No. 24-

IN THE

Supreme Court of the United States

NAVELLIER & ASSOCIATES, INC.
AND LOUIS NAVELLIER,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented in this case are:

1. Whether the Securities and Exchange Commission ("SEC") can seek, and the courts are authorized, under 15 U.S.C. §78u(d)(5) or §78u(d)(7) or *Liu v. SEC* 591 U.S. 71 (2020), to award disgorgement for investor " victim" clients who suffered no pecuniary harm as a result of their investment adviser's violation of the anti-fraud provisions of the federal security statutes, including 15 U.S.C. §80b-6(1), (2)?

2. Whether this Court's holdings in *SEC v. Capital Gains Research Bureau, Inc.* 375 U.S. 180, 193, n. 39 (1963) and its progeny *TSC Industries, Inc. v. Northway, Inc.* 426 U.S. 438 (1976) and *Basic Inc. v. Levinson* 485 U.S. 224 (1988), should be abrogated or clarified to establish that—in determining whether an alleged misrepresentation or omission is "material" in "face-to-face" (as opposed to class action "fraud on the market") securities law anti-fraud violation civil enforcement cases, including §206(1), (2) of the Investment Advisers Act of 1940 [15 U.S.C. §80b-6(1), (2)] violation cases, the SEC must prove that the investor(s) actually relied on the misrepresentation or omission and if the investment advisor produces affirmative investor evidence of non-reliance, the materiality issue must be determined by a jury, not by a judge by summary judgment?

LIST OF PARTIES

Petitioners: The Petitioners are:

Petitioners, *Navellier & Associates, Inc.* and *Louis Navellier* were the Defendants in the United States District Court for the District of Massachusetts and the Appellants in the United States Court of Appeals for the First Circuit, Consolidated Appeals Nos. 20-1581, 21-1857, 22-1733 and 23-1509.

Respondent: The Respondent is:

The Respondent *Securities and Exchange Commission* was the Plaintiff in the District Court and the Appellee in the Court of Appeals.

RULE 29.6 STATEMENT

Louis Navellier is an individual. He has no parent corporation and no publicly held company that owns 10% or more of his assets.

Navellier & Associates, Inc., a Nevada corporation doing business in Reno, Nevada, has no parent corporation and no publicly held company that owns 10% or more of its assets.

RELATED PROCEEDINGS

1. *Securities and Exchange Commission v. Navellier & Associates, Inc. and Louis Navellier*, United States District Court, District of Massachusetts, Case No. 1:17-CV-11633-DJC.

2. *Securities and Exchange Commission v. Navellier & Associates, Inc. and Louis Navellier,* 108 F.4th 19 (1st Cir. 2024)

3. *In the Matter of Louis Navellier and Navellier & Associates, Inc. Administrative Proceeding*—File No. 3-198926 *Before the Securities and Exchange Commission*

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The opinion of the First Circuit Court of Appeals (Appendix A) is reported at *Securities and Exchange Commission v. Navellier & Associates, Inc. et. al.* 108 F.4th 19 (1st Cir. 2024)

The opinions of the District Court are not reported in the official reports, but the summary judgment decision is found at 2020 WL 731611 (Appendix C), and the September 21, 2021 disgorgement award is found at 2021 WL 5072975 (Appendix G).

JURISDICTION

The judgment of the Court of Appeals below was entered on July 16, 2024. A timely petition for rehearing was denied on October 2, 2024. (Appendix B). Extensions were granted (US Supreme Court Case No. 24A622) to file this Petition on or before March 3, 2025 (the first court day after March 1, 2025). (Appendices V and W)

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

15 U.S.C. §80b-6(1) provides in pertinent part as follows:

> It shall be unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly to employ any device, scheme, or artifice to defraud any client or prospective client.

15 U.S.C. §80b-6(2) provides as follows:

> It shall be unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

15 U.S.C. §78u(d)(5) provides as follows:

> **Equitable relief:** In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

15 U.S.C. §78u(d)(7) provides as follows:

> **Disgorgement:** In any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement.

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Navellier & Associates, Inc. ("NAI") and Louis Navellier ("LN"), hereby petition for a writ of certiorari to review the First Circuit's July 16, 2024 Opinion. 108 F.4th 19 (1st Cir. 2024) (Appendix A)

STATEMENT

1. There currently exists a conflict between the circuit courts of appeal on the recurring crucial question of whether the SEC can seek, and federal courts are authorized, under *Liu v. SEC* 591 U.S. 71, 75, 140 S. Ct. 1936, 204 L. Ed. 2nd 401 (2020) ("Liu") or 15 U.S.C. §78u(d)(5) or 15 U.S.C. §78u(d)(7), to award monetary disgorgement for investors *who have suffered no pecuniary harm.*

The Second Circuit Court of Appeals, in *Govil v. SEC* 86 F.4th 89, 94, 98 (2nd Cir. 2023) ("Govil") held that the SEC cannot seek, and federal courts are not authorized to, award monetary disgorgement for violations of the federal security laws for investors who suffered no pecuniary harm.

The First Circuit Court of Appeals in this case, *SEC v. Navellier & Associates, Inc.* 108 F.4th 19, 41, n. 14 (1st Cir. 2024), expressly rejected the Second Circuit's holding in *Govil,* and held that "nothing in *Liu* or §§78u(d)(5) or 78u(d)(7) required the investor(s) to have suffered pecuniary harm as a precondition to awarding disgorgement."

Thus, the First Circuit upheld a $29 Million summary judgment disgorgement award despite the undisputed fact that NAI's investor clients suffered no pecuniary harm and, in fact, received *$221 Million in net profits* from NAI's investment advice.

Not only is there a conflict between the circuit courts as to whether disgorgement can be awarded for investors who suffered no pecuniary harm, but there is a subsidiary conflict between the circuit courts of appeal as to whether disgorgement, under 15 U.S.C. §78u(d)(7), is "equitable disgorgement" as held by the Second Circuit in *Govil* and the First Circuit here, (108 F.4th 19 at 41), and therefore subject to the equitable limits established by this Court in *Liu v. SEC* 591 U.S. 71 (2020), or whether §78u(d)(7) disgorgement is "legal" disgorgement as held by the Fifth Circuit in *SEC v. Hallam* 42 F.4th 316, 341 (5th Cir. 2022) and therefore *not* subject to the equitable limitations of *Liu*.

As of the close of fiscal 2024, there were over 15,396 SEC registered investment advisors managing and investing over $128.4 Trillion of investors' money for millions of investors. (Investment Advisor Association, 2024 Investment Adviser Industry Snapshot) Every one of those investors and investment advisors and the SEC is crucially affected by the circuit court split, especially in light of the SEC's demonstrated penchant for aggressively exceeding the bounds of its mandate by overly aggressively seeking disgorgement (over $6 Billion in fiscal 2024 alone) in the guise of "regulating" the securities industry and "protecting" investors, even investors who suffered no pecuniary harm. (November 22, 22024 SEC Press Release No. 2024—185)

The Court should grant this Petition and resolve the circuit conflict in order to restore uniformity in disgorgement enforcement, which conflict is adversely affecting the entire securities industry.

2. The Court should also grant this Petition in order to abrogate in part *TSC Industries, Inc. v. Northway, Inc.*

426 U.S. 438, 450 (1976) and *Basic Inc. v. Levinson* 485 U.S. 224, 243-245 (1988), to make clear that a determination of the materiality of an alleged misrepresentation or omission for a 15 U.S.C. §80b-6(1), (2) anti-fraud violation (§206 violation") requires a determination of whether there was actual investor reliance (or non-reliance) on the alleged misrepresentation or omission. If there is any conflict in evidence on the reliance element, the materiality issue must be determined by a jury, not by a judge by summary judgment.

This Petition should be granted in order to establish that an alleged misrepresentation or omission is *not* a *material* misrepresentation or omission and therefore, not a violation of §206 if there is affirmative investor evidence that the investor clients did not rely on the alleged misrepresentation or would not have relied on the omission in making their investment decisions even if it had been disclosed to them. *Basic Inc. v. Levinson* 485 U.S. 224, 252 (1988) (White, J., concurring and dissenting); *Crocker–Citizens Nat. Bank v. Control Metals Corp.* 566 F.2d. 631, 636, n. 3 (9th Cir. 1978); *Zweig v. Hearst Corp.* 594 F.2d. 1261, 1272 (9th Cir. 1979) (Ely J., dissent); *Blackie v. Barrack* 524 F.2nd 891, 906, n. 22

The First Circuit in this case, 108 F.4th 19 at 37, held that the standard for materiality under §§206(1) and 206(2) is "not actual investor reliance on the misstatement" and that "the SEC is not required to prove that any investor actually relied on the defendant's misrepresentation in order to establish materiality" (citing *SEC v. Capital Gains Research Bureau, Inc.* 375 U.S. 180, 192-193) where the "omissions are so obviously important to an investor that reasonable minds cannot differ on the question of materiality", citing *TSC Industries, Inc. v. Northway, Inc.* 426 U.S. 438, 450 (1976). But that standard is circular. If materiality (important to investors) can be established without evidence the investors relied on, i.e., thought it important, how can it be deemed important to investors?

The First Circuit, and a number of other lower courts, have misconstrued the *TSC Industries* standard for establishing materiality. They hold that the SEC can establish the required materiality element for an anti-fraud violation by summary judgment, without proof that investors actually relied on the misrepresentation that was supposedly important to them, even if there is affirmative evidence that investors did not rely on the misrepresentation.

That *TSC Industries* materiality standard allows the SEC to obtain, by summary judgment, a determination that a misrepresentation or omission is material to investors, without any proof that those very investors even relied on it. More troubling still, is that the courts, including the First Circuit here, have construed the "no actual investor reliance" evidence as irrelevant, even in the face of affirmative investor evidence that the investors did *not* rely on the misrepresentation and did *not* consider it important in making their investment decision. *Basic Inc. v. Levinson* 485 U.S. 224, 252 (White, J., dissent); *Zweig v. Hearst Corp.* 594 F.2d. 1261, 1272 (9th Cir. 1979) (Ely, J., dissent)

Allowing a judge to disregard affirmative investor evidence of non-reliance deprives investment advisors of due process and of their right to a jury trial on the disputed issue of materiality. Indeed, the SEC's entire

§206 violation claim could, as here, subject investment advisors to tens or hundreds of millions of dollars in "disgorgement" and the loss of their investment advisory profession, simply because a judge chose to disregard evidence that the alleged statement or omission is not material to investors.

The existing *TSC Industries* materiality standard is unfair and prejudicial to investment advisors. It should not be allowed to continue. This Court should grant this Petition in order to abrogate or correct the holdings and inferences in *TSC Industries* and *Basic* to make clear that—in SEC civil enforcement proceedings for an alleged §206 violation, proof of investor reliance (or non-reliance) is an essential factor in the determination of whether the misstatement or omission is material, and that it is for the jury, not the judge by summary judgment, to decide materiality, if there is any evidence (disputed or not) of investor non-reliance.

BACKGROUND

No good deed goes unpunished[1] by the SEC. NAI is an investment advisory firm that was hired by some of its investor clients to provide them with investment advice according to NAI's Vireo investment strategies, and it did so. NAI returned $221 Million in net profits to its Vireo clients. They got back all of their $1.5 Billion in principal plus all of the $39 Million in advisory fees they paid NAI plus *$221 Million in net profits*. Nonetheless, the SEC, after it breached its settlement agreement

1. The phrase is attributed to Oscar Wilde, but no one knows who, in fact, originated it. *Wikipedia*.

with Petitioners, brought this civil selective enforcement action against NAI and LN, alleging that they violated §§206(1) and 206(2) of the Investment Advisors Act of 1940 [15 U.S.C. §§80b-6(1) and (2)] ("§206 violation") by NAI supposedly falsely stating in its Vireo marketing material (brochures) that its Vireo investment strategies had been live traded for clients since 2001 and that the strategies were not "back-tested". NAI's subject two Vireo marketing materials made no such statements.

The SEC subsequently moved for summary judgment. It provided no evidence that what NAI's Vireo marketing actually said was false.

Petitioners opposed the SEC's summary judgment motion and presented evidence that the statements in NAI's marketing material were true. (Appendices K, L, M, N, S, T and U). Petitioners also presented evidence that the alleged misstatements were immaterial and that NAI's Vireo clients did not rely on the misrepresentation or invest with Navellier based on the alleged misrepresentation but rather, because of NAI's actual Vireo performance record. (Appendix O, pp.180a-181a)

The District Court granted the SEC's summary judgment motion. (Appendix G) It then awarded the SEC $29 Million in disgorgement, despite the fact that Petitioners presented undisputed evidence that NAI made $221 Million in profits for its Vireo clients. (Appendix Q) The Court also imposed $2.5 Million in third tier penalties ($2 Million against NAI and $500,000 against LN). The SEC then brought an SEC administrative proceeding based on the summary judgment seeking to bar Petitioners from being investment advisors. Petitioners appealed.

The First Circuit, after purported de novo review, affirmed the liability portion of the summary judgment, holding that the alleged misrepresentation and omission were material because whether performance was real or it was hypothetical, it was material. But in so holding, it improperly confused (melded together) NAI's disclosures about F-Squared's hypothetical performance for its index strategy *with* NAI's actual performance record for its live traded Vireo client accounts. In so holding, the First Circuit created both a nonexistent, single "AlphaSector strategy" and a nonexistent "AlphaSector performance record" neither of which were contained in NAI's Vireo marketing materials. The First Circuit held that Petitioners' [non-existent, imaginary] dissemination of that [non-existent] "AlphaSector strategy" and [nonexistent] "AlphaSector performance record" were materially false and therefore, constituted a §206 violation. (108 F.4th at 37-38)

The First Circuit improperly weighed the evidence. Petitioners presented evidence that the alleged false statement (that some unidentified investment advisor had live traded *his* investment strategy since 2001) was true, i.e., documentary evidence and admissions from Jay Morton, the originator of the strategy, had live traded his strategy going back to 2001. (Appendix L, M and N). Despite the evidence from Morton, the First Circuit refused to credit it, holding that "Appellants' argument that they presented evidence that the statement[s] were true, fails to raise a genuine dispute of material fact as to the statement's veracity." (108 F.4th at 36)

The First Circuit further improperly weighed the evidence and held that affirmative investor evidence of non-reliance (Appendix O, pp.180a-181a) did not defeat the court's summary judgment determination that the misrepresentation or omission were material.

The First Circuit held that the supposed misrepresentation was material, despite the fact that Petitioners produced affirmative, undisputed evidence from investor representatives that NAI clients did not rely on the marketing statement, that it was not important to them, that they did not care about the strategy's origin or another advisor's hypothetical performance but rather, what was important to them and the reason they became NAI Vireo clients was NAI's actual (real, not hypothetical) performance as set forth in its Vireo marketing material (Appendix T) because the "standard for materiality is thus not actual reliance and the SEC is not required to prove any investor actually relied on [Appellants'] misrepresentations".

The First Circuit also upheld the full disgorgement award refusing to follow *Govil* and held that "[n]either *Liu* or our case law, however, require investors to suffer pecuniary harm as a precondition to a disgorgement award." 108 F.4th at 41, n. 14

REASONS WHY THIS PETITION SHOULD BE GRANTED

1. There is a clear and irreconcilable conflict between the First Circuit and the Second Circuit on the crucial and recurring issue of whether federal courts have authority to award disgorgement for securities anti-fraud violations, including §206 violations, where the supposed "victim" investors suffer no pecuniary harm.

The First Circuit held here that federal courts are authorized to award disgorgement, under 15 U.S.C. §§78u(d)(5) and 78u(d)(7) and under *Liu*, even if the client "victim" suffers no pecuniary harm as a result of the investment advisor's securities law violation. (*SEC v. Navellier* 108 F.4th 19, 41, n. 14)

The Second Circuit holds the opposite, i.e., that the SEC cannot seek, and federal courts have no authority to award disgorgement if the investor client suffers no pecuniary harm. *SEC v Govil* supra 86 F.4th at 94, 98

The SEC almost universally seeks, and the federal courts routinely cross the bounds of equity to award, windfall disgorgement amounts to investors, far in excess of their pecuniary harm, if any. *Govil* 86 F.4th at 103, n. 14 and 15. Frequently, the SEC seeks and obtains huge disgorgement awards "for investors" it knows it cannot or will not locate and thus keeps those disgorged amounts. Unfortunately, disgorgement enforcement has become an SEC "cottage industry". In fiscal 2024 alone, the SEC obtained $6.1 Billion in disgorgement awards and it has 583 pending enforcement cases seeking disgorgement. There were 15,396 investment advisors managing $128.4 Trillion for their clients. That is a target-rich hunting ground for SEC improper disgorgement enforcement. (November 22, 2024 SEC Press Release No. 2024-186)

The First Circuit decision here is wrong. It sets an intolerable precedent. It will encourage the SEC to funnel its civil enforcement actions into the First Circuit, where it knows favorable precedent will allow it to obtain millions or billions of dollars in disgorgement from advisors whose clients have suffered no pecuniary harm. The SEC will forum shop to the First Circuit and other circuits that follow the First Circuit's precedent in order to obtain favorable disgorgement awards it could not obtain in the Second Circuit. Enforcement will be unequal. Liability will depend upon where the SEC elects to file its civil enforcement actions, rather than on the merits of the case, with vastly different disgorgement awards.

If the SEC had brought this case in New York rather than Boston, Petitioners rightly and equitably would have had to pay zero dollars in disgorgement instead of the $29 Million windfall disgorgement *penalty* amount for its Vireo clients who suffered no pecuniary harm and, in fact, received $221 Million in net profits from NAI's investment advice. That is an absurd construction of the law. It should be abrogated. Sections 206, 78u(d)(5) and 78u(d)(7) were not enacted to provide windfall disgorgement awards for investors who suffered no pecuniary harm.

This Court's intervention is needed to resolve the circuit conflict on this crucial and recurring disgorgement practice.

This Petition should also be granted to resolve the existing, subsidiary circuit conflict as to whether disgorgement under 15 U.S.C. §78u(d)(7) is "equitable" disgorgement or "legal" disgorgement. The Second Circuit in *Govil* held that disgorgement under §78u(d)(7) is a "belt and suspenders" *equitable* disgorgement remedy governed by the equitable limitations set forth by this Court in *Liu*. *Govil* supra 84 F.4th at 100.

In contrast, the Fifth Circuit in *SEC v. Hallam* 42 F.4th 316, — holds that §78u(d)(7) is a "legal" disgorgement remedy, unconstrained by equitable principles or the equitable limits placed on it by the Court's holding in *Liu*."

In the Fifth Circuit, the SEC can seek, and federal courts can award, "legal" disgorgement, as courts erroneously did prior to *Liu*, and can award it for investors who suffered no pecuniary harm. In the Second Circuit, the SEC cannot do so.

The Fifth Circuit is wrong, as the Second Circuit explained in *Govil* supra 86 F.4th at 100-102. The *Hallam* §78u(d)(7) decision creates the same forum-shopping, unequal, disparate treatment and disparate outcome problems as those that the First Circuit/Second Circuit conflict has created regarding disgorgement for investors who suffer no pecuniary harm.

2. This Petition should also be granted in order to abrogate or at least clarify this Court's decision in *TSC*. The current perceived standard for determining materiality established by *TSC Industries Inc. v. Northway Inc.* supra 426 U.S. 438 at 450 is unworkable and prejudicial to investment advisors. It sets no realistic standard at all by not requiring the SEC to prove investor reliance on the misrepresentation in order to establish materiality and by allowing judges by summary judgment to determine materiality, even if the investment advisor presents affirmative investor evidence of non-reliance. It is prejudicial by depriving investment advisors of the ability to fully defend themselves.

