company's stock to the owners of the privately-owned operating company. The public shell company then typically changes its name to reflect the operating business of the privately-owned operating company. Most public companies that enter into reverse mergers are shell companies, which are companies that have no significant operations or assets.

OLAP Ex. 26 at 1.

Around March 2009, Paradigm Tactical Products, Inc., a public company supposedly engaged in selling handheld security devices, engaged Dalmy as counsel to prepare legal documents for a reverse merger with privately owned Zenergy International Inc., incorporated as a purported biofuels company in July 2006. OLAP Ex. 2 at 2, 4-5; OLAP Ex. 4 at 34-35, 45, 69, 85, 97. Bosko R. Gasich and Robert J. Luiten were two of Zenergy's three founders, and both participated in managing the company either as officers or paid consultants. OLAP Ex. 2 at 2. Zenergy was initially financed in part through a $30,000 loan from Gasich, provided in exchange for convertible debt securities, which gave Gasich the right to convert the debt into Zenergy shares. *Id.* Dalmy addressed the Paradigm-Zenergy reverse merger in her initial engagement letter dated April 1, 2009, to Gasich, who was her main Zenergy contact.[4] OLAP Ex. 4 at 122, 196-98. Vincent Cammarata was Paradigm's president and CEO, and only board member. OLAP Ex. 2 at 4; OLAP Ex. 4 at 131-32. Cammarata worked closely with Scott Wilding, a consultant who had been marketing Paradigm to companies seeking access to publicly traded shares, in structuring the reverse merger transaction. OLAP Ex. 2 at 4; OLAP Ex. 4 at 159. Wilding was Dalmy's primary contact at Paradigm. OLAP Ex. 2 at 14.

Dalmy claimed she investigated Paradigm and Zenergy's businesses, but that documentation was destroyed when her house flooded. OLAP Ex. 4 at 89-92, 267. Dalmy also testified that documents were lost when her computer crashed in 2012 and a computer technician deemed it corrupted and discarded it. *Id.* at 15-16, 23-24; Opp. at 11. She later testified that the computer technician was able to transfer a large portion of documents to a new computer. OLAP Ex. 4 at 270.

Dalmy insisted Paradigm was not a shell company, i.e., an issuer with no or nominal operations and no or nominal assets, based on press releases and Cammarata's representation that Paradigm had continuous operations.[5] 17 C.F.R. § 230.144(i); OLAP Ex. 4 at 132-35, 146-49. Dalmy knew, however, that Paradigm was not in good standing in Delaware because it had failed to pay franchise taxes for several years and that it had not paid Cammarata for over a year due to lack of funds. OLAP Ex. 4 at 132, 189. Dalmy testified that Paradigm had inventory and some sales; however, the merger terms provided that Paradigm would deliver zero assets and zero liabilities at closing.[6] *Id.* at 133-34, 145.

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[4] Gasich was the president, chief executive officer, and sole shareholder of Market Ideas, Inc., which provided capital investment and advisory services to Zenergy. OLAP Ex. 2 at 3. Gasich, however, had access to Zenergy's bank accounts and Zenergy's office address was a site that Gasich maintained. *Id*. Luiten was Zenergy's president, CEO and chairman of the board, and shared his responsibilities with Gasich. *Id*. at 2-3; OLAP Ex. 4 at 196.

[5] Dalmy's hardcopies of the press releases were destroyed in the flood, but some remain on the internet. OLAP Ex. 4 at 135, 291. The district court found it "unnecessary . . . to resolve whether Zenergy or Paradigm were shell companies as understood in the Rule 144 context." OLAP Ex. 2 at 12 n.10.

[6] Dalmy testified that she believed that at the closing Cammarata would cease being CEO and would take Paradigm's inventory and attempt to market products. OLAP Ex. 4 at 145-46.

Dalmy testified that Zenergy was a developmental company with "great prospects," that a Zenergy financial statement for April 2008 showed considerable assets and liabilities that included debt owed to Gasich, but that Zenergy had no cash to pay for services. OLAP Ex. 4 at 153-54. Dalmy could not produce the financial statements she claims to have seen because they were in the box that was destroyed in a flood. *Id.* at 90-92, 154.