THIS COURT SHOULD GRANT THIS PETITION TO RESOLVE THE CIRCUIT CONFLICT AS TO WHETHER DISGORGEMENT CAN BE AWARDED BY FEDERAL COURTS FOR INVESTORS WHO HAVE SUFFERED NO PECUNIARY HARM AS A RESULT OF A VIOLATION OF THE ANTI-FRAUD PROVISIONS OF THE SECURITIES LAWS

The First Circuit in this case held, without significant analysis, and only based on pre-*Liu* disgorgement decisions (*CFTC v. JBW Corp.* 812 F.3rd 98 (1st. Cir. 2016) and *In re PHC, Inc* 894 F.3rd 419, 435 (1st. Cir. 2018)), that disgorgement can be awarded to investors who suffered no pecuniary harm. (108 F.4th 19, 41, n. 14) That holding conflicts with the Second Circuit's decision in *Govil* that the SEC cannot seek, and federal courts have no authority under §78u(d)(5) and §78u(d)(7), to award disgorgement for investors who have suffered no pecuniary harm.

A. Disgorgement Cannot Be Awarded Where The "Victim" Suffered No Pecuniary Harm.

The First Circuit's decision (108 F.4th at 41, n. 14)—that disgorgement can be awarded for investors who suffered no pecuniary harm—also conflicts with this Court's decision in *Liu v. SEC* 140 S. Ct. 1936, 1940 [that disgorgement can only be awarded for "victims"].

In *Liu*, this Court noted that disgorgement, as it developed in the courts prior to *Liu*, had "cross[ed] the bounds of traditional equity practice". *Liu* 140 S. Ct. at 1947; *Govil* supra at 99. So, this Court set limits on when disgorgement, as an equitable remedy for securities law violations, could be awarded, holding that it must only be awarded for "*victims*" (140 S. Ct. at 1940).

In *Liu*, this Court provided guiding principles for who is a "victim" for purposes of "equitable disgorgement". It held that a remedy like disgorgement resides in the "heartland" of equity when it "restores the status quo". *Liu* at 1943 (quoting *Tull v. United States* 481 U.S. 412, 424 (1987). Disgorgement that does not restore the status quo is not "equitable".

Govil further explains that if this Court's requirement that disgorgement must "be for the victim" and the term "victim" includes defrauded investors who suffered no pecuniary harm, thus allowing those investors to receive the proceeds of disgorgement—"we would not be restoring the status quo for those investors. We would be conferring a windfall on those who received the benefit of the bargain." *Govil* supra at 103.

That windfall is exactly what the First Circuit in this case improperly allowed. NAI's clients signed up for, and agreed to pay for, NAI's Vireo investment advice. They got exactly the investment advice they paid for *and* they received back all of the approximately $1.5 Billion in principal they put up for investment. They got back all of the $39 Million in advisory fees they paid NAI for its highly profitable (to them) investment advice. So, they were more than returned to the status quo ante. In addition, they received $221 Million in profits from NAI's investment advice. (8 JA 1890) They were not "victims", they were the beneficiaries of NAI's investment advice. To allow NAI's Vireo investors to keep the valuable investment advice they received from NAI for free and to reap the return of their investment advisory fees *and* keep $221 Million in profits—already a huge windfall—*plus* receive the Court ordered $29 Million disgorgement windfall, is not an equitable remedy—it is an inequitable, unauthorized *penalty*. *Govil* 865 F.4th at 103 and n.14, 106; *Kokesh v. SEC*, 137 S. Ct. 1637, 1643–44 (2017)

The First Circuit disregarded *Liu*'s requirement—that disgorgement be awarded only for "victims"—and focused instead only on the penal concept that it would be inequitable that a wrongdoer should make a profit on its own wrongful act. (108 F.4th at 41 citing *Liu* 591 U.S. at 79-80) But *Liu* limited that earlier penalty concept of disgorgement by holding that—while in the past, courts recognized that a wrongdoer should not profit by his own wrongdoing, there is the countervailing principle that the wrongdoer should not be punished by "pay[ing] more than fair compensation to the person wronged." (*Liu* supra at 80; *Govil* supra at 106) Thus, *Liu* precluded disgorgement in situations, like this, where it would result in paying *more* ($29 Million) than fair compensation to the persons wronged.

The First Circuit misconstrued *Liu* and rejected *Govil* by claiming that "[n]either *Liu* or our case law, however, require investors to suffer pecuniary harm as a precondition to a disgorgement award." (108 F.4th at 41, n. 14) That is simply wrong. *Liu does* require that disgorgement must be equitable and "remedial" and must be for "victims" to remedy their harm. If investors have suffered no pecuniary harm, they are not "victims" and therefore, disgorgement will not remedy their non-existent harm. To the contrary, it will punish the "wrongdoers" by requiring them to pay a windfall to clients that suffered no pecuniary harm and in fact profited. As this Court held in *Basic* supra 485 U.S. at 235, n. 11, it is not fraudulent to conduct business in a way that makes investors better off, citing *Flamm v. Eckerstadt* 814 F.2nd 1169, 1127 (7th Cir. 1987).

The First Circuit (108 F.4th 19, 41, n.14) further attempted to avoid the pecuniary harm requirement by asserting that "notwithstanding the fact that NAI Vireo AlphaSector clients profited from their investments, they were induced into paying advisory fees to NAI by Appellants' misrepresentations."[2] But NAI's clients received value for the investment advisory fees they paid. They received the valuable investment advice which NAI provided them. In any event, they received back all of their advisory fees, so they lost no advisory fees and incurred no pecuniary harm.

B. There Is Also a Conflict Between The Circuits as to Whether Disgorgement Under 78u(d)(7) Is "Equitable" Disgorgement

The Fifth Circuit in *SEC v. Hallam* 42 F.4th 316 at 341 held that disgorgement under §78u(d)(7) is "legal" disgorgement which is not restricted to the equitable principles set forth by this Court in *Liu*.

The Second Circuit in *Govil* (86 F.4th at 100-103) expressly disagreed with the Fifth Circuit holding in *Hallam*. In *Govil* the Second Circuit held that §78u(d)(7) is a "belt and suspenders" equitable disgorgement remedy governed by the equitable limits set forth in *Liu*.

2. There was no evidence that NAI clients were "induced" to become NAI clients or to pay advisory fees in reliance on the alleged misrepresentation. Indeed, the undisputed evidence was that they did not rely on the alleged misrepresentation but rather, became clients because of NAI's actual performance.

(86 F.4th at 100) ["if disgorgement is invalid under one [78u(d)(7)], it is invalid under the other ["78u(d)(5)"]]. *Govil* further holds that discouragement under §78u(d)(7) "must comport with traditional equitable limitations as recognized in *Liu v. SEC* 591 U.S. 71 . . . (2020)". 86 F.4th at 93 and 94.

The First Circuit also acknowledged that disgorgement is an equitable remedy under §78u(d)(7) (108 F.4th at 41) but refused to follow the Second Circuit's disgorgement analysis and held, at 108 F.4th at 41, n. 14, that "notwithstanding the fact that [NAI's] Vireo AlphaSector clients profited from their investments . . . " [Id], "[n]either *Liu* nor our case law however requires investors to suffer pecuniary harm as a precondition to a disgorgement award". (108 F.4th at 41, n. 14)

This Court should grant this Petition to resolve this circuit court split.

THE STANDARD IN *TSC INDUSTRIES, INC. V. NORTHWAY, INC.* 426 U.S. 438, 449 FOR DETERMINING MATERIALITY IN SEC CIVIL ENFORCEMENT SECURITIES ANTI-FRAUD CASES SHOULD BE ABROGATED OR CLARIFIED TO REQUIRE THAT INVESTOR RELIANCE IS THE KEY ELEMENT IN THE MATERIALITY DETERMINATION

This is a case of first impression in this Court, which has never considered the materiality requirement of §206 or whether investor reliance is an element of the materiality analysis in a §206 case.

For over 50 years, this Court and the lower courts have struggled to formulate a standard for determining whether a misrepresentation or omission is "material', as required for the SEC to establish a securities law violation, and whether investor reliance on that misrepresentation is an element in the materiality determination.

In *Affiliated Ute Citizens of Utah v. United States* 406 U.S. 128, 153-154, 92 S. 1456, 31 L. Ed.2nd 741 (1972), this Court stated that when the circumstances of that case involve primarily a failure of disclosure, "positive proof of reliance is not a prerequisite to recovery [under Rule 10b-5]. All that is necessary is that the facts withheld be *material* in the sense that a reasonable investor might have considered them important in making the [investment] decision.

In *TSC Industries, Inc. v. Northway, Inc.* 426 U.S. 438, 449, 96 S. Ct. 2125, 48 L. Ed.2nd 356 (1976), this Court held that—for purposes of a Rule 14a-9 proxy solicitation disclosure violation, a standard for determining if the information withheld was material is that the admitted fact is material if there is a substantial likelihood that a reasonable shareholder *would* have considered it important in deciding how to vote, i.e., that the omitted fact would have assumed *actual* significance in the deliberations of a reasonable shareholder. *Id.* at 449. Materiality is a mixed question of law and fact as to whether a reasonable investor would consider it important in deciding how to vote.

The Court explained that a requirement of a substantial likelihood that the misrepresentation *would* be considered important by the reasonable shareholder, as opposed to "might" be considered important, was imposed so that a cause of action could not be established based on a defect "so trivial or so unrelated to the transaction for which approval is sought that imposing liability would not further the interest protected."

Here, the purported misrepresentation about some unidentified investment advisor's investment strategy going back to 2001 was completely unrelated to the prospective Vireo investor's decision in 2010 to invest with NAI. NAI's actual statement was true. However, even if it were not true, it was completely irrelevant to prospective Vireo investors' investment decision. They were deciding whether to invest with NAI, not some unidentified investment advisor. Moreover, contrary to the First Circuit's confusion, NAI's Vireo marketing material clearly differentiated F-Squared's hypothetical performance record from NAI's actual, live-traded performance record. NAI's marketing material fully explained, in the Important Disclosures section, the "risks" inherent in hypothetical performance. However, those "risks" did not apply because NAI's Vireo strategies were live traded strategies with real life, accurate performance records.

The Court, in *TSC Industries* 426 U.S. at 447, n. 9, also further explained all that the holding in *Affiliated Ute* (that "positive proof of reliance is not a prerequisite to *recovery*") meant, was that all that is required is that the facts withheld be *material* in the sense that a reasonable investor "*might*" have considered them important, meaning that positive proof of reliance is unnecessary when materiality is established, but a precise definition of materiality had not been established, thereby indicating that the materiality standard was evolving and certainly did not preclude a reliance element.

In *SEC v. Capital Gains Research Bureau, Inc.* 375 U.S. 180, 193 n. 39, 84 S. Ct. 275, 11 L. Ed.2nd 237 (1963), the Court did not address the materiality issue directly, but in discussing whether intent to defraud was an element in establishing a breach of a fiduciary duty to disclose, the Court acknowledged that in establishing a §206 violation, it is only necessary that the investment advisor "intend [client] action in reliance on the truth of his misrepresentation."

In *Basic Inc. v. Levinson* 485 U.S. 224, 243-245, 108 S. Ct. 978, 99 L. Ed.2nd 194, the Court dealt with the requirement of proof of shareholder reliance on the misrepresentation, in the class action "fraud on the market" context, and held that a 10b-5 violation could be established by the plaintiff by a rebuttable presumption of reliance on the misrepresentation being baked into the price of the stock established by the market. However, any showing that severs the link between the alleged misrepresentation and the decision to trade [the security], will be sufficient to rebut the presumption of reliance. *Id.* at 248. The Court left for another day whether proof of reliance in a face-to-face misrepresentation case is required. Id. at 244. Mister Justice White, in his concurrence and dissent in *Basic, Inc.*, concurred in the majority's rejection of some lower courts' finding 10b-5 violations "notwithstanding proof that the plaintiff did not in any way *rely* on the [misrepresented] market price", i.e., that the 10b-5 reliance requirement must be capable of being rebutted by a showing that the plaintiff did not "rely" on the market price. *Id.* at 251.

The First Circuit, here, applied the purported *TSC* materiality standard and refused to consider Petitioners' affirmative investor evidence—that they did not rely on the alleged misrepresentations or any hypothetical performance but rather, relied solely on NAI's actual Vireo performance. (Appendix O, pp.180a-181a)

This Petition should be granted because the First Circuit's and other lower courts' construction and expansion of this Court's materiality standards in *TSC* and *Basic*—that a judge supposedly can decide by summary judgment, on conflicting evidence, that a misrepresentation or omission is material to an investor, even *without evidence* that the investor *actually* relied on the misrepresentation or omission, needs to be revisited and corrected to impose a reliance element to the materiality determination.

The current materiality standard is impermissibly prejudicial to investment advisors. By creating even the possibility that a judge (rather than a jury) can summarily decide materiality on disputed evidence without considering whether the investor actually relied on the misrepresentation or omission, subjects investment advisors to huge potential liability, without trial, for even a trivial misstatement or omission, even in the face of affirmative investor evidence that the misrepresentation was not relied on, all at the subjective (not objective) whim of a judge who has no real "standard" for materiality, other than his/her subjective opinion of what he/she thinks is "important" to the very investor whose opinion of materiality the judge is ignoring. Common sense dictates that evidence that an investor did not rely on or would not have relied on the alleged misrepresentation is compelling evidence the misrepresentation was not material. *Crocker–Citizens Nat. Bank v. Control Metals*

Corp. 566 F.2d. 631, 636, n. 3 (9th Cir. 1978); *Zweig v. Hearst Corp.* 594 F.2d. 1261, 1272 (9th Cir. 1979)

This case is an unfortunate example of why the materiality issue cannot be decided by summary judgment. Here, NAI presented evidence that the SEC had gathered in its investigations from interviewing Ken Zanonni, an independent investment advisor who had reviewed NAI's allegedly fraudulent marketing materials and still referred hundreds of his investment clients with over $100 Million in assets for NAI to manage according to its Vireo investment strategies. Mr. Zanonni testified to the SEC that he and his investor clients that he referred to NAI, did not care, in 2010 through 2013, about the statements that the SEC alleged were misleading. He testified that what was important to him and his clients was *NAI's actual, live-traded performance record* for its Vireo clients. The alleged misrepresentation and hypothetical F-Squared index performance was irrelevant, i.e., not material to them. (Appendix O, pp.180a-181a)

The First Circuit, in its "de novo" review, improperly weighed and then disregarded this crucial "non-reliance" evidence on the grounds that it could and that the SEC is not required to prove that any investor actually relied on the misrepresentation. (108 F.4th at 37)

The fact that the First Circuit here, and other lower courts, assert *TSC*'s supposed non-reliance standard is a compelling reason why this Petition should be granted. The *TSC* decision needs to be abrogated or at least clarified to make clear that investor reliance or non-reliance is a crucial factor that must be considered in determining the issue of materiality.

THIS COURT SHOULD GRANT THIS PETITION IN ORDER TO EXERCISE ITS SUPERVISORY POWER DUE TO THE FIRST CIRCUIT'S EXTREME DEPARTURE FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS.

Petitioners request that this Court grant certiorari to exercise its supervisory power, pursuant to Supreme Court Rule 10(a), because unfortunately, the First Circuit in this case has so far departed from the accepted and usual course of judicial proceedings, and has upheld the district court's erroneous departure, so as to require Petitioners to call for an exercise of this Court's supervisory powers.

Instead of deciding Petitioners' appeal on the facts and the law of *this case*, the First Circuit (108 F.4th at 35) impermissibly departed from long-established collateral estoppel law by *sua sponte* "deciding" this case (108 F.4th at 35) by collateral estoppel, based on another case, *SEC v. Present*. Petitioners were not parties to that case. They did not appear or participate in it, and it was not even part of the record in this case. *Hansberry v. Lee* 311 U.S. 32, 40 (1940); *Guzman-Ruiz v. Hernandez-Colon* 406 F.3rd 31, 36 (1st Cir. 2005); *United States v. Gary* 74 F.3rd 304, 313-314 (1st Cir. 1996); *Taylor v. Sturgell* 553 U.S. 880, 898-901, 128 S. Ct. 2161, 171 L. Ed. 2nd 153 (2008); *Richards v. Jefferson City* 517 U.S. 793,798 That was a manifest deprivation of Petitioners' rights to due process and a jury trial.

The First Circuit (108 F. 4th at 34-35) also mischaracterized NAI's *actual* marketing statement (Appendix T) and argument (Appendix T) and then held that it was "undisputed" that the marketing statement was false. (Id. at 34, n. 9)

The First Circuit then improperly inverted the SEC's burden of proof to establish that NAI''s actual marketing statement was false (*ZPR Inv. Mgmt., Inc. v. SEC* 861 F.3d 1239, 1247 (11th Cir. 2017) and instead, placed that burden on Petitioners to prove that the statement was true (108 F.4th at 36). (Appendix A, p.23a)

The Panel then disregarded the fact that the SEC had presented no admissible evidence that NAI's alleged false statement was false and then, incredibly, weighed and rejected NAI's undisputed evidence that proved NAI's marketing statement was true. (108 F.4th at 36) (Appendices K, M, N, and S)

The First Circuit then refused to follow this Court's decision in *Liu v. SEC*—that "disgorgement" can only be awarded for "victims" of a securities law violation—and the Second Circuit's decision in *Govil*, in order to uphold a $29 Million disgorgement award for NAI clients that received $221 Million in net profits from NAI's investment advice.

The First Circuit refused to adhere to this Court's *Liu* holding that—disgorged amounts must be causally connected to the misrepresentation—to uphold the disgorgement amounts for goodwill and fees for other strategies that were not derived from the alleged misrepresentation. 108 F.4th at 43-44.

The First Circuit upheld liability against Mr. Navellier, even though it was undisputed that he was not an investment advisor for any of the Vireo strategies or for any of the NAI Vireo clients. He did not create or disseminate or market the alleged misrepresentation.

(1 JA 155) He did not provide any investment advice to the alleged Vireo clients (2 JA 312) and did not receive compensation for any investment advice to those clients. *Belmont v. MB Inv. Partners, Inc.* 708 F.3d 470 (3d Cir. 2013)

The First Circuit upheld the SEC's persecution of Petitioners by denying Petitioners' clearly established selective enforcement defense. The SEC vindictively brought this enforcement action against NAI and LN, but not others identified by Petitioners, such as Wells Fargo Advisors, which disseminated marketing materials that contained *exactly the same allegedly "false" statement as the statement contained in NAI's marketing* materials. (4 JA 826)

In short, the First Circuit failed to adhere to the long-established law applicable to summary judgment by resolving all evidence and reasonable inferences in favor of the moving party, the SEC. *Celotex Corp. v. Catrett* 477 U.S. 317. The First Circuit failed to follow *Liu* regarding the limits on awarding disgorgement.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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DATED: March 3, 2025

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED JULY 16, 2024

United States Court of Appeals, First Circuit.

Nos. 20-1581, 21-1857, 22-1733, 23-1509

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff, Appellee,

v.

NAVELLIER & ASSOCIATES, INC.;
LOUIS NAVELLIER,

Defendants, Appellants.

Filed July 16, 2024

Before Kayatta, Lipez, and Gelpí, Circuit Judges.

OPINION

GELPÍ, Circuit Judge.