The evidence shows that Dalmy played a role in Paradigm's or Zenergy's press releases, although she denied drafting or reviewing any of them. OLAP Ex. 4 at 103-08. On March 13, 2009, Wilding informed Dalmy:

> Diane, here's the final share breakdown. All parties have agreed. Now we the [sic] share the exchange agreement and a [press release], Bob is working on one with what you sent us. See ya all tomorrow.

Id. at 138-40, 207. On March 27, 2009, Wilding shared Zenergy press releases with Dalmy that would be issued "after we're public." *Id.* at 99-101. On April 19, 2009, Wilding emailed Gasich, noting that Dalmy had written something in connection with a news release concerning Paradigm's possible merger with Zenergy. OLAP Ex. 11; OLAP Ex. 4 at 103-08. When presented with these emails, Dalmy noted that she "might have offered advice on a press release" and "might have sent an email generally talking about a press release." OLAP Ex. 4 at 107-08.

As part of the reverse merger, Paradigm agreed to assume the $30,000 worth of convertible debt that Zenergy owed to Gasich, which translated into 300 million shares of Zenergy stock. OLAP Ex. 2 at 6. Dalmy testified that she told Gasich, Wilding, and Cammarata when discussing assigning convertible debt to compensate people who had provided services to Zenergy that the debt had to be: (1) evidenced on financial statements and aged, and (2) non-affiliated with the issuer, i.e., not have "an officer, director or 10 percent or greater shareholder holding shares or having anyone in the same household, including your spouse, who may or may not live in that household, holding shares," in order to rely on the Securities Act Rule 144 safe harbor exemption to Securities Act Section 5. OLAP Ex. 4 at 158-59, 169; *see* 17 C.F.R. § 230.144. Dalmy conceded that shares assigned by an affiliate would have to be held one year when the merged entity was "not a fully reporting company." OLAP Ex. 4 at 160; *see* 17 C.F.R. § 230.144(d)(1)(ii).

Dalmy prepared board resolutions and the share exchange agreement based on information from Gasich about the convertible debt owed to Gasich and Zenergy's April 2008 financial statements. OLAP Ex. 4 at 232-33. On May 17, 2009, Gasich emailed Dalmy that he wanted to assign his $30,000 of debt convertible at par value to eight individuals and three entities,[7] and requested from Dalmy a copy of a standard convertible note. OLAP Ex. 5. Gasich also noted in his email that he was "not an officer or director but 10%+ owner." *Id.* On May 18, 2009, Wilding emailed Dalmy, identically describing Gasich as "not an officer or director but 10%+ owner." OLAP Ex. 6; OLAP Ex. 4 at 65. On May 19, 2016, Dalmy responded to Wilding, recognizing that "Gasich as an affiliate needs to assign a portion of his debt." OLAP Ex. 6. Dalmy testified that if

[7] The list of assignees included Cammarata, Dalmy, Javorka Gasich, Kymberly Nelson, and Wilding's company Skyline Capital. OLAP Ex. 5.

Gasich owned shares of ten percent or more in Zenergy, Gasich would be an affiliate. OLAP Ex. 4 at 175.

On May 28, 2009, Wilding offered to wire Dalmy $1,000 for Dalmy's opinion letters and stated, "We're almost there and wouldn't want any delays, especially now. We're golden once the shares hit our accounts, payday is right around the corner." OLAP Ex. 13. On May 31, 2009, Wilding emailed Dalmy with the subject line "Zenergy":

> We're so close to making a huge score . . . Even if it doesn't happen this week, I'll still assign the 2m. Sorry for this email but it's like we won the lottery but cannot cash in ticket for a few weeks.

OLAP Ex. 14.

On June 3, 2009, Wilding emailed Dalmy that "since [B]ob [Gasich] is an affiliate with [Z]energy (10%) . . . do you see any violations of rule 144 that could ever come back to haunt us." OLAP Ex. 7. Dalmy testified that she did not recall this email. OLAP Ex. 4 at 172. On June 4, 2009, Gasich requested that Dalmy "prepare a copy of Zenergy's board of director resolution ratifying the Zenergy Debt and terms thereof. If we don't have, we will need to prepare with current date but effective of May 2007- the date of the note- please adjust date on legal opinions." OLAP Ex. 17. Despite this email, Dalmy denied there was a convertible promissory note, that she knew about the note, and that she had anything to do with the note dated April 7, 2008, that was in her files.[8] OLAP Ex. 4 at 225-28, 264; OLAP Ex. 18.

Dalmy testified she "had no idea" that Gasich was an affiliated person of Zenergy when she later drafted documents naming Gasich as the assignor of the convertible debt used to issue freely tradable shares of Zenergy. OLAP Ex. 4. at 162, 182-83. Dalmy claimed that prior to June 2009, she "specifically asked [Gasich] do you hold shares in Zenergy? And he said no, he did not." *Id.* at 162, 170, 174.

Dalmy also testified that if she had known that Gasich owned shares of The Spires Group, which owned over 30% of Zenergy shares, she would have considered Gasich an affiliate of Zenergy and would not have written a Rule 144 opinion that Gasich assignees received free trading shares. OLAP Ex. 4 at 175-76, 184. The district court found that Gasich received approximately 67 million shares in the merged company issued to The Spire Group. OLAP Ex. 2 at 5 n.5.

Dalmy believed Gasich's statements that everyone who received an assignment of shares in the merged entity had provided services to Zenergy and needed to be compensated. OLAP Ex. 4 at 152, 167, 220. Dalmy did not consider Gasich family members who owned shares affiliates within the definition of Rule 144(a)(2)(i) because Gasich told her they did not live in his household. *Id.* at 163-66. Dalmy testified that she did not know that Kymberly Nelson, an

[8] OLAP argues that the note found in Dalmy's files was backdated, "so that the holding period would be shorter if it was necessary to rely on the one-year waiting period." Motion at 9-10, 24.

assignee for whom she wrote a Rule 144 letter, was Gasich's live-in girlfriend, and admitted that if she had known that, "[t]hat would be a factor I would consider." *Id.* at 165-68.

Dalmy's draft Rule 144 opinion dated June 12, 2009, erroneously stated that "[t]he Zenergy Debt is evidenced by and reflected in the financial statements of Zenergy as of June 2006." OLAP Ex. 4 at 209; OLAP Ex. 3. Also, the letter erroneously stated that "[a]s at June 2006, Zenergy and Gasich verbally agreed and established that the Zenergy Debt could be convertible at Gasich's sole option into shares of common stock of Zenergy at $0.0001 per share," when the agreement was reached in April 2008. OLAP Ex. 4 at 209-10; OLAP Ex. 3. This opinion letter identified Downshire Capital Group Inc., Skyline Capital Investments Inc., Sigma Consulting Group LLC, Romero Kiep, Kymberly Nelson, Javorka Gasich, Nenad Jovanovich, Diana Bozavic, and Diane Dalmy as assignees. OLAP Ex. 3. Dalmy's investigation consisted of accepting Gasich's answer that those named did not have affiliate status and they all had performed services for Zenergy. OLAP Ex. 4 at 212-17. Dalmy "believe[s] everything that people tell [her]." *Id.* at 215.

On June 16, 2009, Dalmy emailed Wilding, Gasich, and Cammarata Rule 144 and Rule 144(b) opinions for transmission to the transfer agent. OLAP Ex. 16. Attached to the opinions were a convertible promissory note dated April 7, 2008, between Gasich and Zenergy, an assignment of debt from Gasich to Skyline Capital Investment, Inc., and a notice of conversion by Skyline Capital Investments, Inc. OLAP Ex. 16. When confronted with this email, Dalmy again denied having known about the note, but conceded that the note was based on her own template which she had provided. OLAP Ex. 4 at 225-27, 239-44, 250. Dalmy testified to being "so upset" because someone "backdated that note and they used me." *Id.* at 228.