In 2017, the Securities and Exchange Commission ("SEC") brought suit against investment advisers Louis Navellier ("Navellier") and Navellier & Associates, Inc. ("NAI") (collectively, "Appellants"), alleging violations of sections 206(1) and 206(2) of the Investment Advisers Act ("Advisers Act"), 15 U.S.C. § 80b-6(1)-(2). After the United States District Court for the District of Massachusetts granted summary judgment in favor of the SEC and, inter alia, ordered disgorgement in an amount exceeding $22 million, Appellants appealed. They then moved the district court to stay pending appeal and to alter or amend its judgment, both of which the district court denied. Appellants appealed from this denial. Finally, Appellants appealed from the district court's denial of their motion to reduce the supersedeas bond. We consolidated the appeals and now affirm.

I. BACKGROUND

A. Statutory Background

The Advisers Act[1] "was the last in a series of Acts designed to eliminate certain abuses in the securities industry." *SEC* v. *Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 186, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963). In drafting the Advisers Act, Congress recognized that "the national public interest and the interest of investors are adversely affected ... when the business of investment advisers is so conducted as to defraud or mislead investors, or to enable such advisers to relieve themselves of their fiduciary obligations to their clients." *Investment Trusts and Investment Companies: Hearings Before a Subcomm. of the Comm. on Banking & Currency on S. 3580*, 76th Cong. 30 (1940). The Advisers Act thus "substitute[s] a philosophy of full disclosure for the philosophy of *caveat emptor*" and prescribes federal fiduciary standards for investment advisers. *Cap. Gains*, 375 U.S. at 186, 84 S.Ct. 275; *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 471 n.11, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977).

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1. Pub. L. No. 76-768, 54 Stat. 847 (1940) (codified as amended at 15 U.S.C. §§ 80b-1 to 80b-21).

At issue here are sections 206(1) and 206(2) of the Advisers Act. Section 206(1) makes it unlawful for an investment adviser "to employ any device, scheme, or artifice to defraud any client or prospective client." 15 U.S.C. § 80b-6(1). Section 206(2), in turn, prohibits an investment adviser from "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. § 80b-6(2).

B. Factual Background

We draw the following facts from the summary judgment record and present them in the light most favorable to Appellants. *See González-Piña* v. *Rodríguez*, 407 F.3d 425, 431 (1st Cir. 2005).

During the relevant time period, Navellier was the majority owner, Chief Investment Officer ("CIO"), and Chief Executive Officer ("CEO") of NAI, an SEC-registered investment advisory firm. As CIO and CEO, Navellier had authority, along with NAI's Board of Directors, to decide which investment strategies NAI offered its clients and to sell NAI's business lines. Navellier was also "responsible for [the] supervision of individuals providing investment advice to [NAI's] clients." At all relevant times, Navellier and NAI acted as "investment advisers" within the meaning of the Advisers Act.[2]

2. The Advisers Act defines "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses

Appendix A

1. SEC Communications with NAI

From 1999 to 2007, the SEC's Office of Compliance Inspections and Examinations ("OCIE") sent NAI three letters detailing compliance deficiencies in NAI's marketing materials. In 1999, OCIE's first letter informed NAI of its failure to adequately disclose that some of its marketed performance figures "d[id] not represent actual trading using client assets, but were achieved through a form of back-testing." As relevant to this action, "back-testing" is the process by which an investment strategy is retroactively applied to historical market data (the prices of underlying securities during a past time period) as if the strategy had actually been used to trade assets during that time period. Back-tested investment strategies thus generate *hypothetical* performance figures and benefit from hindsight. By contrast, "live" or "active" investment strategies are in fact used to trade assets, thus generating *actual* performance figures, and reflect "investment decisions [made] at the time of execution."

In 2003, OCIE's second letter again warned NAI of its failure to prominently disclose that some of its marketed, back-tested performance figures were "purely hypothetical and constructed based on the benefit of hindsight." Finally, in 2007, OCIE's third letter detailed similar compliance deficiencies. In this third letter, OCIE noted its "concern[] that NAI may not have taken [the previous letters] seriously," and stated that the SEC

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or reports concerning securities." 15 U.S.C. § 80b-2(a)(11). The Advisers Act defines "person" as "a natural person or a company." 15 U.S.C. § 80b-2(a)(16).

"views repeat violations as a serious matter and considers recidivist behavior when making a determination on whether to refer matters to the enforcement staff for possible further actions."

2. AlphaSector Strategy

In or around 2001, Jay Morton ("Morton"), at the time the principal owner of a wealth management firm, developed a "defensive, sector rotation investment strategy" meant to invest in exchange-traded funds ("ETFs").[3] The investment strategy was thereafter licensed by investment advisory firm Newfound Research LLC ("Newfound"). In 2008, investment advisory firm F-Squared Investments, Inc. ("F-Squared") licensed the strategy from Newfound and rebranded it as the "AlphaSector" strategy.

In October 2009, Peter Knapp ("Knapp"), NAI's General Counsel and Chief Compliance Officer, met with Howard Present ("Present"), President and CEO of F-Squared, to conduct due diligence on the AlphaSector strategy in connection with NAI potentially licensing and offering the strategy to their clients. Present claimed that the AlphaSector strategy was a live investment

3. An ETF "is a pooled investment security that can be bought and sold like an individual stock. ETFs can be structured to track anything from the price of a commodity to a large and diverse collection of securities." James Chen, *Exchange-Traded Fund (ETF): What It Is and How To Invest*, Investopedia, https://www.investopedia.com/terms/e/etf.asp [https://perma.cc/9PAS-U99V] (last updated May 23, 2024).

strategy. Specifically, Present told Knapp that, from 2001 to 2008, a wealth management firm had used the AlphaSector strategy to manage real client accounts and trade actual assets, and that the strategy's performance figures were based on those trades. However, when Knapp asked Present for the trade confirmations that would support Present's claim, Present responded that a confidentiality agreement prevented him from disclosing that information.

While Present did not provide Knapp with the trade confirmations, Present did provide other information regarding the origin, methodology, and performance of the AlphaSector strategy. First, Present provided Knapp with "a spreadsheet that showed all of the 'trades' conducted" based on the AlphaSector strategy from 2001 to 2008. Second, Present emailed Knapp a letter from index performance calculation firm NASDAQ OMX Group, Inc. ("NASDAQ"). The letter explained that, in September 2008, NASDAQ "began the process of converting [the AlphaSector] live investment strategy to a daily valued, public index"[4] named the "AlphaSector Rotation Index." On October 13, 2008, NASDAQ "began publishing and disseminating the [AlphaSector Rotation] Index value[s] on a daily basis." The letter noted that NASDAQ had calculated those values based on data provided by F-Squared, which F-Squared had "indicated to represent live[] ... investment decisions." NASDAQ, however, did not disseminate any AlphaSector Rotation "Index values prior to October 13, 2008."

4. As relevant to this action, an index reflects the performance track record of an investment strategy.

Notwithstanding the spreadsheet and NASDAQ letter, Knapp later testified that Present "could[] [not] produce anything to" verify his claim that the AlphaSector strategy had been used to manage real client accounts and trade actual assets from 2001 to 2008. Furthermore, Knapp and Arjen Kuyper ("Kuyper"), NAI's President, testified that because NASDAQ did not disseminate any AlphaSector Rotation Index values prior to 2008, NASDAQ could not verify the AlphaSector strategy's performance figures prior to 2008.

On October 5, 2009, Knapp prepared an executive summary of his due diligence on the AlphaSector strategy. There, Knapp stated that "[t]he AlphaSector trading system was originally developed and used by a large wealth management group" and that "[t]here is a confidentiality agreement that prevents [F-Squared] from divulging who they are." Knapp further stated that F-Squared "flat out [would not] show the math to" him, "which would knock [F-Squared] out of contention but for" the fact that "[F-Squared] began reporting the holdings/trades to NASDAQ, which ... used the data to calculate and publish [the AlphaSector Rotation Index's] performance[] since October 2008." This, according to Knapp, "add[ed] to the legitimacy of the analytical system."

Shortly thereafter, Knapp met with Navellier and discussed his executive summary with him. Knapp later testified that, during this meeting, "[i]t would have come up that [Knapp] couldn't verify" the AlphaSector strategy's performance figures from 2001 to 2008. Knapp recommended to Navellier that NAI license the AlphaSector strategy from F-Squared. Navellier agreed.

On or around October 19, 2009, NAI and F-Squared entered into a Model Manager Agreement whereby NAI licensed the AlphaSector strategy from F-Squared. Pursuant to the agreement, F-Squared would periodically send NAI trading signals indicating which ETFs to purchase and which to sell based on the AlphaSector strategy. NAI rebranded the strategy and offered it to its clients under NAI's new, separate "Vireo AlphaSector" brand.

3. Internal Communications

On April 6, 2011, Navellier emailed NAI employees, expressing concern over the lack of support for the AlphaSector strategy's performance track record. Navellier wrote:

> What is so frustrating about [F-Squared] and Vireo is the ongoing lies. ... I was told the numbers were GIPS[5] verified. Lie .... I was told that we had all the trade confirm[ations]. Lie .... I am now told that we just have a spreadsheet. Any idiot can make up numbers on a spreadsheet! ... Obviously, I have to distance myself from [F-Squared] when it blows up and am still trying to figure out how to reduce [NAI's] liability, since when the lies become evident, we are out of business ....

5. "GIPS" are the Global Investment Performance Standards.

Knapp responded, emailing Navellier "the [e]xecutive [s]ummary [that Knapp] prepared that ha[d] the representations made to [Navellier] regarding F-Squared." Later that day, Navellier emailed Knapp, writing:

> I went to get the [trade] confirm[ations] yesterday to see the [wealth management] firm that built the record and I was told that there were no [trade] confirm[ations], just a spreadsheet. I was shocked. Any idiot can send in a bogus spreadsheet! That is not due diligence, that is stupidity. ... We have always been transparent to consulting groups, but now we suddenly smell like rotting fish! ... [Present] is not transparent .... I have no idea how to avoid liability on this fiasco. At least no one has lost money yet, but come the next market downturn, we could be out of business.

Navellier then emailed Kuyper, stating that "[t]he SEC [was] going to love this." The next week, on April 12, 2011, Navellier emailed NAI employee Jane Hunt ("Hunt") and instructed her to "take 'Navellier' off of as many [Vireo AlphaSector] documents [as she could], such as Advisory Agreements, the Web Site, etc."

The following month, Navellier again emailed NAI employees, stating that "[u]nless somebody show[ed] [him] the [trade] confirm[ations], [F-Squared] [was] merely a model and [Navellier would] protect[NAI] from potential fraud, so [NAI employees] must not talk about [F-Squared] as being base[d] on real [money] since 2001."

Navellier, however, stated that he would not stop Vireo AlphaSector sales and would direct "tough questions" to Knapp.

On August 11, 2011, in another email to NAI employees, Navellier stated that the "[F-Squared system] ... continue[d] to smell like pure FRAUD" and that he could not explain "why [Present was] clueless about basic statistics." Navellier further stated that while "Vireo was a good idea," NAI "sold the wrong product that continues to smell like FRAUD." Navellier suggested that, in light of the situation, NAI could "try to sell" the Vireo AlphaSector business. On August 25, 2011, Navellier emailed John Ranft ("Ranft"), NAI's Director of Marketing, stating:

> After Vireo is sold, you can run wild and do whatever you want, but I am not going to be convicted for fraud, so we need some serious disclosure[s] .... Having indices that cannot be found or daily pricing smells to high heaven. So until [F-Squared] can be transparent and ... allow the validation of their claims, I will continue to believe that the original Alpha Sector Premium Model ... is just made up and pure FRAUD.

4. Marketing Materials

Meanwhile, NAI distributed NAI-created Vireo AlphaSector marketing materials to current and prospective clients. From August 2011 to November 2011, NAI distributed Vireo AlphaSector presentations that stated that the AlphaSector strategy had an inception date of April 1, 2001 (defined as the date in which "[l]ive assets began tracking" the strategy), described the AlphaSector strategy as an "active" one, and noted that the strategy's returns, going back to 2001, were "not back-tested."

In 2012, NAI continued to distribute Vireo AlphaSector marketing materials containing these statements. For example, in March 2012, NAI sent a Vireo AlphaSector presentation to a Wells Fargo Advisors ("WFA") representative. At the time, WFA advertised the Vireo AlphaSector strategy to its clients. The presentation still stated that "[l]ive assets began tracking" the AlphaSector strategy on April 1, 2001. In June 2012, NAI sent Vireo AlphaSector "commentary" to another WFA representative. The commentary again described the AlphaSector strategy as an "active" one with an inception date of April 1, 2001, and stated that the strategy's returns, going back to 2001, were not back-tested. WFA provided its clients with these marketing materials.

5. Sale of the Vireo AlphaSector Business to F-Squared

On March 15, 2013, NAI and F-Squared executed a letter of intent setting forth the terms of F-Squared's proposed offer to purchase NAI's "Vireo strategies and associated client accounts." According to the letter, the purchase price would be $14 million, "payable in cash at closing, assuming [that there were] at least $1.1 billion in revenue generating client assets transfers at [the] time of closing."

On April 20, 2013, Navellier emailed NAI employees and notified them of the impending sale of the Vireo AlphaSector business to F-Squared. In the email, Navellier stated that "[t]he catalyst for the [sale] ... [was] that F-Squared refuse[d] to stop circulating its fake 10+ year [AlphaSector] indices before the ETFs actually commenced on May 10, 2007." Navellier further stated that NAI was "tipped off to F-Squared's fraud by an ex-SEC enforcement officer, so [NAI] ha[d] no other choice other than to clean up th[e] mess" in light of the "obvious fraud." Navellier described the situation as "a massive due diligence failure" and noted that NAI was at risk of a $225,000 fine "for creating indices before the actual securities existed, due to F-Squared flooding the broker/advisor market with its fake 10+ year performance record" that "[could not] be documented."

On August 7, 2013, NAI and F-Squared entered into an Assignment and Asset Purchase Agreement whereby NAI agreed to sell the Vireo AlphaSector business to F-Squared for $14 million. The next day, NAI sent a letter to its clients announcing that NAI and F-Squared had entered into an agreement whereby F-Squared "plan[ned] to purchase from [NAI] the client accounts and associated investment advisory agreements invested within the Vireo[] AlphaSector[] suite of strategies." The letter stated that, upon completion of the sale, "there should be no material change in investment decision-making or investment objectives of client accounts." The letter went further, stating that "the only material change for clients [would be] that the strategy names [would] change from the Vireo AlphaSector strategies to the F-Squared

AlphaSector strategies." The letter did not indicate any reason for the sale.

In September 2013, NAI sold the Vireo AlphaSector business to F-Squared for $14 million. Almost all Vireo AlphaSector clients consented to the sale and continued investing in the AlphaSector strategy with F-Squared. Appellants do not dispute that at no time before or after the sale did they inform their clients of the reason for the sale or of Appellants' lack of support for the statements in their Vireo AlphaSector marketing materials.

6. SEC Investigation

In or around October 2013, the SEC began investigating F-Squared. As part of that investigation, the SEC served investigative subpoenas on NAI and other investment advisory firms that had licensed or marketed AlphaSector products. In December 2014, the SEC brought an enforcement action against F-Squared, which later settled. The SEC also brought a civil action against Present, which did not settle. The SEC litigated its case against Present, won a jury verdict, and obtained an injunction against Present.

The SEC brought enforcement actions against twenty other investment advisers, including NAI and Navellier, in connection with the dissemination of marketing materials relating to the AlphaSector strategy. Of those investment advisers, only NAI and Navellier did not settle with the SEC.

C. Procedural Background

On August 31, 2017, the SEC brought suit against Appellants in the United States District Court for the District of Massachusetts. Count I alleged that Appellants had violated section 206(1) of the Advisers Act by making "materially false and misleading statements and omissions to their investment advisory clients" and engaging "in a scheme to defraud those clients by concealing material information regarding the performance track record of the investment strategies they offered." Count II alleged that Appellants had similarly violated section 206(2) of the Advisers Act. Count III alleged that, in the alternative, Navellier had aided and abetted NAI's violations of sections 206(1) and 206(2) of the Advisers Act. Finally, Count IV alleged that NAI violated section 206(4)[6] of the Advisers Act. The SEC sought permanent injunctions, disgorgement, and civil monetary penalties against Appellants. Appellants answered the SEC's complaint, denying the allegations therein and asserting affirmative defenses, including a selective enforcement defense.

On August 12, 2019, the SEC moved for partial summary judgment on Count I, Count II, and Appellants' selective enforcement defense. Appellants cross-moved for summary judgment on all counts and on their selective enforcement defense.

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6. Section 206(4) of the Advisers Act makes it unlawful for an investment adviser "to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." 15 U.S.C. § 80b-6(4).

On February 13, 2020, after holding a hearing on the motions, the district court denied Appellants' motion for summary judgment and granted the SEC's partial motion for summary judgment as to Count I, Count II, and Appellants' selective enforcement defense. As to Counts I and II, the district court concluded that Appellants had violated sections 206(1) and 206(2) of the Advisers Act. As to Appellants' selective enforcement defense, the district court first determined that Appellants alleged two types of equal protection claims: a claim of selective enforcement and a class of one claim. The district court then concluded that both claims failed.[7]

On March 12, 2020, Appellants moved the district court to reconsider its grant of partial summary judgment in favor of the SEC. The district court denied Appellants' motion for reconsideration.

On June 2, 2020, the district court entered its final judgment. Therein, the district court (1) permanently enjoined Appellants from violating sections 206(1) and 206(2) of the Advisers Act; (2) held Appellants jointly and severally liable for disgorgement in the amount of $28,964,571 plus prejudgment interest of $6,513,619; and (3) ordered NAI and Navellier to respectively pay civil penalties of $2 million and $500,000. On June 12, 2020, the SEC instituted administrative proceedings against Appellants. Appellants timely appealed from the district court's grant of partial summary judgment

7. On March 25, 2020, the SEC moved to dismiss, with Appellants' consent, Counts III and IV. The district court granted the motion. Counts III and IV are not at issue here.

in favor of the SEC, denial of reconsideration, and final judgment.

On June 22, 2020, the Supreme Court decided *Liu* v. *SEC*, 591 U.S. 71, 140 S.Ct. 1936, 207 L.Ed.2d 401 (2020). There, the Court held that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under" the Securities Exchange Act of 1934 ("Exchange Act").[8] *Id.* at 75, 140 S.Ct. 1936. The Court also instructed district courts to "deduct legitimate expenses before ordering disgorgement." *Id.* at 91-92, 140 S.Ct. 1936.

On August 20, 2020, we granted the SEC's motion for a limited remand to allow the district court to make additional factual findings and conclusions of law regarding the disgorgement award in light of *Liu*. On September 21, 2021, the district court entered its amended final judgment, lowering the disgorgement amount to $22,734,487 with prejudgment interest of $6,635,403, along with amended disgorgement findings of fact and conclusions of law. Appellants timely appealed from the district court's amended final judgment.

On October 13, 2021, Appellants moved to stay enforcement of the amended final judgment pending their appeals (and to thus stay the SEC's administrative proceedings) and to reduce the supersedeas bond. On October 19, 2021, Appellants moved the district court to

8. Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78rr).

alter or amend its amended final judgment. On September 13, 2022, the district court denied both motions. Appellants timely appealed from the district court's denial of both motions.

On October 7, 2022, Appellants renewed their motion to reduce the supersedeas bond, which the district court again denied. Appellants timely appealed from the district court's denial of their renewed motion to reduce the supersedeas bond.

On November 22, 2022, Appellants moved this court to stay the SEC's administrative proceedings pending their appeals. We denied the motion on December 23, 2022. On August 7, 2023, we consolidated the four appeals.

II. DISCUSSION

A. Sections 206(1) and 206(2) of the Advisers Act

We begin with Appellants' challenge to the district court's grant of summary judgment in favor of the SEC as to Counts I and II. To the extent Appellants also appeal the district court's denial of their cross-motion for summary judgment on the same claims, we address those arguments as well.