On July 1, 2009, after Dalmy had first issued opinion letters stating Gasich was a non-affiliate of Zenergy, Gasich emailed Dalmy and Wilding, noting that "Robert Gasich is a non-affiliate and non control person of Zenergy." Opp. at Ex. A. Later that day, Dalmy told counsel for a broker-dealer, who questioned Gasich's affiliate status, that "Gasich has not been during the past twelve months nor currently is an affiliate of Zenergy or Paradigm," and that a convertible note evidencing the debt existed. OLAP Ex. 15. Despite attaching the convertible note to her email, Dalmy insisted she "didn't even know a note existed" and in attaching it "might have gotten this confused with another company." OLAP Ex. 4 at 249-52.

Dalmy wrote a Rule 144 opinion letter on August 26, 2009, concerning stock assigned to Wilding that Wilding was transferring to Dale Baeton's company, Investing in Stock Market, Inc. OLAP Ex. 4 at 259-60; OLAP Ex. 19. Dalmy again could not explain how the opinion letter she drafted had a copy of a Zenergy convertible promissory note dated April 7, 2008, attached because she claimed there was no written promissory note. OLAP Ex. 4 at 250, 261; OLAP Ex. 19. Dalmy also denied drafting the Consent Resolutions of the Board of Directors that were attached to the August 26, 2009, opinion. OLAP Ex. 4 at 261-65; OLAP Ex. 19. Dalmy testified she was not aware that Baeton had entered a consulting agreement with Wilding, and had accepted as true Wilding's representation that he was giving Baeton stock as a gift. OLAP Ex. 4 at 265-66, 272. Despite including in her letter that she had examined an "acknowledgment of gift of shares dated August 7, 2009 signed by a representative of Skyline," Dalmy equivocated when asked if she had in fact done so and claimed any copy of this document would have been lost in a flood. *Id.* at 266-67; OLAP Ex. 19. Moreover, Dalmy attached a consulting services agreement to the opinion letter,

which she denied doing, contradicting her stated belief that Wilding was merely gifting shares to a "friend." OLAP Ex. 4 at 259, 265-66; OLAP Ex. 19.

On December 28, 2009, Dalmy wrote a Rule 144 letter for Cammarata regarding the sale of shares of Zenergy common stock. OLAP Ex. 23. Earlier that month, she had emailed Cammarata that she would not be providing any Rule 144 opinions, but later qualified that she would not be providing an opinion regarding Zenergy until she was satisfied that there were "absolutely no issues regarding this company"; she referenced "the state of affairs in the industry involving FINRA and the SEC," and said she was "not sure" that everything was in order concerning the company. OLAP Ex. 4 at 273-77; OLAP Ex. 22.

Dalmy never met Wilding, Cammarata, Gasich or the people for whom she wrote Rule 144 letters. OLAP Ex. 4 at 138-40, 148-49, 166, 271.

The district court found that as part of a penny-stock pump-and-dump scheme:

> In June 2009, [Gasich] and other individuals associated with [Zenergy] acquired the publicly traded stock of [Paradigm] through a reverse-merger. In connection with the merger, Gasich assigned convertible debt securities that he had received from Zenergy to several of his friends, family members, and business associates, who subsequently converted the assigned securities into 300 million shares of Zenergy stock. Gasich and others then organized a campaign to promote Zenergy in press releases and over the Internet. Between June 2, 2009 and mid-August 2009, the price per share of Zenergy stock increased approximately tenfold. As the share price increased, Gasich's assignees sold their stock to unsuspecting investors. The assignees generated $4.4 million in profits.

OLAP Ex. 2 at 1. Dalmy was one of Gasich's assignees, and received four million shares of stock in June 2009. *Id.* at 6, 8. In August 2009, Dalmy used documents, some of which she prepared, to sell 1 million Zenergy shares to public investors for $43,995. *Id*. at 7.

The district court found further that:

> Dalmy performed a variety of services as the transaction attorney for the reverse merger between Zenergy and Paradigm. She advised the parties regarding implementing the transaction and prepared its essential documents, including the Share Exchange Agreement, board resolutions, and other corporate filings. Then, following the reverse merger, Dalmy prepared several opinion letters representing that the stock Gasich assigned to her and other assignees was exempt from the registration requirements of Section 5 of the Securities Act. It is undisputed that no registration statement was filed or in effect for any of sales of Zenergy shares that Gasich's assignees made, and that the shares were not exempt.

OLAP Ex. 2 at 7-8. Dalmy does not dispute that she violated Section 5.[9] *Id.* at 9.

Applicable Standards

In any hearing held on a petition to lift a temporary suspension filed under Rule 102(e)(3)(ii), if it is shown by the Commission staff that the respondent was "[f]ound by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party . . . to have violated (unless the violation was found not to have been willful) . . . any provision of the Federal securities laws," 17 C.F.R. § 201.102(e)(3)(i)(B), "that showing, without more, may be the basis for censure or disqualification. Once that showing has been made, the burden shall be upon the petitioner to show cause why he or she should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission." *Id.* § 201.102(e)(3)(iv).

"In determining whether that burden has been met and assessing an appropriate sanction, [the Commission is] guided by the strong and clear public interest in ensuring the integrity of [its] processes." *Thomas D. Melvin, CPA*, Exchange Act Release No. 75844, 2015 SEC LEXIS 3624, at *8 (Sept. 4, 2015). "That assessment is, in turn, informed by . . . consideration of [the *Steadman*] public interest factors," including "the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood of future violations."[10] *Id.* The Commission "also consider[s] the extent to which a sanction may have a deterrent effect." *Id.*

Arguments of the Parties

OLAP

According to OLAP, application of the *Steadman* factors and deterrence support disqualifying Dalmy from practicing before the Commission. Motion at 16-34; Reply at 18-25.

OLAP views Dalmy's conduct as egregious because worthless stock would not have been sold to public investors without the transaction documents and eleven attorney opinion letters she prepared. Motion at 16. Furthermore, according to OLAP, Dalmy acted with a high degree of scienter because when she opined that Zenergy shares were "free of any restriction on transfer," she knew or recklessly disregarded evidence that showed Gasich was an affiliate of Zenergy and Paradigm was a shell company. Motion at 20-21. OLAP rejects Dalmy's position that she made a single mistake and maintains she violated Section 5 eleven times and committed three additional transgressions. *Id*. at 22-26. OLAP contends that Dalmy has not given adequate assurances against future violations, noting that "weeks after submitting a response to the Commission's Wells notice" in the Zenergy investigation, Dalmy submitted opinion letters that

[9] Scienter is not an element of a Section 5 violation, thus Dalmy's good faith defense was unavailing in the district court action. OLAP Ex. 2 at 9 n.6.

[10] *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds,* 450 U.S. 91 (1981).

are the subject of Administrative Proceeding File No. 3-16339.[11] Motion at 27 n.21; OLAP Ex. 30. In addition, as of September 25, 2009, Dalmy, after being warned that she had submitted inadequate opinion letters, was placed on OTC Markets' prohibited attorney list, which means that OTC Markets refuses to accept attorney opinion letters from Dalmy. Motion at 27 n.21; OLAP Ex. 29; *see* Prohibited Attorneys, Accountants/Auditors and Other Service Providers, OTC Markets, http://www.otcmarkets.com/research/prohibited-attorney (last visited July 28, 2016).

OLAP insists that Dalmy has failed to recognize her wrongdoing by arguing that she made one innocent mistake and as a licensed attorney practicing in the area of securities, there is a "near certainty" that Dalmy will have opportunities to commit future violations. Motion at 28-32. Finally, OLAP argues that a lengthy suspension is necessary because it is critical to send a message "that there will be serious consequences for issuing baseless legal opinions that allow schemers to flood the market with shares of a security that should have been registered or restricted." *Id.* at 33.

Dalmy

Dalmy claims that she acted with good faith, conducted due diligence, and arrived at a single mistaken conclusion. Opp. at 2, 5-6, 15. She argues that OLAP exaggerates her regulatory history in the securities industry and misconstrues the district court's opinion, and that there is scant evidence of harm to any innocent investors. *Id.* at 11-14.