We review the district court's grant of summary judgment de novo. *Ferrari* v. *Vitamin Shoppe Indus. LLC*, 70 F.4th 64, 69 (1st Cir. 2023). In conducting this review, we construe the record in the light most favorable to the non–moving party and draw all reasonable inferences in their favor. *Id.* We need not, however, "credit 'conclusory allegations, improbable inferences, and unsupported speculation.'" *Dixon-Tribou* v. *McDonough*, 86 F.4th 453, 458 (1st Cir. 2023) (quoting *Lahens* v. *AT&T Mobility P.R., Inc.*, 28 F.4th 325, 333 (1st Cir. 2022)).

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This standard "remains the same when the district court is faced with cross-motions for summary judgment." *Dixon-Tribou*, 86 F.4th at 458. We "may affirm a district court decision on any ground supported by the record." *P.R. Ports Auth.* v. *Umpierre-Solares*, 456 F.3d 220, 224 (1st Cir. 2006).

Section 206(1) of the Advisers Act makes it unlawful for an investment adviser "to employ any device, scheme, or artifice to defraud any client or prospective client." 15 U.S.C. § 80b-6(1). Section 206(2) prohibits an investment adviser from "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. § 80b-6(2). To establish a violation, "each of these sections requires the SEC to show the investment adviser made a material misrepresentation with a culpable mental state." *ZPR Inv. Mgmt. Inc.* v. *SEC*, 861 F.3d 1239, 1247 (11th Cir. 2017). We address each element in turn.

1. Misrepresentations

Appellants do not dispute that their Vireo AlphaSector marketing materials stated that the AlphaSector strategy had an inception date of April 1, 2001, that the strategy was an "active" one, and that the strategy's returns were not back-tested.[9] Appellants, however, contend that the SEC did not prove that these statements were false.

The Supreme Court has emphasized that "[t]o impose upon the [SEC] the burden of showing deliberate dishonesty as a condition precedent to protecting investors through the prophylaxis of disclosure would effectively nullify the protective purposes of the statute." *Cap. Gains*, 375 U.S. at 200, 84 S.Ct. 275. Consistent with this, we have made clear that section 206 "includes an obligation to provide 'full and fair disclosure of all material facts' to investors" and "to employ reasonable care to avoid misleading" current and prospective clients. *SEC* v. *Tambone*, 550 F.3d 106, 146 (1st Cir. 2008) (quoting *Cap. Gains*, 375 U.S. at 194, 84 S.Ct. 275). It follows that section 206 "prohibits failures to disclose material information, not just affirmative frauds." *SEC* v. *Wash. Inv. Network*, 475 F.3d 392, 404 (D.C. Cir. 2007).

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9. After Appellants conceded having made these statements in their opening brief, Appellants argued, for the first time in their reply brief, that what "NAI *actually* said and did was to provide a two-page performance chart and disclosure stating correctly that its Vireo AlphaSector Premium live-traded strategy began in '2010' and provided its live-traded performance track record of a 13.18% increase through December 31, 2010." The record, however, confirms that Appellants made the relevant statements, and Appellants have waived any argument to the contrary. *See United States* v. *Evans-Garcia*, 322 F.3d 110, 114 (1st Cir. 2003) ("Arguments raised for the first time in reply briefs are generally deemed waived.").

Here, the undisputed facts establish that the relevant statements were false and therefore misrepresentations within the scope of section 206. As early as October 2009, Knapp knew that Present would not disclose the trade confirmations that would verify his claims about the AlphaSector strategy's performance figures from 2001 to 2008. Navellier was similarly on notice that F-Squared "flat out [would not] show the math to" Knapp. Indeed, F-Squared later admitted in an administrative proceeding that it "did not create AlphaSector until late 2008" and that the claim that the AlphaSector strategy "had been used to manage client assets from April 2001 to September 2008" was "materially false." And, in 2017, a jury found that Present's misrepresentations as to the history of the AlphaSector strategy violated the Advisers Act. *See SEC* v. *Present*, No. 14-cv-14692, 2018 WL 1701972, at *1 (D. Mass. Mar. 20, 2018).

From April 2011 to August 2011, in a series of internal emails with NAI employees,[10] Navellier expressed

10. Appellants contend that the district court "impermissibly did not consider" the context of Navellier's internal emails with NAI employees. According to Appellants, these "internal email accusations were unsupported fabrications, made by [Navellier] in an effort to coerce and scare NAI's marketers to stop marketing Vireo, and focus instead on marketing [Navellier's] personally created investment strategies." Appellants thus argue that the emails were a product of Navellier's "jealous[y] of Howard Present and his success." The record, however, which evidences Appellants' lack of support for the relevant statements, belies Appellants' post hoc rationalization of these emails. Appellants' characterization of the emails is thus insufficient to create a genuine issue of material fact. *See Triangle Trading Co.* v. *Robroy Indus.*, 200 F.3d 1, 2 (1st

concern over having "no [trade] confirm[ations], just a spreadsheet," to support Present's claims about the AlphaSector strategy and its performance. More than once, Navellier acknowledged the liability that could stem from NAI's lack of support for these claims. Navellier emphasized that the Vireo AlphaSector business "smell[ed] like FRAUD, especially since no one [could] find" trade confirmations for the AlphaSector strategy's performance. Navellier even warned NAI employees "not [to] talk about [the AlphaSector strategy] as being base[d] on real [money] since 2001."

Nevertheless, from 2011 to 2012, NAI created and distributed Vireo AlphaSector marketing materials that restated Present's false claims. Specifically, the marketing materials claimed that the AlphaSector strategy had an inception date of April 1, 2001, that the strategy was an "active" one, and that the strategy's performance figures, all the way back to 2001, were "not back-tested." NAI, however, remained unable to corroborate these statements. Indeed, in their answer to the SEC's complaint, Appellants admitted that they "lack[ed] knowledge or information sufficient to admit or deny ... that [the] statements" in their Vireo AlphaSector marketing materials were false.

Instead of modifying or stopping the distribution of the relevant statements, Navellier ordered Hunt to "take 'Navellier' off of as many [Vireo AlphaSector] documents [as she could], such as Advisory Agreements, the Web Site,

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Cir. 1999) ("Conclusory allegations, improbable inferences, and unsupported speculation, are insufficient to establish a genuine dispute of fact.") (internal quotation marks and alteration omitted).

etc." Instead of halting Vireo AlphaSector sales, Navellier declared that he would "not stop[] Vireo sales" and would direct "tough questions to [Knapp]." Instead of informing clients of the lack of support for the statements, Navellier sold the Vireo AlphaSector business to F-Squared and told clients that "there should be no material change in investment decision-making or investment objectives of client accounts."

Appellants' argument that they presented "evidence that the statement[s] [were] true" fails to raise a genuine dispute of material fact as to the statements' veracity.[11] First, Appellants point to Morton's assurances to Present that he began applying the sector rotation strategy to actual assets in April 2001. But while the assurances Appellants received about the AlphaSector strategy may be relevant to what Appellants knew about the strategy's performance, they do not actually prove the strategy had been live traded since 2001. Second, Appellants contend that the NASDAQ letter "reasonably confirmed" that the AlphaSector strategy had been used to manage real assets since 2001. The letter, however, states only that NASDAQ "calculated historical values of the Index back to the inception date as defined by F-Squared," and that

11. The Supreme Court rejected a similar argument in *Capital Gains*, which interpreted the reach of section 206. 375 U.S. at 200, 84 S.Ct. 275. There, the respondents argued that "their advice was 'honest' in the sense that they believed it was sound." *Id.* The Court characterized this argument as "another way of putting the rejected argument that the elements of technical common-law fraud -- particularly intent -- must be established before an injunction requiring disclosure may be ordered." *Id.*

NASDAQ relied upon data provided by F-Squared, which F-Squared "indicated to represent live[] ... investment decisions." NASDAQ itself never independently verified the claim that the AlphaSector strategy had been live traded since 2001. Indeed, Knapp and Kuyper testified that, even with the NASDAQ letter, NAI remained unable to verify the strategy's performance figures prior to 2008. Appellants' inability to point to any direct evidence supporting their claims as to the AlphaSector strategy – evidence they have every incentive to produce in this litigation – is telling.

For the foregoing reasons, we conclude that there remains no genuine dispute of material fact as to whether the relevant statements were misrepresentations within the scope of sections 206(1) and 206(2) of the Advisers Act.

2. Materiality

Next, Appellants argue that either the relevant statements were not material or that materiality is a question for the jury that cannot be resolved on a motion for summary judgment. Appellants rely on (1) an SEC witness's testimony that "for purposes of coming to [a] settlement[,]" "the older [a] track record gets, the less important it is"; (2) an investment adviser's testimony that, when advising clients to invest in Vireo AlphaSector strategies, he "[f]ocused on how [the strategies] would behave going forward" and "[did not] care about [back-testing]"; and (3) Ranft's testimony that "[i]t was [his] understanding ... that the reason [investors] remained NAI Vireo clients was the actual performance they received."

Appellants misconstrue the materiality requirement. Omissions are material "if there is a *substantial likelihood* that a *reasonable investor* would consider [them] important in" making an investment decision. *SEC* v. *Fife*, 311 F.3d 1, 9 (1st Cir. 2002) (emphasis added) (citing *Basic* v. *Levinson*, 485 U.S. 224, 231-32, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988)). The standard for materiality is thus not actual reliance and "the SEC [is] not required to prove that any investor actually relied on [Appellants'] misrepresentations." *SEC* v. *World Tree Fin., L.L.C.*, 43 F.4th 448, 465 (5th Cir. 2022); *Wash. Inv. Network*, 475 F.3d at 405 ("To obtain an injunction under section 206 against fraudulent conduct, the SEC does not need to prove reliance on the investment adviser's misleading statements, nor does the SEC need to prove injury." (citing *Cap. Gains*, 375 U.S. at 192-93, 195, 84 S.Ct. 275)). If the "established omissions are 'so obviously important to an investor, that reasonable minds cannot differ on the question of materiality[,]' ... the ultimate issue of materiality [is] appropriately resolved 'as a matter of law' by summary judgment." *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 450, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976) (quoting *Johns Hopkins Univ.* v. *Hutton*, 422 F.2d 1124, 1129 (4th Cir. 1970)). Such is the case here.

The established omissions here are obviously important to an investor because whether the AlphaSector strategy's performance figures are back-tested or based on actual trades speaks to the potential risk that an investor will take if they decide to invest in the strategy. As opposed to active strategies and performance figures generated by actual trades, back-testing generates only hypothetical performance figures, benefits from hindsight, and involves "the corresponding ability to manipulate [data] to obtain attractive returns." A reasonable investor, in deciding whether to invest in the Vireo AlphaSector strategy, would thus consider Appellants' omissions, that they were unable to corroborate that the strategy was an "active" one and its performance returns not back-tested, obviously important. The disclosure of these omissions "would obviously change the perceived" risk of investing in the strategy "to a reasonable investor." *See SEC* v. *Bauer*, 723 F.3d 758, 773 (7th Cir. 2013). In other words, the "omissions were material because a reasonable investor would want to know the risks involved" in their investment. *Fife*, 311 F.3d at 10.

Neither does any of Appellants' proffered evidence raise a genuine question of fact as to the materiality of the misstatements. The SEC witness's testimony speaks only to how the SEC itself weighs misstatements about an investment strategy's track record when formulating a proposed settlement offer, and not how investors would use the same information when making an investment decision. Similarly, Ranft's testimony goes only to whether the misstatements motivated investors to remain NAI Vireo AlphaSector clients, not whether it encouraged them to sign up for Vireo in the first place. And the investment adviser's testimony describes how he presented the information about Vireo AlphaSector to potential clients, not how those potential clients themselves considered the statements at issue when choosing to put their money in Vireo.

The record provides further support for the conclusion that Appellants' omissions were material as a matter of law. First, on three different occasions prior to NAI's distribution of the relevant statements, OCIE flagged NAI's failure to adequately disclose performance figures as back-tested, explaining and alerting NAI to the importance of this disclosure. Second, Navellier himself acknowledged the importance of this disclosure not only by repeatedly referencing the liability that could stem from NAI's unsupported claims but also by directing NAI employees "not [to] talk about [F-Squared] as being base[d] on real [money] since 2001." *See SEC* v. *Mayhew*, 121 F.3d 44, 52 (2d Cir. 1997) ("[A] major factor in determining whether information was material is the importance attached to it by those who knew about it.").

Because Appellants' omissions "are 'so obviously important to an investor[] that reasonable minds cannot differ on the question of materiality' ... the ultimate issue of materiality [is] appropriately resolved [here] 'as a matter of law' by summary judgment." *TSC Indus., Inc.*, 426 U.S. at 450, 96 S.Ct. 2126 (quoting *Johns Hopkins Univ.*, 422 F.2d at 1129).

3. Culpable Mental State

While the misrepresentation and materiality elements are the same for sections 206(1) and 206(2) of the Advisers Act, the requisite mental state differs. *See ZPR Inv. Mgmt. Inc.*, 861 F.3d at 1247. Section 206(1) "requires the SEC to show the adviser acted with scienter." *Id.* Section 206(2), on the other hand, "require[s] no showing of scienter, and a showing of negligence is sufficient." *Id.*

a. Scienter

As to scienter, Appellants argue that summary judgment was improper because a reasonable jury could find that they did not intend to defraud current or prospective clients.[12] This argument fails.

Proving scienter requires "a showing of either conscious intent to defraud or 'a high degree of recklessness.'" *ACA Fin. Guar. Corp.* v. *Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008) (quoting *Aldridge* v. *A.T. Cross Corp.*, 284 F.3d 72, 82 (1st Cir. 2002)). "Recklessness is 'a highly unreasonable omission, involving not merely simple, or even inexcusable [] negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious the actor must have been aware of it.'" *Fife*, 311 F.3d at 9–10 (alteration in original) (quoting *Greebel* v. *FTP Software, Inc.*, 194 F.3d 185, 198 (1st Cir. 1999)). "As this court has observed, a

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12. Appellants further argue that the district court improperly considered "NAI's work product/attorney-client privileged communications" with ACA Compliance Group ("ACA"), a consulting firm "hired at the behest of NAI's attorney to assist him in providing legal advice to [Appellants] in anticipation of possible litigation with the SEC." Even assuming arguendo that the district court improperly considered the communications, any such error is harmless as our de novo review does not rely on the communications. *See Dusel* v. *Factory Mut. Ins. Co.*, 52 F.4th 495, 512 (1st Cir. 2022).

defendant's publication of statements when that defendant 'knew facts suggesting the statements were inaccurate or misleadingly incomplete is classic evidence of scienter.'" *SEC* v. *Johnston*, 986 F.3d 63, 74 (1st Cir. 2021) (quoting *Aldridge*, 284 F.3d at 83).

As per our analysis of the misrepresentation and materiality requirements, Appellants' omissions were not only material but an extreme departure from the standards of ordinary care. Furthermore, as evidenced by OCIE's communications with NAI as well as Navellier's internal emails with NAI employees, the misrepresentations presented a danger of misleading current and prospective clients that was known to Appellants when they distributed the relevant statements. The record thus establishes that Appellants acted with a high degree of recklessness, thus acting with scienter.

b. Negligence

"[T]he negligence required by [section] 206(2) is a less demanding standard than scienter ...." *SEC* v. *Cutter Fin. Grp., LLC*, No. 23-cv-10589, 2023 WL 8653927, at *6 (D. Mass. Dec. 14, 2023). Here, the SEC has proved that Appellants were negligent "by failing to 'employ reasonable care to avoid misleading [their] clients.'" *SEC* v. *Duncan*, No. 3:19-cv-11735, 2021 WL 4197386, at *15 (D. Mass. Sept. 15, 2021) (quoting *Cap. Gains*, 375 U.S. at 194, 84 S.Ct. 275).

For the foregoing reasons, we conclude that there remains no genuine dispute of material fact as to any element of the alleged violations of sections 206(1) and 206(2) of the Advisers Act. We thus affirm the district court's grant of summary judgment in favor of the SEC as to Counts I and II.

B. Affirmative Defense

We turn to Appellants' challenge to the district court's grant of summary judgment in favor of the SEC as to Appellants' selective enforcement defense. The district court determined, and neither party disputes, that Appellants alleged (1) a claim of selective enforcement and (2) a class of one claim. We take each claim in turn.

1. Selective Enforcement

To establish a claim of selective enforcement under the Equal Protection Clause, Appellants must establish that "(1) [they], compared with others similarly situated, [were] selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Rubinovitz* v. *Rogato*, 60 F.3d 906, 910 (1st Cir. 1995) (quoting *Yerardi's Moody St. Rest. & Lounge, Inc.* v. *Bd. of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989)).

a. "Similarly Situated" Element

Appellants argue that they were similarly situated to investment advisory firms WFA and Beaumont Financial

Partners ("Beaumont") because both WFA and Beaumont disseminated the relevant statements to their clients, yet the SEC took no enforcement action against them. We are unpersuaded.

"[T]he standard 'is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.'" *Mulero-Carrillo* v. *Román-Hernández*, 790 F.3d 99, 106 (1st Cir. 2015) (quoting *Barrington Cove Ltd. P'ship* v. *R.I. Hous. & Mortg. Fin. Corp.*, 246 F.3d 1, 8 (1st Cir. 2001)). "[T]he 'relevant aspects' are those factual elements which determine whether reasoned analogy supports, or demands, a like result." *Dartmouth Rev.* v. *Dartmouth Coll.*, 889 F.2d 13, 19 (1st Cir. 1989), *overruled on other grounds by Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61 (1st Cir. 2004). While "[e]xact correlation is neither likely nor necessary, ... the cases must be fair congeners." *Dartmouth*, 889 F.2d at 19.

Here, a prudent person, looking objectively at the incidents, would not think them roughly equivalent or the protagonists similarly situated. In arguing only that WFA and Beaumont disseminated the relevant statements, Appellants ignore the ways in which Appellants' case is unique and differs from WFA and Beaumont's. For example, Appellants point to only one instance in which WFA and Beaumont each distributed the relevant statements, whereas Appellants repeatedly disseminated the statements from 2011 to 2012 while knowing that they lacked support for them. Furthermore, Appellants did so even after OCIE had warned them of having made similar misleading statements in the past and informed them that the SEC "views repeat violations as a serious matter and considers recidivist behavior when making a determination on whether to refer matters to the enforcement staff for possible further actions." Appellants, however, have produced absolutely no evidence that this was also the case for WFA and Beaumont, or that, at the very least, these firms had received similar warnings. The cases are not "fair congeners." *See id.*

Because Appellants fail to establish that they were similarly situated to the comparators they identify, Appellants' selective enforcement claim fails as a matter of law. We need not consider whether the alleged selective treatment was based on impermissible considerations or bad faith. *See PDK Lab'ys Inc.* v. *DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) ("[I]f it is not necessary to decide more, it is necessary not to decide more.").

2. Class of One

To establish a class of one claim, Appellants "must show that they were 'intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Freeman* v. *Town of Hudson*, 714 F.3d 29, 38 (1st Cir. 2013) (quoting *Vill. of Willowbrook* v. *Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000)). The "similarly situated" element here requires "an extremely high degree of similarity between [Appellants] and the [entities] to whom they compare themselves." *Id.* (quoting *Cordi–Allen* v. *Conlon*, 494 F.3d 245, 251 (1st Cir. 2007)). In light of our previous conclusion, *see supra*, Appellants have failed to establish a high degree of similarity between WFA, Beaumont, and Appellants. Their class of one claim thus fails as a matter of law.