Dalmy maintains that a bar from appearing or practicing before the Commission is an extreme measure that would destroy her ability to earn a living and support her college-aged daughter. *Id.* at 15. According to Dalmy, a bar is unnecessary to protect the public interest, unjustified because her conduct was not egregious, she lacked scienter, "and it is unlikely her violations will recur due to the high price she already has had to pay." *Id.*

Legal Conclusions

OLAP has established that the district court in *SEC v. Zenergy* found that Dalmy violated Section 5 of the Securities Act, and the district court left open the question regarding Dalmy's willfulness. OLAP Ex. 2. The question is therefore whether Dalmy has carried her burden of showing that the Commission should not permanently deny her the privilege of appearing or practicing before it based on the district court's finding of a violation of a "provision of the Federal securities laws." 17 C.F.R. § 201.102(e)(3)(i)(B), (iv).

Dalmy has not carried this burden for the following reasons. Although scienter was irrelevant to the district court's finding of a Section 5 violation, it is a relevant public interest

[11] In that proceeding, an administrative law judge found that Dalmy willfully violated Section 17(a)(1) and (3) of the Securities Act, dismissed the charge that she violated Section 17(a)(2), and imposed sanctions. *Diane D. Dalmy, Esq.*, Initial Decision Release No. 886, 2015 SEC LEXIS 3866 (Sept. 18, 2015). That decision is not final and is now on review before the Commission.

factor under *Steadman*. OLAP Ex. 2 at 9 n.6. Dalmy either knew or was at least reckless—i.e., took an extreme departure from the standards of ordinary care—in disregarding evidence that showed Gasich was an affiliate of Zenergy, and in opining in letters that Zenergy shares were free of any restriction on transfer. Her December 2009 emails indicate that Dalmy had some initial reluctance about issuing an opinion letter, OLAP Ex. 22, but those emails fail to overcome the fact that Dalmy received or sent emails stating that Gasich owned more than ten percent of Zenergy's shares. OLAP Exs. 5-7. It is undisputed that such circumstance would have rendered Gasich an affiliate and made Rule 144's safe harbor for exemption from registration inapplicable. OLAP Ex. 2 at 12-14; OLAP Ex. 4 at 175. Thus, by ignoring or disregarding such contrary evidence, Dalmy acted with scienter. *See ZPR Inv. Mgmt., Inc.*, Advisers Act Release No. 4249, 2015 SEC LEXIS 4474, at *55-56 (Oct. 30, 2015) (recklessness satisfies scienter requirement).

In addition, the evidence contradicts Dalmy's position that she acted in good faith in any aspect of the reverse merger of Paradigm and Zenergy and the resulting unlawful issuance of unrestricted Zenergy stock. Instead, her conduct was egregious. Dalmy's insistence that she conducted due diligence on Paradigm by reading press releases and talking with Cammarata, an individual who stood to benefit from the transaction, is absurd. OLAP Ex. 4 at 90, 135, 147-48. At a basic level, due diligence is "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Black's Law Dictionary* (10th ed. 2014). An experienced securities attorney such as Dalmy cannot reasonably claim to have done due diligence without independent confirmation of information received from a party to the transaction and without having retained financials that she allegedly relied on for her opinion. *See FDIC v. O'Melveny & Myers*, 969 F.2d 744, 749 (9th Cir. 1992) ("An important duty of securities counsel [assisting with the public offering of securities] is to make a reasonable, independent investigation to detect and correct false or misleading materials. This is what is meant by a due diligence investigation." (internal quotation marks and citations omitted)), *rev'd on other grounds*, 512 U.S. 79 (1994), *and opinion readopted in part*, 61 F.3d 17 (9th Cir. 1995).

Dalmy's acceptance of Gasich's representations that he was not an affiliate of Zenergy, that his assignees did not have affiliate status, and that Zenergy owed him $30,000 in debt to be converted into shares of the merged company show an egregious lack of due diligence.[12] OLAP Ex. 4 at 232. Dalmy claimed to rely on Gasich's self-serving representation that $30,000 debt was owed to him and on Zenergy April 2008 financial statements. *Id.* at 231-33. Dalmy did not have the financial statements, however, which she seemed to claim were destroyed in a flood in her home or in a crash of her computer. *Id.* at 22-23, 92, 154, 233-34.

[12] Rule 144 defines an affiliate of an issuer as "a person that directly, or indirectly through one or more intermediaries, *controls*, or is controlled by, or is under common control with, such issuer." 17 C.F.R. § 230.144(a)(1) (emphasis added). Although Rule 144 fails to define "control," Rule 405 of Regulation C establishes a definition of "affiliate" identical to that of Rule 144 and defines "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." *Id.* § 230.405.

Although Dalmy recognizes that she violated Section 5, she fails to recognize the wrongful extent of misconduct, arguing that she made only one mistake, resulting primarily from being "too trusting of others." Opp. at 2. Dalmy's assurances against future violations are especially unconvincing taking into account her regulatory history. *Id.* at 17-18; OLAP Ex. 27-29. Moreover, it is concerning that Dalmy minimizes the seriousness of Section 5 violations. Opp. at 12-13. Dalmy's position that she only committed one mistake, i.e., that the Zenergy shares did not require registration, and her actions did not harm investors, are implausible. Opp. at 11-13, 15-16.

The district court found that

> [Dalmy] violated Section 5. She directly sold one million shares of Zenergy stock for $43,995. Nor does she contest the SEC's argument that she acted as an indirect seller in the sales of Zenergy stock by Gasich's assignees by virtue of the opinion letters she issued.

OLAP Ex. 2 at 9. Dalmy violated Section 5 both as a direct seller of Zenergy stock and by drafting eleven false opinion letters that allowed her and the other Gasich assignees to sell their unrestricted shares, and thus her conduct was recurrent. Violations of Section 5 of the Securities Act are serious violations. *See Mark. S. Parnass*, Exchange Act Release No. 65261, 2011 SEC LEXIS 3213, at *9-10 (Sept. 2, 2011) ("[W]e have long regarded violations of the registration provisions to be among the most serious, having noted that Section 5 is the keystone of the Securities Act and serves to protect the public in the offer and sale of new securities issues." (internal quotation marks omitted)). As a result of her letters, "Gasich's assignees obtained at least $4.4 million from their sales." OLAP Ex. 2 at 7.

Dalmy has not met her burden of showing why she should not be disqualified from appearing or practicing before the Commission. To the contrary, application of the *Steadman* factors—including considering Dalmy's occupation and the hope of deterrence—establish that her continued participation in the industry presents a "significant threat to the integrity of the Commission's processes" established to protect investors, and that she should be permanently disqualified from appearing or practicing before the Commission. *Thomas D. Melvin, CPA*, 2015 SEC LEXIS 3624, at *10.

Order

It is ORDERED that Diane D. Dalmy, Esq., be permanently disqualified from appearing or practicing before the Securities and Exchange Commission as an attorney pursuant to Rule 102(e)(3)(iii) of the Commission's Rules of Practice.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to 17 C.F.R. § 201.540, a party may file a petition for review of this initial decision within ten days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the initial decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111(h). If a motion to correct a manifest error of fact is filed by a

party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.[13] The initial decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occur, the initial decision shall not become final as to that party.

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Brenda P. Murray
Chief Administrative Law Judge

[13] Under Rule 540, "[a]ny person who seeks Commission review of an initial decision as to whether a temporary sanction shall be made permanent shall file a petition for review pursuant to § 201.410, provided, however, that the petition must be filed within 10 days after service of the initial decision." 17 C.F.R. § 201.540(a). Rule 410 separately provides that where a party files a motion to correct, "a party shall have 21 days from the date of the hearing officer's order resolving the motion to correct to file a petition for review." 17 C.F.R. § 201.410(b). Rule 540 does not purport to alter Rule 410's 21-day period for the filing of a petition for review following the hearing officer's resolution of a motion to correct.