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of the SEC as to Appellants' selective enforcement defense.[13]

C. Disgorgement

We now consider Appellants' challenges to the district court's disgorgement order.

1. Availability

Appellants first argue that disgorgement was not an available equitable remedy because NAI's Vireo AlphaSector clients suffered no pecuniary harm. "The availability of an equitable remedy presents a question of law engendering de novo review." *In re PHC, Inc. S'holder Litig.*, 894 F.3d 419, 435 (1st Cir. 2018); *see also SEC* v. *Sanchez-Diaz*, 88 F.4th 81, 87 n.2 (1st Cir. 2023).

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13. Appellants argue that the district court's denial of reconsideration of its summary judgment ruling "was an abuse of discretion since[] ... [the district court] failed to follow the law and the fact that there was no evidence the statement[s] [were] false." In light of our reasoning and conclusion above, this argument fails. *See Laureano-Quiñones* v. *Nadal-Carrión*, 982 F.3d 846, 849-50 (1st Cir. 2020) (dismissing challenge to the district court's denial of motion for reconsideration when the motion was directed to the underlying substantive issue of summary judgment).

To punish securities fraud, Congress authorized federal courts to grant "any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5); *see also Liu*, 591 U.S. at 87-90, 140 S.Ct. 1936. Congress explicitly provided for disgorgement as equitable relief, stating that "[i]n any action or proceeding brought by the [SEC] under any provision of the securities laws, the [SEC] may seek, and any [f]ederal court may order, disgorgement." 15 U.S.C. § 78u(d)(7). Under this provision, federal courts have jurisdiction to require disgorgement "of any unjust enrichment by the person who received such unjust enrichment as a result of" a securities law violation. 15 U.S.C. § 78u(d)(3)(A)(ii).

Appellants' argument that disgorgement was not an available equitable remedy here because NAI's Vireo AlphaSector clients did not suffer pecuniary harm mischaracterizes the nature and purpose of disgorgement.[14] Disgorgement is a "profit-based measure

14. Appellants cite *SEC* v. *Govil*, 86 F.4th 89, 98 (2d Cir. 2023), for the proposition that, before awarding disgorgement, the district court was required to find that NAI's clients suffered pecuniary harm. *Govil* states that "[a]n investor who suffered no pecuniary harm as a result of the fraud is not a victim," and thus disgorgement in such a case would not be "awarded for victims," as *Liu* requires. *See id.* at 98; *Liu*, 591 U.S. at 74, 140 S.Ct. 1936. Neither *Liu* nor our case law, however, require investors to suffer pecuniary harm as a precondition to a disgorgement award. In *Liu*, the Court held that a disgorgement award must be awarded for victims, and explained that "the SEC's equitable, profits-based remedy must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill–gotten gains." *Liu*, 591 U.S. at 74, 89, 140 S.Ct. 1936. Here, notwithstanding the fact that

of unjust enrichment" which reflects the foundational principle that "it would be inequitable that [a wrongdoer] should make a profit out of [their] own wrong." *Liu*, 591 U.S. at 79-80, 140 S.Ct. 1936 (alteration omitted) (first alteration in original). Disgorgement is thus "tethered to a *wrongdoer's* net unlawful profits." *Id.* at 80, 140 S.Ct. 1936 (emphasis added). Consistent with this understanding, we have recognized the distinction between disgorgement, which is limited to "the amount with interest by which the defendant profited from his wrongdoing," and other forms of equitable relief which may "include[] total losses suffered by the victims." *CFTC* v. *JBW Cap.*, 812 F.3d 98, 111 (1st Cir. 2016) (quoting *SEC* v. *MacDonald*, 699 F.2d 47, 54 (1st Cir. 1983) (en banc)). We have similarly emphasized that "[t]he case law holds with conspicuous clarity that when a fiduciary has secured an undue advantage by virtue of his position, equitable relief is available even in the absence of direct economic loss to the complaining party." *In re PHC, Inc.*, 894 F.3d at 436.

We thus conclude that, "in the circumstances of this case, the equitable remedy of disgorgement was available in principle." *Id.* at 437.

Vireo AlphaSector clients profited from their investments, they were induced into paying advisory fees to NAI by Appellants' misrepresentations. And the SEC "intends to distribute to the Vireo AlphaSector clients any disgorgement awarded." Disgorgement here will thus do more than simply benefit the public at large – it will remedy a direct harm to Vireo AlphaSector clients.

2. Appropriateness

Next, we consider Appellants' challenges to the appropriateness of the district court's disgorgement order. "[T]he decision either to award or to refrain from awarding an available equitable remedy is reviewed for abuse of discretion." *Id.* at 435. Similarly, we evaluate under an abuse of discretion standard "whether the district court ... properly tailored the scope of the disgorgement order to address the wrongdoer's conduct." *Sanchez-Diaz*, 88 F.4th at 87 n.2; *see also SEC* v. *Happ*, 392 F.3d 12, 31 (1st Cir. 2004). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). We will thus conclude that a district court "abuse[d] its discretion only if we are left with a firm conviction that it has committed 'a meaningful error in judgment.'" *Rosario-Torres* v. *Hernandez-Colon*, 889 F.2d 314, 323 (1st Cir. 1989) (quoting *Anderson* v. *Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988)).

A "disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible" under the Exchange Act. *Liu*, 591 U.S. at 75, 140 S.Ct. 1936. "The equitable nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors for their benefit." *Id.* at 88, 140 S.Ct. 1936. "The amount of disgorgement 'need only be a reasonable approximation of profits causally connected to the violation.'" *Happ*, 392

F.3d at 31 (quoting *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989)). "Once the SEC shows that the disgorgement is a reasonable approximation, the burden shifts to the defendant to demonstrate that the amount of disgorgement is not a reasonable approximation." *Id.* District courts must "deduct legitimate expenses before ordering disgorgement" so that the disgorgement award does not "exceed the gains 'made upon any business or investment, when both the receipts and payments are taken into the account.'" *Liu*, 591 U.S. at 91-92, 140 S.Ct. 1936 (quoting *Providence Rubber Co.* v. *Goodyear*, 76 U.S. 9 Wall. 788, 804, 19 L.Ed. 566 (1869)). "The risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty." *Happ*, 392 F.3d at 31.

In its amended final judgment, the district court ordered Appellants jointly and severally liable for disgorgement in the amount of $22,734,487 plus prejudgment interest of $6,635,403. The district court first determined that disgorgement will be for the benefit of investors because the SEC "intends to distribute to the Vireo AlphaSector clients any disgorgement awarded here." The district court then noted that there were two types of profit causally connected to Appellants' violations: (1) the advisory fees NAI clients paid for Vireo AlphaSector strategies from 2011 to 2013, when Appellants sold the Vireo AlphaSector business, and (2) the proceeds from such sale. Based on NAI's income statements, the district court determined that the advisory fees totaled $22,775,867. The proceeds from the sale of the Vireo AlphaSector business were $14 million. The district court thus concluded that the total profits causally connected to Appellants' violations equaled $36,775,867. Consistent with *Liu*, the district court then deducted $14,041,380 in legitimate expenses from these profits. This deduction represented research expenses, other non-marketing expenses, and non-marketing salaries. The district court thus determined the total disgorgement amount to be $22,734,487.

Appellants launch multiple challenges to the district court's disgorgement order. First, they contend that the district court abused its discretion in ordering Navellier jointly and severally liable with NAI even though Navellier himself did not disseminate the relevant statements and did not directly provide investment advice to NAI's Vireo AlphaSector clients.

This argument is unavailing. The "imposition of joint and several liability for a disgorgement award is permissible so long as it is 'consistent with equitable principles.'" *SEC* v. *Janus Spectrum LLC*, 811 F. App'x 432, 433-34 (9th Cir. 2020) (quoting *Liu*, 591 U.S. at 91, 140 S.Ct. 1936). The district court concluded that joint and several liability was consistent with equitable principles here because Appellants engaged in concerted wrongdoing. *See Liu*, 591 U.S. at 90, 140 S.Ct. 1936. In so concluding, the district court considered (1) Navellier's authoritative role in NAI; (2) Navellier's fiduciary duty, as investment adviser, to all of NAI's clients; (3) Navellier's violation of sections 206(1) and 206(2) of the Advisers Act; and (4) that Navellier, as majority owner of NAI, shared in profits received by NAI. In light of the district court's considerations, the district court did not abuse its discretion in ordering Appellants jointly and severally liable for disgorgement.

Second, Appellants argue that there is no causal connection between the advisory fees paid by NAI's clients for Vireo AlphaSector strategies and Appellants' violations of the Advisers Act. Specifically, Appellants contend that the SEC did not prove that investors became and remained Vireo AlphaSector clients because of NAI's dissemination of the relevant statements.

This argument likewise fails. The SEC need only establish that the amount of disgorgement sought is a *reasonable approximation* of profits causally connected to the violation. *See Happ*, 392 F.3d at 31. And the causal connection requirement does not demand the type of tracing suggested by Appellants. Indeed, this requirement "does not imply that a court may order a malefactor to disgorge only the actual property obtained by means of [their] wrongful act." *SEC* v. *Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000) ("[D]isgorgement is an equitable obligation to return a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset."). Instead, "the causal connection required is between the amount by which the defendant was unjustly enriched and the amount [they] can be required to disgorge." *Id.*

With this in mind, we find no abuse of discretion in the district court's determination that there is a causal connection between the paid advisory fees and Appellants' violations. The SEC presented evidence that Appellants distributed the relevant, material statements to current and prospective clients, and that those who became Vireo AlphaSector clients paid advisory fees to NAI. From 2011 to 2013, those clients continued to pay advisory fees to NAI while Appellants continued to conceal their lack of support for the relevant statements. Once the burden shifted to Appellants, Appellants failed to demonstrate that any of the advisory fees paid to them were unconnected to the Vireo AlphaSector strategies.

Appellants' related argument that there is no causal connection between the proceeds from the sale of the Vireo AlphaSector business and Appellants' violations fails for similar reasons. According to the letter of intent between NAI and F-Squared, the sale price would be $14 million "assuming [that there were] at least $1.1 billion in revenue generating client assets transfers at [the] time of closing." The sale price was therefore dependent on the number of Vireo AlphaSector clients who transferred their assets to F-Squared. The district court concluded, and Appellants do not dispute, that Appellants thus "had a substantial incentive not to disclose their misrepresentations and the reason they were selling the business." And, indeed, Appellants did not disclose them. At the time of the sale, almost all Vireo AlphaSector clients transferred their assets to F-Squared, and the sale price was, in fact, $14 million. In light of this, the district court did not abuse its discretion in concluding that Appellants' profits from the sale of the Vireo AlphaSector Business are causally connected to their violations.

Third, Appellants argue that disgorgement must be limited to only two of the Vireo AlphaSector strategies they sold because some Vireo AlphaSector marketing materials for the other strategies did not contain the relevant statements. Not so. Contrary to Appellants' assertion, the record shows that the distributed relevant statements applied to all of their Vireo AlphaSector strategies. For example, Appellants' marketing materials claimed that "[l]ive assets began tracking the [AlphaSector] *strategies*" on April 1, 2001, and that "the Indexes are based on active *strategies*." That Appellants distributed marketing materials that did not contain these statements does not change the fact that these statements, which apply to all Vireo AlphaSector strategies, may have induced investors to buy any of the offered strategies.[15]

15. Appellants also argue that they were entitled to a deduction of legitimate expenses in the amount of $8,303,849, and a deduction of the profits they provided to their clients as part of the Vireo AlphaSector business. Appellants, however, fail to explain how their $8,303,849 figure and the investment profits returned to their clients, which their clients were entitled to, represent legitimate expenses that had "value independent of fueling a fraudulent scheme." *Liu*, 591 U.S. at 92, 140 S.Ct. 1936; *see also United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[W]e see no reason to abandon the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."). Similarly, Appellants assert, in both their opening and reply briefs, that they repaid their Vireo AlphaSector clients all advisory fees in addition to returning the Vireo AlphaSector profits. At no point, however, do Appellants provide support for this assertion. *See Zannino*, 895 F.2d at 17.

For the foregoing reasons, we find no abuse of discretion in the district court's disgorgement order,[16] and affirm the district court's amended final judgment.[17]

D. Supersedeas Bond[18]

Appellants argue that the amount of the supersedeas bond should be reduced to no more than $1.5 million. "The nature and the amount of [a supersedeas] bond is entrusted to the discretion of the trial court." *Acevedo-García* v. *Vera-Monroig*, 296 F.3d 13, 17 (1st Cir. 2002).

Under Local Rule 62.2, "[a] bond or other security staying execution of a money judgment shall be in the amount of the judgment plus 10% of the amount." LR, D. Mass. 62.2. Here, that is approximately $33 million.

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16. Appellants conclusorily assert that the ten-year statute of limitations Congress enacted in 2021 governing claims under section 206(1) is unconstitutionally retroactive. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6501, 134 Stat. 3388, 4625-26 (codified at 15 U.S.C. § 78u(d)(8)). This argument is waived. *See Zannino*, 895 F.2d at 17.

17. Our conclusion disposes of Appellants' claims that the district court abused its discretion in ordering Appellants to pay prejudgment interest and civil penalties, and in declining to alter or amend its amended final judgment, both of which are based on Appellants' challenges to the disgorgement order.

18. Appellants again ask us to stay the SEC's administrative proceedings. We have already considered Appellants' arguments and deny the request for the reasons stated in our December 23, 2022, order.

In deciding whether to reduce this amount, district courts may consider "whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position." *Cognitive Edge Pte Ltd.* v. *Code Genesys, LLC*, No. 1:19-cv-12123, 2021 WL 4477434, at *5 (D. Mass. Sept. 30, 2021) (quoting *In re Nassau Cnty. Strip Search Cases*, 783 F.3d 414, 417-18 (2d Cir. 2015)).

Appellants argue that the supersedeas bond should be reduced to no more than $1.5 million because "neither NAI [n]or [Navellier] have the assets or financial capability to obtain" a higher supersedeas bond. Appellants also argue that Navellier and his wife hold real estate, personal property, and financial accounts as tenants by the entirety, and that Navellier's wife "is not a judgment debtor in this case and does not consent to hav[ing] their ... assets available to satisfy" Appellants' debts.

The district court rejected these arguments. In doing so, the district court considered Appellants' financial report and concluded that the report did not "warrant the [district court's] exercise of discretion" to reduce the supersedeas bond, "particularly where [the] amount [of $1.5 million] represents less than 5% of the $33 million bond that would otherwise be required." As to Navellier's assets, the district court noted that "[w]hether all such assets would be reachable by judgment in this case is different [from] whether [those assets] could be collateral for a bond that exceeds the [$1.5] million" Appellants seek. In light of the district court's considerations, we find no abuse of discretion in its decision not to reduce the amount of the supersedeas bond.

III. CONCLUSION

The district court's judgments in these consolidated appeals are ***affirmed***.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, ENTERED OCTOBER 2, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 20-1581, 21-1857, 22-1733, 23-1509

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff - Appellee,

v.

NAVELLIER & ASSOCIATES, INC.;
LOUIS NAVELLIER,

Defendants - Appellants.

Before

Barron, *Chief Judge*,
Lipez, Kayatta, Gelpí, Montecalvo,
Rikelman, and Aframe
Circuit Judges.

Entered October 2, 2024

ORDER OF COURT

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Anastasia Dubrovsky, Clerk

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, FILED FEBRUARY 13, 2020

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case No. 17-cv-11633

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

NAVELLIER & ASSOCIATES, INC.
AND LOUIS NAVELLIER,

Defendant.

MEMORANDUM AND ORDER

CASPER, J. February 13, 2020

I. Introduction

The Securities and Exchange Commission ("SEC") filed this lawsuit against Navellier & Associates, Inc. ("NAI") and its principal, Louis Navellier ("Navellier") (collectively, "Defendants"), alleging violations of the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. §§ 80b-1–80b-21. D. 1. The SEC has moved for partial summary judgment on Defendants' affirmative defense of selective enforcement and on Counts One and

Two of the complaint. D. 220. Defendants have cross-moved for summary judgment on all counts. D. 223. For the reasons stated below, the Court DENIES Defendants' motion for summary judgment and ALLOWS the SEC's motion as to Defendants' affirmative defense and Counts One and Two.

II. Standard of Review

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under the applicable law." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 52 (1st Cir. 2000) (quoting *Sánchez v. Alvarado*, 101 F.3d 223, 227 (1st Cir. 1996)). The movant "bears the burden of demonstrating the absence of a genuine issue of material fact." *Carmona v. Toledo*, 215 F.3d 124, 132 (1st Cir. 2000); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant meets its burden, the non-moving party may not rest on the allegations or denials in his pleadings, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986), but "must, with respect to each issue on which [he] would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in [his] favor." *Borges ex rel. S.M.B.W. v. Serrano-Isern*, 605 F.3d 1, 5 (1st Cir. 2010). "As a general rule, that requires the production of evidence that is 'significant[ly] probative.'" *Id.* (quoting *Anderson*, 477 U.S. at 249) (alteration in original). When assessing a motion for summary judgment, the Court will not consider "conclusory allegations, improbable inferences, and unsupported speculation." *Galloza v. Foy*, 389 F.3d 26, 28 (1st Cir. 2004) (quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990)). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." *Noonan v. Staples, Inc.*, 556 F.3d 20, 25 (1st Cir. 2009). "At the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *DeNovellis v. Shalala*, 124 F.3d 298, 308 (1st Cir. 1997).

III. Factual Background

The following facts are drawn primarily from the SEC's statement of undisputed material facts, D. 222, Defendants' statement of undisputed facts,[1] D. 227, each

1. The SEC argues that Defendants' motion should be denied in full based on violations of Local Rule 56.1, which sets forth procedural requirements for summary judgment motions, including the statements of material facts required to be filed by both parties in conjunction with their motions. *See* D. 231 at 1. In particular, the SEC argues that Defendants' statement of material facts is not supported by evidentiary cites or cites to documents that do not fully support the statements made. *Id.* The Court declines to deny Defendants' motion on this basis, but the Court has not relied upon any alleged facts or claimed disputes of fact that have not been adequately supported by record evidence. *See Bradley v. Cruz*, 13-cv-12927-IT, 2017 WL 1197700, at *1 (D. Mass. March 30, 2017); *Shervin v. Partners Healthcare Sys.*, 2 F. Supp. 3d 50, 60 (D. Mass. 2014).

party's response to same, D. 232 & D. 236, and the SEC's reply to Defendants' response, D. 242.

A. History of SEC Communication with NAI

At all times relevant to this dispute, both NAI and Navellier acted as investment advisers pursuant to the definition in the Advisers Act.[2] D. 232, ¶ 1; D. 242, ¶¶ 6 & 8. In 1999, the SEC's Office of Compliance Inspections and Examinations ("OCIE") sent a letter to NAI detailing compliance deficiencies regarding NAI's failure to disclose that certain performance figures had been backtested. D. 242, ¶ 35; D. 222-20. OCIE sent another letter to NAI in 2003 detailing deficiencies in NAI's advertisement of investment performance figures. D. 242, ¶ 36; D. 222-21. OCIE examined NAI again in 2006 and sent a letter to NAI in 2007 detailing deficiencies in NAI's presentation of performance figures. D. 242, ¶ 37; D. 222-22. The 2007 letter indicated that "NAI should be aware that the [SEC] staff views repeat violations as a serious matter and considers recidivist behavior when making a determination whether to refer matters to enforcement staff for possible further actions." *Id.* at 8-9.

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2. The Advisers Act defines "investment adviser" as, in part, "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." 15 U.S.C. § 80b-2(a)(11). The Advisers Act defines "person" as "a natural person or company." *Id.* § 80b-2(a)(16).

B. NAI Agreement with F-Squared

In 2009, a representative from NAI, Peter Knapp ("Knapp"), met with Howard Present ("Present"), the founder of F-Squared Investments, Inc. ("F-Squared"), to conduct due diligence on an investment strategy developed by F-Squared called the AlphaSector Allocator ("AlphaSector"). D. 232, ¶ 21; D. 242, ¶ 49. Following this meeting, Knapp prepared an "Executive Summary" detailing his due diligence. D. 232, ¶ 26; D. 242, ¶ 49. In the Executive Summary, Knapp stated that "[F-Squared] flat out won't show the math to us" in regard to the AlphaSector strategies. D. 242, ¶ 49; D. 222-42. Knapp later testified that NAI never received any trading confirmations for the AlphaSector performance returns. D. 242, ¶ 50; D. 222-43 at 7. NAI's President, Arjen Kuyper ("Kuyper"), also testified that NAI was not given any materials to confirm the AlphaSector strategy performance prior to 2008. D. 242, ¶ 52; D. 222-44 at 3. Knapp discussed the due diligence with Navellier, who agreed that NAI should enter into a model management agreement with F-Squared to license the AlphaSector strategies. *See* D. 232, ¶ 27. Pursuant to the model management agreement, F-Squared sent NAI securities and percentage allocation information for each of the licensed AlphaSector strategies. D. 232, ¶ 63. NAI rebranded the licensed strategies they offered to clients as "Vireo AlphaSector" strategies. *See* D. 232, ¶ 63; D. 242, ¶ 1.

The SEC alleges that materials used by NAI to market the Vireo AlphaSector products falsely indicated that the track record of the Vireo AlphaSector strategy was based on live trading since 2001. D. 242, ¶ 4. Defendants dispute that their marketing materials include these claims; however, the SEC has submitted exhibits of NAI marketing materials that state that the strategies were live traded since 2001 and that they were not backtested. *Id.*; D. 222-27-35. Additionally, NAI's Rule 30(b)(6) witness confirmed that NAI marketing materials included the claim that the strategies were live traded for the entire time that NAI sold the Vireo AlphaSector strategies. D. 242, ¶ 41. This was confirmed by other witnesses for NAI, including NAI's Director of Marketing. D. 242, ¶ 42. In particular, NAI marketing materials included the claims that "live assets began tracking the [Vireo AlphaSector] strategies" beginning in 2001, that the returns were "not back-tested" and that presented results were "based on an active strategy with an inception date of April 1, 2001," among other claims. D. 242, ¶ 43. Defendants have admitted that they do not have sufficient knowledge to confirm whether the strategy underlying the Vireo AlphaSector products was backtested. D. 242, ¶ 5; D. 222-2, ¶ 5.

C. NAI's Internal Communications Regarding AlphaSector

During a conference call in March 2011 in which Present and NAI participated, Present stated that the AlphaSector strategies were not based on actual trades starting in 2001. D. 242, ¶ 55. A month later, in April 2011, Navellier sent an internal email to NAI personnel in which he stated that he "went to get the [AlphaSector] confirms yesterday . . . and I was told there were no confirms, just a spreadsheet. I was shocked. Any idiot can send a bogus spreadsheet!" D. 242, ¶ 56; D. 222-46. Navellier then stated "[t]hat is not due diligence, that is stupidity" and expressed concerns about avoiding liability based on this revelation, noting that "[w]e just have to cover our ass somehow" and that "the SEC is going to love this." *Id.* In May 2011, Navellier sent another internal email stating that "[u]nless somebody shows me the confirms, [F-Squared] is merely a model and I am protecting the firm from potential fraud, so we must not talk about [F-Squared] as being base[d] on real $ since 2001." D. 242, ¶ 57; D. 222-47. Navellier, however, stated at that time that he was "not stopping Vireo [AlphaSector] sales." *Id.* In August 2011, Navellier sent an internal email to NAI leadership stating that "Vireo was a good idea, but we sold the wrong product that continues to smell like FRAUD." D. 242, ¶ 58; D. 222-48. He then stated that NAI could possibly sell the Vireo AlphaSector business so that members of management could "have a big payday." *Id.* Navellier sent another email in August 2011 in which he referenced selling off the Vireo AlphaSector business because the F-Squared model is "made up" and "fraud does not protect you from the SEC and other regulatory heat." D. 242, ¶ 59; D. 222-49.

D. Compliance Review by ACA

In January 2013, NAI entered into a consulting agreement with ACA Compliance Group ("ACA") to conduct a focused market review. D. 242, ¶ 65. Ted Eichenlaub ("Eichenlaub"), a representative of ACA, spoke with Kuyper and, in contemporaneous email notes to himself regarding the call, Eichenlaub noted that he was told, in part, that the Vireo AlphaSector performance results were backtested and that they were incorrect. D. 242, ¶ 68. Kuyper then followed up with an email to Eichenlaub that stated, in part, that F-Squared could not provide any confirmations of the performance numbers for the AlphaSector strategies, that there was no way to confirm actual trades and that marketing materials used by NAI incorrectly indicated that Vireo AlphaSector returns went back ten years. D. 242, ¶ 69. Eichenlaub advised NAI in a response to Kuyper that NAI was required to "have a basis for representing" performance numbers in their marketing materials. D. 242, ¶ 72.

E. Sale of Vireo AlphaSector to F-Squared

In March 2013, Navellier executed a letter of intent to sell NAI's "Vireo strategies and associated client accounts using such strategies" to F-Squared. D. 242, ¶ 73; D. 222-63. The letter of intent stated that the purchase price would be $14 million upon the fulfillment of certain terms, including that there was "at least $1.1 billion in revenue generating clients at the time of closing." *Id.* In April 2013, Navellier emailed employees of NAI to notify them of the sale to F-Squared, stating, in part, that "[t]he catalyst for the surrender . . . is that F-Squared refuses to stop circulating its fake 10+ year AlphaDEX indexes before the ETFs actually commenced on May 10, 2007" and that NAI was "tipped off to F-Squared's fraud by an ex-SEC enforcement officer, so we have no other choice other than to clean up this mess ASAP." D. 242, ¶ 74; D. 222-64. The letter noted that this was "a massive due diligence failure" on behalf of NAI and that NAI was "at risk of a $225,000 fine" from the SEC for their distribution of the false performance records. *Id.* In August 2013, NAI and F-Squared entered into an assignment and asset purchase agreement to sell the Vireo AlphaSector business to F-Squared. D. 242, ¶ 75; *see* D. 232, ¶ 138. NAI also sent a letter to its clients in August 2013 announcing the sale of the Vireo AlphaSector products to F-Squared. D. 242, ¶ 77; D. 222-67. The letter did not indicate the reasons for the sale that were articulated in the letter to NAI employees and failed to notify clients that the performance information included in advertisements and marketing materials had been inaccurate and misleading. *Id.* Defendants do not dispute that they never informed their clients that there was no evidence to support the performance record of the Vireo AlphaSector strategy between 2001 and 2008 or any evidence that the strategy had been live traded and not backtested as they had marketed. D. 242, ¶ 77.

F. SEC Investigates F-Squared, NAI, and Other Investment Advisers

In October 2013, the SEC began investigating F-Squared and served investigative subpoenas on NAI and other advisory firms that had similarly licensed the AlphaSector products from F-Squared. D. 232, ¶ 143. During this investigation, the SEC collected approximately fifteen million pages of documents and conducted interviews. D. 232, ¶ 144. The SEC instituted an administrative action against F-Squared, which was later settled. D. 232, ¶ 145. In 2014, the SEC also initiated a civil action against Present. D. 232, ¶ 146; D. 242, ¶ 10.

The SEC litigated its case against Present and obtained an injunction and industry bar against him. D. 242, ¶ 13. The SEC brought enforcement actions against over twenty investment firms in connection with the investigation into F-Squared. D. 232, ¶ 147; D. 242, ¶ 10. Many of the parties settled with the SEC. D. 242, ¶ 13. The SEC and NAI attempted to negotiate a similar settlement, but negotiations eventually broke down and the SEC initiated the present action against NAI and Navellier in August 2017. *See* D. 242, ¶¶ 14-34.

IV. Procedural History

The SEC instituted this action on August 31, 2017. D. 1. The SEC moved for summary judgment on Defendants' affirmative defense of selective enforcement and on Counts One and Two, which allege violations of the Advisers Act. D. 220. Defendants cross-moved for summary judgment on all counts. D. 223. The Court held a hearing on the motions and took the matter under advisement. D. 246.

V. Discussion

A. Selective Enforcement

Defendants' fourteenth affirmative defense asserts that the SEC has engaged in selective enforcement in bringing this action against them. D. 53 at 37-38. Defendants allege selective enforcement based on both a violation of the Equal Protection clause and under a class of one theory. D. 235 at 22. They claim that similar actions have not been brought against other entities and individuals that are similarly situated and, therefore, the entire action against them must be dismissed. D. 53 at 37-38; D. 235 at 25. Defendants also assert that the SEC brought this action in bad faith to punish them for declining a settlement offer. D. 224 at 29-30. The SEC argues that it should be granted summary judgment on Defendants' selective enforcement defense because the evidence demonstrates that it sought enforcement against similarly situated entities and that any differences in enforcement against those who are similarly situated to NAI and Navellier had a rational basis. D. 221 at 11-14.

1. Equal Protection

To establish a claim for an equal protection violation based on selective enforcement, the individual or entity must show that "(1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Rubinovitz v. Rogato*, 60 F.3d 906, 910 (1st Cir. 1995) (quoting *Yerardi's Moody St. Restaurant & Lounge, Inc. v. Board of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989)); *Barth v. City of Peabody*, No. CV 15-13794-MBB, 2017 WL 114403, at *4 (D. Mass. Jan. 11, 2017) (internal quotations omitted); *see Aponte-Ramos v. Álvarez-Rubio*, 783 F.3d 905, 908 (1st Cir. 2015) (quoting *Marrero-Gutierrez v. Molina*, 491 F.3d 1, 9 (1st Cir. 2007)). To determine whether individuals or entities are similarly situated, "the test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated . . . the 'relevant aspects' are those factual elements which determine whether reasoned analogy supports, or demands, a like result." *Aponte-Ramos*, 783 F.3d at 909 (quoting *Barrington Cove Ltd. P'ship v. R.I. Hous. & Mort. Fin. Corp.*, 246 F.3d 1, 8 (1st Cir. 2001)).

Defendants argue that the SEC has failed to enforce against numerous entities and individuals engaged in conduct like that on which the SEC bases its claims against NAI and Navellier. D. 235 at 24. The SEC counters that these entities and individuals are not similarly situated to NAI and Navellier because they did not engage in conduct as severe as that of NAI and, with regard to the individuals identified by Defendants, they were not in similar roles in their respective companies as Navellier, who is the owner and Chief Investment Officer of NAI. D. 231 at 4-5. For example, the SEC notes that Defendants have not addressed the volume and length of time over which the false claims were made or whether, like NAI and Navellier, these other entities and individuals were aware that their marketing claims were fraudulent. *Id.* Additionally, Defendants had also been warned of previous violations on at least three occasions but have not provided any evidence indicating that these entities and individuals that they claim are similarly situated had received similar warnings. Defendants have failed to meet their burden to establish that the comparators they identify are similarly situated in all relevant aspects to NAI and Navellier. *See Startzell v. City of Philadelphia*, 533 F.3d 183, 203 (3d Cir. 2008) (stating that, for the purposes of a selective enforcement claim, "[p]ersons are similarly situated under the Equal Protection Clause when they are alike in all relevant aspects" (internal quotations omitted)).

Even if Defendants had successfully established that they were selectively treated as compared to those similarly situated, they have not established that the SEC enforced this action against them based upon impermissible considerations, to inhibit or punish the exercise of their constitutional rights, or in bad faith. Defendants claim that "it cannot be disputed" that the SEC is pursuing this enforcement action against them in bad faith based upon Defendants' denial of the SEC's settlement terms. D. 224 at 29-30. To show that the SEC acted in bad faith, however, Defendants must establish that the SEC acted with "gross abuse of power, invidious discrimination or fundamentally unfair procedures." *Walsh v. Town of Lakeville*, 431 F. Supp. 2d 134, 145 (D. Mass. 2006) (quoting *Baker v. Coxe*, 230 F.3d 470, 474 (1st Cir. 2000)). The standard for bad faith is "very high and must be scrupulously met." *Kitras v. Temple*, No. 16-cv-11428-ADB, 2017 WL 4238862, at *5 (D. Mass. Sept. 25, 2017) (internal quotations omitted). Although Defendants argue that a settlement agreement was reached with the SEC, the SEC disputes this fact and the record indicates that settlement negotiations between the parties broke down before any settlement was agreed to by both parties. *See* D. 242, ¶ 19. There is no indication that the SEC sought to enforce more harshly against NAI or Navellier following the breakdown in settlement negotiations; rather, the SEC seeks enforcement consistent with that which they discussed in their initial communications with NAI and Navellier. D. 222-9 at 1 ("Wells Notice" sent from

SEC to Defendants' counsel indicating that, if it proceeded to an enforcement action, the SEC could seek remedies similar to those sought in the present action for the same violations alleged herein). Defendants have not provided evidence sufficient to support their claim that the SEC in enforcing against them in bad faith or is based upon an improper consideration. *See Rubinovitz*, 60 F.3d at 911.

Defendants further argue that the SEC is estopped from disputing that it is proceeding against Defendants in bad faith because the SEC "refused" to produce certain documents related to its enforcement decisions in discovery. D. 224 at 30. The Court previously ruled on the Defendants' attempts to seek discovery related to the SEC's decision-making process regarding enforcement against other investment advisers. D. 175 (denying various document requests and deposition topics regarding the SEC's enforcement considerations and noting that the decision did not "deprive Defendants, as they suggest, of pursuing their selective enforcement defense" but that it reflected the need for discovery requests to comport with Rule 26). Defendants cite no cases that support their argument that the SEC is estopped from denying that it is acting in bad faith based on the SEC's objections to discovery requests that the Court has already determined were overbroad and not proportional.

2. Class of One

"A cognizable class of one equal protection claim requires a showing that the plaintiff 'has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Boyle v. Barnstable Police Dep't*, 818 F. Supp. 2d 284, 314 (D. Mass. 2011) (quoting *SBT Holdings, LLC v. Town of Westminster*, 547 F.3d 28, 34 (1st Cir. 2008)); *see Comley v. Town of Rowley*, 296 F. Supp. 3d 327, 335 (D. Mass. 2017). "[T]he proponent of the equal protection violation must show that the parties with whom he seeks to be compared have engaged in the same activity vis-a-vis the government entity without such distinguishing or mitigating circumstances as would render the comparison inutile." *Cordi-Allen v. Conlon*, 494 F.3d 245, 251 (1st Cir. 2001).

The SEC has enforced against other investment advisers that are similarly situated to NAI in cases regarding false advertising of the AlphaSector strategy. D. 242, ¶¶ 10-12. Defendants argue that, despite the SEC's enforcement of claims against these similarly situated entities, there are other similarly situated entities and individuals that the SEC did not enforce against and, thus, Defendants are in a class of one and the claims against them must be dismissed. D. 224 at 29. This argument is unavailing as a class of one defense cannot be maintained where similar enforcement has been sought against other individuals and entities. *Cordi-Allen*, 494 F.3d at 254 (rejecting a class of one claim and stating that "[b]y definition, a class of one is not a class of many"). It is undisputed that the SEC has initiated enforcement proceedings against numerous similarly situated entities and against one individual, Present. D. 242, ¶ 10. Defendants, therefore, have not demonstrated that the SEC's initiation of proceedings against them regarding the marketing of the AlphaSector strategy selectively singled them out.

In further support of their class of one argument, Defendants claim that the SEC sought less severe remedies against the other similarly situated investment advisory firms. D. 224 at 29. Proceedings against most of the other similarly situated entities, however, ended in settlements rather than proceeding to litigation. D. 242, ¶ 13. The SEC initially sought to negotiate a similar settlement with Defendants, but negotiations between the parties broke down. Defendants do not dispute that the SEC settled with these other similarly situated parties. *See id.*

Additionally, the SEC has offered a rational basis for any difference in treatment between Defendants and others similarly situated. *See Wojcik v. Mass. State Lottery Comm'n*, 300 F.3d 92, 104 (1st Cir. 2002) (to prove class of one selective enforcement, a party must show that "there is no rational basis for the difference in treatment") (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). For example, the SEC identifies three prior instances whereby the SEC had sent prior warnings to Defendants about problems in their advertising and disclosures and also warning that it would consider "recidivist behavior" when determining whether to bring enforcement actions. D. 221 at 14; D. 242, ¶¶ 35-37. The SEC also claims that Defendants' "major role in pushing AlphaSector products into the marketplace" and the evidence indicating that Navellier and other NAI personnel were aware of the false marketing and concealed it from clients contributed to any difference in treatment from other investment advisers against whom enforcement proceedings were brought regarding the AlphaSector strategies. D. 221 at 14; D. 242, ¶ 40. Defendants have failed to offer evidence disputing these rational bases for any difference in enforcement as compared to other similarly situated entities and individuals. As a result, the Court allows SEC's motion for summary judgment as to Defendants' selective enforcement defense and denies Defendants' motion for summary judgment as to the same defense.

B. Counts One & Two—Violations of Sections 206(1) and (2) of the Advisers Act

Both parties argue that summary judgment should be awarded in their favor on Counts One and Two, alleging that Defendants violated Sections 206(1) and (2) of the Advisers Act. D. 1, ¶¶ 73-82. Section 206(1) provides that it is unlawful for an investment adviser, "by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly" to "employ any device, scheme, or artifice to defraud any client or prospective client." 15 U.S.C. § 80b-6(1). Section 206(2) of the Advisers Act makes it unlawful for an investment adviser, "by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly," to "engage in any transaction, practice, or course of business which operates a fraud or deceit upon any client or prospective client." *Id.* § 80b-6(2). "[T]o establish a violation, each of these sections requires the SEC to show the investment adviser made a material misrepresentation with a culpable mental state." *ZPR Inv. Mgmt. v. SEC*, 861 F.3d 1239, 1247 (11th Cir. 2017) (citing

Steadman v. SEC, 603 F.2d 1126, 1129-34 (5th Cir. 1979)). Section 206(1) violations require a showing of scienter, whereas Section 206(2) violations do not. *Steadman*, 603 F.2d at 1134 (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963)); *SEC v. Slocum, Gordon, & Co.*, 334 F. Supp. 2d 144, 182 (D.R.I. 2004). Therefore, "to demonstrate a Section 206(1) violation, the [SEC] must show that the Defendants willfully or recklessly employed a device, artifice, or scheme to defraud," but "to establish a violation of Section 206(2), the [SEC] must show that Defendants failed to disclose or omitted material facts in their dealings with clients." *Slocum, Gordon, & Co.*, 334 F. Supp. 2d at 182.

The SEC argues that the evidence shows that Defendants marketed to potential and current clients that the Vireo AlphaSector strategy had been live traded since 2001 and that Defendants were aware that they did not have any documentation or confirmation to support those assertions. D. 221 at 17. Defendants argue that they are not liable under Section 206 because there is no evidence that they "market[ed]" the strategies, they did not "make" the original false claims and certain other investment advisory firms did not discover the falsity and did not conduct due diligence but have not been similarly charged with negligent advertising. D. 224 at 32. Defendants also argue that the statements made were not false because they described the performance of a hypothetical index and not an "actual performance record." D. 235 at 30. Defendants further claim that, even if marketing materials included false information, they did not have the requisite scienter because they were not aware that the performance records of the AlphaSector strategies were false. *Id.*

1. False Claims

Defendants' argument that they did not market the AlphaSector strategies is inconsistent with the undisputed evidence and Defendants' own admissions. Defendants admit that they distributed AlphaSector brochures to "brokers and advisers" that would then distribute them to clients who, if interested, would be referred to NAI. D. 242, ¶ 3. Further, the suggestion that Defendants did not "make" the false statements regarding the AlphaSector strategies is inapposite where they incorporated these statements into their own marketing materials where Section 206(1) of the Advisers Act requires only that they "employ any device, scheme, or artifice to defraud" their clients. 15 U.S.C. § 80b-6(1); *see Lorenzo v. SEC*, — U.S. —, 139 S. Ct. 1094, 1101 (2019) (concluding, under Rule 10b-5, that "[b]y sending emails he understood to contain material untruths, Lorenzo 'employ[ed]' a 'device,' 'scheme' and 'artifice to defraud'). The record includes multiple examples of NAI-created marketing materials that include false and misleading statements regarding the performance of the AlphaSector strategies. D. 222-27–34 (Vireo AlphaSector marketing stating that the strategies had been live tested since 2001). Although certain of these advertisements include reference to an index, they claim that the index was based on an active strategy that had an inception date of April 1, 2001 even though Defendants did not have the data to support this statement. *See id.* Each of these examples includes the NAI Vireo branding and was distributed by NAI personnel. *Id.*

Defendants also argue that the statements alleged to be false were not material because, by 2011, NAI was publishing actual performance numbers for the strategies and, therefore, any prior false statements were insufficient to support a violation of Section 206(1). D. 235 at 30. Defendants, however, cite no legal or factual support of their claim that the false and misleading statements regarding the historical performance of the strategies were immaterial to investors. *See id.* Kuyper admitted that the historical performance of a strategy would be material to an investor, in particular whether a strategy had been back-tested or was based on actual performance. *See* D. 222-68 at 2-3. "A statement is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether or not to invest his money in a particular security." *SEC v. Fife*, 311 F.3d 1, 9 (1st Cir. 2002). This is especially true here as the AlphaSector strategies were marketed as defensive strategies that had been "stress tested across *two* bear markets." *See* D. 222-27 at 3 (emphasis in original).[3]

2. Scienter

"To prove scienter, a plaintiff must show 'either a conscious intent to defraud or a high degree of recklessness." *SEC v. EagleEye Asset Mgmt., LLC*, 975 F. Supp. 2d 151, 158 (D. Mass. 2013) (quoting *SEC v. Ficken*,

3. To the extent that Defendants argue that these claims are time-barred because certain of the statements fell outside of the five-year statute of limitations, D. 244 at 3, n.2, that contention fails because record shows that they sent such marketing materials to clients within the statute of limitations. *See* D. 222-27-34.

546 F.3d 45, 47 (1st Cir. 2008)). The record demonstrates that NAI personnel, including Navellier, were aware that the marketing was not supported by sufficient data, but that they took no steps to inform clients of the false statements and, instead, continued to sell the AlphaSector strategies despite their knowledge that representations about the strategies were false and misleading. After conducting due diligence on the F-Squared AlphaSector strategies, Knapp prepared an "Executive Summary" of his findings, which stated that "F-Squared flat out won't show the math to us [supporting the strategies]." D. 242, ¶ 49; D. 222-42 at 2. Defendants relied on a letter from NASDAQ in lieu of actual performance indices; however, it is clear on the record indicates that NASDAQ did not conduct any independent testing but relied upon information provided by F-Squared. D. 236-1 at 299-301. Despite this lack of support, NAI licensed and sold the AlphaSector strategies under its own branding. Navellier acknowledged that the due diligence conducted by NAI was insufficient in an email to Knapp, stating that Navellier "went to get the confirms yesterday . . . and I was told there were no confirms, just a spreadsheet . . . That is not due diligence, that is stupidity." D. 242, ¶ 56; D. 222-46 at 3. Navellier later emailed other management personnel at NAI stating that "[u]nless somebody shows me the confirms, [F-Squared] is merely a model and I am protecting the firm from potential fraud, so we must not talk about [F-Squared] being base[d] on real $ since 2001." D. 242, ¶ 57; D. 222-47. Despite this acknowledgement, Navellier further stated in the email that he was "not stopping Vireo [AlphaSector] sales." *Id.* Navellier acknowledged that NAI was selling AlphaSector strategies based on fraudulent representations in another

email to NAI management, stating "we sold the wrong product that continues to smell like FRAUD, especially since no one can find the [F-Squared] indices" and "[m]aybe we can try to sell the Vireo managed account business . . . so you & Peter K. can have a big payday." D. 242, ¶ 58; D. 222-48. Defendants claim that emails sent by Navellier to other NAI personnel that reference fraud in relation to the AlphaSector strategies were not indicative of any true concerns, but were lies told by Navellier to NAI personnel because he wanted to scare them into no longer selling the strategies and he disliked Present. D. 242, ¶¶ 56-62. Such contention, however, does not change the fact that Defendants made the actionable statements to clients or the undisputed record that Defendants were, at a minimum, highly reckless in making statements to clients about investment strategies.

NAI further acknowledged that it was aware of problems with its due diligence and marketing in an email that Kuyper sent to Eichenlaub, a compliance officer NAI hired to conduct a review, in which Kuyper notes that NAI did not have any data to confirm the actual performance of the strategies and that this raised concerns about certain marketing claims. *See* D. 242 ¶ 69, D. 222-59 at 3-4. After conducting a review, Eichenlaub responded to Kuyper that NAI "must have a basis for representing [their] numbers and the legitimacy of the numbers." D. 242, ¶ 72.[4] Despite

4. Defendants move to strike communications between NAI and ACA as privileged. D. 235 at 20-21. This Court previously considered this issue and found that the communications were not subject to either the attorney-client or the work product privilege. D. 125. Accordingly, the Court denies Defendants' motion to strike these communications.

their knowledge of the inadequate due diligence and the misleading statements in their marketing, NAI did not attempt to halt sales or inform clients of the fraudulent statements, but instead began to explore opportunities to sell the Vireo AlphaSector business. Such actions demonstrate an intention to defraud clients or, at least, a high degree of recklessness in violation of Section 206(1). On this record, NAI, through their management team and Navellier in particular, were aware that they had not obtained sufficient support for the claims included in their marketing of the AlphaSector strategies and that they did not take any action to inform their clients, but instead continued to sell the strategies while exploring options for selling the business. *See* D. 242, ¶¶ 75, 77.

The same evidence supporting a finding in favor of the SEC on Count One, that NAI and Navellier violated Section 206(1), supports a finding that Navellier and NAI violated Section 206(2). As noted above, violations of Section 206(1) include a scienter requirement, whereas violations of Section 206(2) do not. Section 206(2) makes it unlawful to "engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. § 80b-6(2). For the reasons stated above, the Court concludes that the undisputed record shows that that Defendants engaged in a course of business that operated a fraud or deceit upon their clients. Accordingly, the Court allows summary judgment in favor of the SEC on Counts One and Two.

C. Counts Three and Four

Defendants seek summary judgment on Counts Three and Four. D. 224 at 33. Count Three alleges that, in the alternative to finding Navellier liable on Counts One and Two, Navellier should be found liable for aiding and abetting NAI's violations of Sections 206(1) and (2) of the Advisers Act. D. 1, ¶¶ 83-87. To establish a claim for aiding and abetting, the SEC must show "(1) a primary or independent securities law violation by an independent violator; (2) the aider and abettor's knowing and substantial assistance to the primary securities law violator; and (3) awareness or knowledge by the aider and abettor that his role was part of an activity that was improper." *Slocum, Gordon, & Co.*, 334 F. Supp. 2d at 184 (citing *SEC v. Fehn*, 97 F.3d 1276, 1288 (9th Cir. 1996); *Cleary v. Perfectune, Inc.*, 700 F.2d 774, 777 (1st Cir. 1983)). As discussed previously, NAI has violated Sections 206(1) and (2) because it included material misrepresentations in its marketing materials with knowledge that it lacked sufficient data to support its claims. Further, the evidence indicates that Navellier was aware of these misleading claims and chose not to halt sales of the AlphaSector strategies or inform clients of the false claims. *See* D. 222-46; 222-48; 222-64. Accordingly, the Court denies Defendants' motion for summary judgment as to Count Three.

Count Four alleges that NAI violated Section 206(4) of the Advisers Act, which makes it unlawful for an investment adviser "by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly" to "engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." 15 U.S.C. § 80b-6(4). The SEC has also promulgated rules and regulations describing the conduct prohibited. Rule 206(4)-1 states that it is a fraudulent, deceptive, or manipulative act for an investment adviser to "publish, circulate, or distribute any advertisement . . . which contains any untrue statement of material fact, or which is otherwise false or misleading." 17 C.F.R. § 275.206(4)-1. For the same reasons that NAI is liable under Counts One and Two, Defendants are not entitled to summary judgment on Count Four where NAI never obtained confirmation for the claims that it included in its marketing of the Vireo AlphaSector strategies and did not halt the sale of the strategies or inform existing clients of the misleading marketing. Thus, the Court denies Defendants' motion for summary judgment as to Count Four.

D. Injunctive Relief

Defendants seek summary judgment on the SEC's claim for injunctive relief, arguing that the SEC improperly seeks an injunction banning Defendants "for life from the securities industry" where the SEC has not sought similar relief against any similarly situated investment advisers. D. 224 at 34-35. Defendants also argue that there is no basis to bar NAI and Navellier from marketing the AlphaSector strategies because they sold the AlphaSector business to F-Squared. *Id.* at 35. The SEC responds that it does not seek an injunction barring Defendants from marketing the AlphaSector strategies but, rather, seeks to enjoin Defendants from engaging in actions that violate Section 206 of the Advisors Act. D. 231 at 14; *see* D. 1, ¶ A.

An injunction barring a defendant from violating the securities laws is "appropriate where there is, 'at a minimum, proof that a person is engaged in or is about to engage in a substantive violation of either one of the Acts or of the regulations promulgated thereunder.'" *SEC v. Sargent*, 329 F.3d 34, 39 (1st Cir. 2003) (quoting *Aaron v. SEC*, 446 U.S. 680, 700-01 (1980)). To determine whether future violations are reasonably likely, courts consider numerous factors, including "the nature of the violation, including its egregiousness and its isolated or repeated nature, as well as whether the defendants will, owing to their occupation, be in a position to violate again." *Id.* (citing *SEC v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984)); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1228 (D.C. Cir. 1989); *SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044, 1048 (2d Cir. 1976)). Here, the undisputed evidence indicates that, on at least three prior occasions, the SEC sent deficiency letters to Defendants identifying violations related to their marketing materials. D. 242 ¶¶ 35-37. Despite these notices, Defendants continued to violate the Advisors Act in their marketing materials. D. 242, ¶ 37. Additionally, despite their awareness that their Vireo AlphaSector marketing materials contained misleading statements, Defendants continued to use these materials and did not halt sales of the strategies or notify clients of the misleading statements. Further, as Defendants continue to operate as investment advisors, they are in a position to commit further violations of the Advisors Act. For these reasons, the Court denies Defendants' motion for summary judgment on the SEC's claim for injunctive relief.

E. Disgorgement

Defendants also seek summary judgment on the SEC's claim for disgorgement of Defendants' "ill-gotten gains and losses avoided" as a result of their violations. D. 1, ¶ D. In a securities law action, "[d]isgorgement forces the defendant to give up the amount by which he was unjustly enriched, 'even if it exceeds actual damages to victims.'" *SEC v. Present*, No. 14-cv-14692-LTS, 2018 WL 1701972, at *2 (D. Mass. Mar. 20, 2018) (quoting *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006)). "The Court has discretion to enter an order of disgorgement in an amount reflecting 'a reasonable approximation of the profits causally connected to'" the violations. *Id.* (quoting *SEC v. Happ*, 392 F.3d 12, 31 (1st Cir. 2004)).

Defendants argue that the five-year statute of limitations applicable to the SEC's claims bars consideration of violations that occurred prior to August 10, 2011[5] and, thus, bars the SEC's claim for disgorgement based on marketing prior to that date. D. 224 at 35. The SEC does not dispute that the applicable statute of limitations is five years and that it "cannot seek penalties or disgorgement for violations before that time." D. 231 at 17. The Supreme Court has stated that the five-year statute of limitations applies to disgorgement in SEC enforcement actions.

5. The SEC claims the applicable date is August 10, 2011 pursuant to tolling agreements. D. 231 at 16, n.6.

Kokesh v. SEC, —U.S. —, 137 S. Ct. 1635, 1639 (2017). The Court concluded that "any claim for disgorgement in an SEC enforcement action must be commenced within five years of the date the claim accrued." *Id.* at 1645. The SEC seeks disgorgement of the ill-gotten gains realized when NAI sold its Vireo AlphaSector business to F-Squared in 2013. It is undisputed that these gains were realized within the applicable statute of limitations.

Defendants also argue that it is entitled to summary judgment on the SEC's claim for disgorgement in its entirety because NAI was well within its rights to sell its "goodwill" to F-Squared and there was "no obligation" on the part of NAI's Vireo AlphaSector clients to transfer their business to F-Squared following the sale of the business. D. 224 at 37. Defendants, however, ignore the fact that the value of the business, and thus the value it received in the sale, is traceable to its wrongdoing in violating the Advisers Act. In misleading clients by making claims in its marketing materials, Defendants were able to gain clients that they arguably would not have gained had these misleading statements been omitted. These actions contributed to the value of the Vireo AlphaSector business that Defendants then sold to F-Squared. Since Defendants have failed to meet their burden for summary judgment as to the SEC's claim for disgorgement, the Court denies their motion as to this claim.

VI. Conclusion

For the foregoing reasons, the Court DENIES Defendants' motion for summary judgment, D. 223, and

ALLOWS the SEC's motion as to Defendants' fourteenth affirmative defense and Counts One and Two, D. 220.

So Ordered.

/s/
Denise J. Casper
U.S. District Judge

APPENDIX D — CASPER ELECTRONIC ORDER DENYING RECONSIDERATION, DATED APRIL 2, 2020

04/02/2020	270	Judge Denise J. Casper: ELECTRONIC ORDER entered. D. 258 : Having considered Defendant's motion for reconsideration, D. 258-59, and the opposition to same, D. 265, the Court DENIES the motion. (McKillop, Matthew) (Entered: 04/02/2020)

APPENDIX E — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS, DATED JUNE 2, 2020

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case No. 17-cv-11633-DJC

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

NAVELUER & ASSOCIATES, lNC. and LOUlS NAVELLIER,

Defendants.

FINAL JUDGMENT

On February 13, 2020, this Court allowed the Plaintiff Securities and Exchange Commission's Motion for Partial Summary Judgment on Counts One and Two of the Complaint finding that the Defendants intentionally or recklessly violated Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act"). Subsequently, the Commission moved, with Defendants' consent, to dismiss the remaining counts of the Complaint which has been granted. Accordingly, the Court enters judgment as follows:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants are permanently restrained and enjoined from violating Sections 206(1) and (2) of the Investment Advisers Act of 1940 ("Advisers Act") [15 U.S.C. §§ 80b-6(1)] by, directly or indirectly, using the mails or of any means or instrumentality of interstate commerce, (a) employing any device, scheme, or artifice to defraud any client or prospective clients, or (b) engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendants' officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendants or with anyone described in (a).

II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants are jointly and severally liable for disgorgement of $28,964,571, representing profits and sale proceeds gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $6,513,619. Defendants shall satisfy this obligation by paying $28,964,571 to the

Securities and Exchange Commission within 30 days after entry of this Final Judgment.

Defendants may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendants may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Navellier & Associates and Louis Navellier as Defendants in this action, and specifying that payment is made pursuant to this Final Judgment.

Defendants shall simultaneously transmit photocopies of evidence of payment and case identifying information to Commission·s counsel in this action. By making this payment, Defendants relinquish all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendants. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

If disgorgement is ordered, the Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 30 days following entry of this Final Judgment. Defendants shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

The Commission shall hold the funds (collectively, the "Fund") and may propose a plan to distribute the Fund subject to the Court's approval. The Court shall retain jurisdiction over the administration of any distribution of the Fund. If the Commission staff determines that the Fund will not be distributed, the Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 30 days following entry of this Final Judgment. Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 196 l.

III.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Navellier & Associates shall pay a civil penalty in the amount of $ 2,000,000 and Louis Navellier shall pay a civil penalty in the amount of $ 500,000 to the Securities and Exchange Commission pursuant to Section 209(e) or the Advisers Act [15 U.S.C. §80b-9(e)]. Defendants shall make this payment within 30 days after entry of this Final Judgment.

Defendants may transmit payment electronically to the Commission, which will provide detailed ACH transfer/ Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendants may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
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Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Navellier & Associates and Louis Navellier as Defendants in this action, and specifying that payment is made pursuant to this Final Judgment.

Defendants shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendants relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendants. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury. Defendants shall pay post-judgment interest on any delinquent amounts pursuant to 28 USC § 1961.

IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

So ordered.

/s/ Denise J. Casper
Hon. Denise J. Casper
United States District Court
Judge

Dated: June 2, 2020

APPENDIX F — CASPER ELECTRONIC ORDER DISMISSING COUNTS 3 AND 4, FILED MARCH 26, 2020

03/26/2020	266	Judge Denise J. Casper: ELECTRONIC ORDER entered granting 260 Motion to Dismiss Counts 3 and 4 (Hourihan, Lisa) (Entered: 03/26/2020)

Appendix F

P MEMO ISO MOTION TO DISMISS COUNTS 3 AND 4

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case No. 17-cv-11633-DJC

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

NAVELLIER & ASSOCIATES, INC. and LOUIS NAVELLIER,

Defendants.

Filed March 5, 2020

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS COUNTS THREE AND FOUR OF THE COMPLAINT

Plaintiff Securities and Exchange Commission ("SEC") submits this memorandum in support of its motion to dismiss with prejudice Counts Three and Four of the SEC's Complaint. Defendants consent to the dismissal of these two counts that were not resolved by the court's grant of summary judgment. In a separate motion and memorandum, the SEC also moves for entry of final judgment with respect to Counts One and Two of the Complaint.

BACKGROUND

On February 13, 2020, the Court allowed the SEC's Motion for Partial Summary Judgment, finding that the Defendants intentionally or recklessly violated Sections 206(1) (Count One) and 206(2) (Count Two) of the Investment Advisers Act of 1940 ("Advisers Act"). In light of the Court's grant of summary judgment, the SEC moves to dismiss the remaining claims (Counts Three and Four) pursuant to Fed. R. Civ. P. 15(a).

THE COURT SHOULD GRANT SEC'S MOTION TO DISMISS THE REMAINING COUNTS WHERE JUSTICE SO REQUIRES.

Rule 15(a) "is the proper vehicle to drop some but not all claims against a defendant or defendants...." *Transwitch Corp. v. Galazar Networks, Inc.,* 377 F. Supp.2d 284,288 (D. Mass 2005) (*citing Addamax Corporation v. Open Software Foundation, Inc.,* 149 F.R.D. 3, 5 (D. Mass 1993); *Wells Fargo Bank, N.A. v. Narbonne,* Civ. No. 10-11261-MBB, 2013 WL 5519042, *4 (D. Mass Sept. 30, 2013) (holding Rule 15(a) is available to eliminate particular claims or issues from an action). As the SEC's dismissal of Counts Three and Four will enable this Court to proceed to final judgment on the remainder of this case, Defendants will not be prejudiced and the interests of justice will be served. *See* Fed. R. of Civ. P. 15(a) ("The court should freely give leave when justice so requires.")

CONCLUSION

For the reasons set forth above, the Court should allow the SEC's assented-to Motion to Dismiss Counts Three and Four of the Complaint.

Respectfully submitted,

SECURITIES AND
EXCHANGE COMMISSION
By its attorneys,

/s/ Jennifer Cardello
Jennifer A. Cardello (Mass. Bar No. 657253)
Marc J. Jones (Mass. Bar No. 645910)
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Dated: March 25, 2020

P MOTION TO DISMISS COUNTS 3 AND 4

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case No. 17-cv-11633-DJC

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

NAVELLIER & ASSOCIATES, INC. and
LOUIS NAVELLIER,

Defendants.

Filed March 5, 2020

PLAINTIFF'S MOTION TO DISMISS COUNTS 3 AND 4

Plaintiff Securities and Exchange Commission ("SEC") respectfully requests, with Defendants' consent, that the Court dismiss with prejudice Counts Three and Four of the Complaint pursuant to Fed. R. Civ. P. 15(a). Counts Three and Four are the remaining counts of the Complaint which were not resolved by the Court's grant of summary judgment. In support of this motion, the SEC relies on its Memorandum, filed herewith.

Respectfully submitted,

SECURITIES AND
EXCHANGE COMMISSION
By its attorneys,

/s/ Jennifer Cardello

Jennifer A. Cardello (Mass. Bar No. 657253)
Marc J. Jones (Mass. Bar No. 645910)
William J. Donahue (Mass. Bar No. 631229)
Robert B. Baker (Mass. Bar No. 637438)
Attorneys for Plaintiff
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33 Arch Street, 24th Floor
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Dated: March 25, 2020

APPENDIX G — AMENDED FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, FILED SEPTEMBER 21, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case No. 17-cv-11633-DJC

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

NAVELLIER & ASSOCIATES, INC. and
LOUIS NAVELLIER,

Defendants.

Filed September 21, 2021

~~PROPOSED~~ AMENDED FINAL JUDGMENT

On February 13, 2020, this Court allowed the Plaintiff Securities and Exchange Commission's Motion for Partial Summary Judgment on Counts One and Two of the Complaint finding that the Defendants intentionally or recklessly violated Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act"). Subsequently, the Commission moved, with Defendants' consent, to dismiss the remaining counts of the Complaint which has been granted. Accordingly, the Court enters judgment as follows:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants are permanently restrained and enjoined from violating Sections 206(1) and (2) of the Investment Advisers Act of 1940 ("Advisers Act") [15 U.S.C. §§ 80b-6(1)] by, directly or indirectly, using the mails or of any means or instrumentality of interstate commerce, (a) employing any device, scheme, or artifice to defraud any client or prospective clients, or (b) engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendants' officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendants or with anyone described in (a).

II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants are jointly and severally liable for disgorgement of $22,734,487, representing profits and sale proceeds gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $6,635,403. Defendants shall satisfy this obligation by paying $29,369,890 to the Securities and Exchange Commission within 30 days after entry of this Final Judgment.

Defendants may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendants may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Navellier & Associates and Louis Navellier as Defendants in this action, and specifying that payment is made pursuant to this Final Judgment.

Defendants shall simultaneously transmit photocopies of evidence of payment and case identifying information to Commission's counsel in this action. By making this payment, Defendants relinquish all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendants. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

If disgorgement is ordered, the Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 30 days following entry of this Final Judgment. Defendants shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

The Commission shall hold the funds (collectively, the "Fund") and may propose a plan to distribute the Fund subject to the Court's approval. The Court shall retain jurisdiction over the administration of any distribution of the Fund. If the Commission staff determines that the Fund will not be distributed, the Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 30 days following entry of this Final Judgment. Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

III.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Navellier & Associates shall pay a civil penalty in the amount of $2,000,000 and Louis Navellier shall pay a civil penalty in the amount of $500,000 to the Securities and Exchange Commission pursuant to Section 209(e) or the Advisers Act [15 U.S.C. §80b-9(e)]. Defendants shall make this payment within 30 days after entry of this Final Judgment.

Defendants may transmit payment electronically to the Commission, which will provide detailed ACH transfer/ Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendants may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

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and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Navellier & Associates and Louis Navellier as Defendants in this action, and specifying that payment is made pursuant to this Final Judgment.

Defendants shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendants relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendants. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury. Defendants shall pay post-judgment interest on any delinquent amounts pursuant to 28 USC § 1961.

IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

So ordered.

Sept. 21, 2021 /s/ Denise J. Casper

Hon. Denise J. Casper
United States District Court Judge

Dated: ______________

Appendix G

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case No. 17-cv-11633-DJC

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

NAVELLIER & ASSOCIATES, INC. and
LOUIS NAVELLIER,

Defendants.

Filed September 21, 2021

AMENDED DISGORGEMENT FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The Court Has Broad Discretion to Order Disgorgement

1. In any action or proceeding brought or instituted by the Securities and Exchange Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors. Section 21(d)(5) of the Exchange Act, 15 U.S.C. 78u(d)(5).

2. A "disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims" is equitable relief permissible under [Section 21(d)(5)]." *Liu v. SEC*, 140 S. Ct. 1936, 1940, 207 L. Ed. 2d 401 (2020).

3. Disgorgement is a "profit-based measure of unjust enrichment" that is measured by the defendant's "wrongful gain," and is ordered to reflect the "foundational principle" of equity that "it would be inequitable that a wrongdoer should make a profit out of his own wrong." *Liu*, 140 S. Ct. at 1943 (internal quotation marks omitted); *SEC v. Sargent*, 329 F.3d 34 (1st Cir. 2003) (disgorgement "is intended to deprive wrongdoers of profits they illegally obtained by violating the securities laws") (internal quotation omitted).

4. A wrongdoer can be required to give up unjust enrichment "without the need to show that the claimant has suffered a loss." Restatement (Third) of Restitution and Unjust Enrichment § 1, cmt. a; *see generally, e.g., Magruder v. Drury*, 235 U.S. 106, 118-20, 35 S. Ct. 77, 59 L. Ed. 151 (1914) (trustee liable for profits gained in breach of fiduciary duty, and "[i]t makes no difference that the estate was not a loser in the transaction, or that the commission was no more than the services were reasonably worth").

5. Because disgorgement is measured by a violator's "wrongful gains" as opposed to the victim's damages, *Liu*, 140 S. Ct. at 1944, disgorgement can be ordered

in an amount that is different from, or even exceed the victim's loss. *See Kansas v. Nebraska*, 574 U.S. 445, 463, 135 S. Ct. 1042, 191 L. Ed. 2d 1 (2015) (ordering disgorgement that exceeded the victim's "actual damages"); *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993) ("[A] disgorgement order might be for an amount more or less than that required to make the victims whole.").

6. Disgorgement in the amount an investment adviser illicitly obtained is an appropriate remedy for violations of the Investment Advisers Act of 1940. *See, e.g., SEC v. Kokesh*, 884 F.3d 979, 980 (10th Cir. 2018); *Montford & Co., Inc. v. SEC*, 793 F.3d 76, 83-84, 417 U.S. App. D.C. 76 (D.C. Cir. 2015); *SEC v. Illarramendi*, 260 F. Supp. 3d 166, 182 (D. Conn. 2017); *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 384-85 (S.D.N.Y. 2007).

7. Because "flexibility is inherent in equitable remedies," the Court has broad discretion in determining the amount of disgorgement. *Kansas*, 574 U.S. at 464-45 ("[D]isgorgement need not be all or nothing."); *see also SEC v. Happ*, 392 F.3d 12, 31 (1st Cir. 2004) (standard of review); *SEC v. Wyly*, 56 F.Supp.3d 394, 426 (S.D.N.Y. 2014) (a disgorgement order "gives courts flexibility to determine the appropriate remedy to fit the wrongful conduct").

8. The amount of disgorgement ordered "need only be a reasonable approximation of profits causally connected to the violation." *SEC v. Happ*, 392 F.3d

12, 31 (1st Cir. 2004) (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231-1232, 281 U.S. App. D.C. 410 (D.C. Cir. 1989)); *SEC v. Yang*, 2020 U.S. App. LEXIS 24837, 2020 WL 4530630, at *2 (9th Cir. Aug. 6, 2020) (applying this standard after *Liu*); *SEC v. Mizrahi*, 2020 U.S. Dist. LEXIS 186259, 2020 WL 6114913, at *2-4 (C.D. Cal. Oct. 5, 2020) (same); *SEC v. Smith*, 20-cv-1056, Dkt. 65 at 3-4 (C.D. Cal. Oct. 19, 2020) (same).

9. "Once the SEC shows that the disgorgement is a reasonable approximation of disgorgement, the burden shifts to the defendant to demonstrate that the amount of disgorgement is not a reasonable approximation." *Happ*, 392 at 31.

10. To the extent there is a "risk of uncertainty in calculating disgorgement," that risk falls on Defendants who are the "wrongdoer[s] whose illegal conduct created that uncertainty. *Id.*; *see also Rubber Co. v. Goodyear*, 76 U.S. 788, 803-04, 19 L. Ed. 566 (1870) (explaining that no deduction is appropriate for claimed expenses where the "manner in which the books ... were kept renders such an account impossible," reasoning that the defendants' "conduct in this respect has not been such as to commend them to a court of equity," and holding that "[u]nder the circumstances, every doubt and difficulty should be resolved against them") (cited with approval in *Liu*, 140 S. Ct. at 1945-46, 1950); *United States v. Rapower-3, LLC*, 18-4119 (10th Cir. July 17, 2020) (denying rehearing petition based on *Liu* where the

petition "fail[ed] to identify any expenses that were not part and parcel of Petitioners' scheme and should be deducted from the disgorgement order under the standard stated in *Liu*"). "[D]oubts are to be resolved against the defrauding party." *SEC v. MacDonald*, 699 F.2d 47, 55 (1st Cir. 1983).

11. An order of disgorgement here is appropriate to deprive Defendants Louis Navellier ("Navellier") and Navellier and Associates, Inc. ("NAI") of unjust profits they made from their repeated fraudulent marketing misrepresentations and failures to disclose material information to clients about the Vireo products. *See* D. 252 (Memorandum and Order granting Plaintiff partial summary judgment).

II. Defendants Are Jointly and Severally Liable for Disgorgement

12. Courts may impose joint and several liability against "partners" engaged in "concerted wrongdoing." *Liu*, 140 S. Ct. at 1949; *see also SEC v. Janus Spectrum, LLC*, 2020 U.S. App. LEXIS 20710, 2020 WL 3578077, at *2 (9th Cir. July 1, 2020) ("[T]he imposition of joint and several liability for a disgorgement award is permissible so long as it is 'consistent with equitable principles.'") (quoting *Liu*, 140 S. Ct. at 1949).

13. Imposing joint and several liability for profits resulting from breach of a fiduciary duty is consistent with equitable principles. *See Crites, Inc., v. Prudential Ins. Co. of Amer.*, 322 U.S. 408, 414, 64

S. Ct. 1075, 88 L. Ed. 1356 (1944) ("Any profits that might have resulted from a breach of [a fiduciary duty], including the profits of others who knowingly joined [the fiduciary] in pursuing an illegal course of action, would have to be disgorged and applied to the estate.") (citing cases).

14. Courts may order that an owner-officer and a company pay disgorgement on a joint and several basis. *SEC v. Esposito, et al.*, Civ. No. 16-cv-10960-ADB, 2018 U.S. Dist. LEXIS 72728, 2018 WL 2012688, *9 (D. Mass. April 30, 2018) (ordering managing director and entity jointly and severally liable for total disgorgement where violations are closely intertwined); *SEC v. Locke Capital Mgmt., Inc.*, 794 F. Supp. 2d 355, 369 (D.R.I. 2011) (holding entity and entity's sole owner, an individual, jointly and severally liable for disgorgement).

15. Defendants were engaged in concerted wrongdoing. First, Navellier formed, owned, and controlled all aspects of NAI during the relevant time period. D. 53 (Amended Answer) at ¶ 15. Navellier served as NAI's Chief Investment Officer and Chief Executive Officer, during that time. *Id.* Navellier had the authority to hire, promote, demote, and fire NAI employees. *Id.* He had authority, along with the Board of Directors of NAI, to decide what products and investment vehicles NAI offered to its clients during the relevant time period. *Id.* He also had authority along with the Board of Directors of NAI to sell NAI business lines, including the Vireo AlphaSector business. *Id.* In

other words, Navellier had final authority over NAI's fraudulent activity.

16. Second, Navellier committed his violations of Counts I and II in concert with NAI. He knew the marketing was misleading, had the power to stop NAI from its fraudulent marketing efforts, and authorized his NAI staff to continue the marketing campaign anyway. *See* Order and Memorandum, D. 252, at 5-6 (detailing Navellier's approvals of the continued marketing of the Vireo AlphaSector products using the misleading advertising, despite his knowledge that due diligence had been inadequate, that NAI lacked support for its marketing statements, and that the product "smelled like fraud") and at 7 (detailing Navellier's effort to sell NAI's Vireo line of business as a result of NAI's "massive due diligence failure," risk of SEC liability, and F-Squared's fake indexes which Defendants used in their Vireo marketing).

17. Navellier had the power to decide what products NAI offered. He authorized the selling of the Vireo AlphaSector products, even though he was well aware that the Vireo AlphaSector performance claims were unsupported. D. 252 at 5; *see also* D. 222-46, D.222-47. Navellier did not stop sales of the Vireo products or notify clients of any of Defendants' misrepresentations. *Id.* In the end, he decided to sell the Vireo assets despite what he considered "a massive due diligence failure." *Id.* at 6-7; *see also* D. 222-48, 222-63, 222-64.

18. Third, both Defendants benefited from their concerted wrongdoing. From 2009 to August 2013, Navellier owned at least 75% of NAI and in 2013, Navellier acquired complete ownership of NAI. D. 53, ¶ 15. Navellier is now the sole owner of NAI and shares in all profits and proceeds received by NAI. *Id.*; *see also* D. 222-2 at 8-9.

19. Applying the equitable principles above to these facts, Defendants may properly be held joint and severally liable for disgorgement as partners engaged in concerted wrongdoing.

III. Disgorgement Here Will Be For the Benefit of Investors

20. In *Liu*, the Supreme Court held that the "equitable nature of the profits remedy generally requires the Commission to return a defendant's gain to wronged investors for their benefit." 140 S. Ct. at 1948.

21. Because of the "delicate fiduciary nature of an investment advisory relationship" investment advisers have "an affirmative duty of utmost good faith, and full and fair disclosure of all materials facts, as well as an affirmative obligation to employ reasonable care to avoid misleading [their] clients." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186, 84 S. Ct. 275, 11 L. Ed. 2d 237 (1963).

22. Through their violations, Defendants breached these duties in this case to the detriment of their clients and prospective clients. D. 252 at 16.

23. The Commission intends to distribute to the Vireo AlphaSector clients any disgorgement awarded here, if Defendants timely pay what it owed.

24. If Defendants do not timely pay their full disgorgement, the Commission shall reassess the feasibility of the distribution based on the amount paid and, if still feasible, distribute funds to clients consistent with this Court's Final Judgment. If the Commission determines at that time that a distribution is not feasible given the amount Defendants have paid in disgorgement, it shall advise the Court and seek the Court's guidance on whether "a specific order ... directing any proceeds to the Treasury" is permissible. *Liu*, 140 S. Ct. at 1949.

25. Based on the Commission's representations concerning the distribution of the disgorgement to victim clients, the award of disgorgement is for the benefit of investors, as required by *Liu*. 140 S. Ct. at 1948; *see also Mizrahi*, 2020 U.S. Dist. LEXIS 186259, 2020 WL 6114913, at *2 (disgorgement ordered "for the benefit of investors" where SEC represented that it would "return [the disgorged] funds to [the violator's] clients").

IV. Defendants Should Be Deprived of the Net Profits They Gained from Their Illegal Conduct During the Statute of Limitations Period

26. Disgorgement of "net profits from wrongdoing after deducting legitimate expenses" may be awarded on a finding of the violations here. *Liu*, 140 S. Ct. at 1946.

27. To determine the net profits, it is necessary first to determine the amount of revenues from the wrongdoing. Then it is necessary to deduct those expense that are legitimate, that is, that are unrelated to the wrongdoing, here the expenses associated with providing advisory services. *See id.* at 1950 ("courts must deduct legitimate expenses before ordering disgorgement"). Net profits are the "gains 'made upon any business or-investment, when both the receipts and payments are taken into the account.'" *Id.* at 1949-50 (quoting *Goodyear*, 9 Wall., at 804). "[A] defendant may be denied inequitable deductions" and expenses that "are merely wrongful gains under another name." *Id.* at 1950 (internal quotation marks omitted).

28. As of January 1, 2021, the statute of limitations for disgorgement applicable to disgorgement in this case has been changed to ten years. Pub. L. 116-283, §6501(a)(3) & (b), Jan. 1, 2021, 134 Stat. 3388.

29. All profits of the Defendants' fraudulent scheme can be disgorged, as the earliest profits received by the Defendants from their fraudulent conduct occurred in 2011, less than ten years before the filing of this case.

30. The Commission has properly included in its calculation of disgorgement revenues and expenses paid from January 1, 2011 through 2013 (when Defendants sold the Vireo business, and stopped receiving revenue or incurring expenses for that business).

A. Revenues

31. Defendants' misconduct resulted in two types of revenue: fees paid by clients and the proceeds of the sale of the Vireo business. Each type represents "ill-gotten gains" obtained by the Defendants as a result of the fraudulent marketing scheme and their failure at any time to disclose to their clients the significant fraudulent misrepresentations that had been made to them by Defendants about the Vireo products. *See SEC v. AbsoluteFuture.com*, 115 Fed. App'x. 105, 106-107 (2d. Cir. 2004) (affirming order to disgorge all profits received as result of fraud).

1. Fees Paid By Clients

32. Based on Navellier's income statements, as summarized in the declaration of the Commission's accountant, Rory Alex, revenue from the Vireo AlphaSector business was $22,775,867 from 2011 through 2013. This amount represents the total investment advisory fees paid by Defendants' clients for the Vireo products during the limitations period. Declaration of Rory Alex ("Alex Decl."), ¶ 8.

33. All fees from 2011 through the date of the sale of the Vireo AlphaSector business fall within the 10-year limitations period for disgorgement claims resulting from a violation of Section 206(1) of the Investment Advisors Act of 1940. Pub. L. 116-283, §6501(a)(3) & (b), Jan. 1, 2021, 134 Stat. 3388 (extending statute of limitations applicable to claims for disgorgement for

certain securities fraud violations to ten years, and applying that extension to currently pending cases).

34. Defendants fraudulently induced people to become their investment advisory clients. The clients then paid investment advisory fees to NAI, while Defendants continued to conceal the truth about the Vireo products' track records. Thus, the investment advisory fees paid by those clients represent one component of Defendants' ill-gotten gains.

2. Sale of Vireo

35. In addition to the fees earned, Defendants subsequently sold the Vireo AlphaSector assets (namely, its client relationships) on September 23, 2013 for $14,000,000. Alex Decl. at ¶ 9 & Ex. 2 (NAI's business checking account statement for September 2013).

36. The value Defendants received in the sale is causally connected to its wrongdoing in violating the Advisers Act. Defendants "actions contributed to the value of the Vireo AlphaSector business that Defendants then sold to F-Squared." D. 252 at pp. 22-23. This is particularly true as, up to and including through the sale, Defendants did not fulfill their on-going obligation to disclose the falsity of their marketing representations that was their fiduciary duty. D. 252 at 17-18. As the Vireo sale price was largely dependent on the number of clients who transferred to F-Squared (instead of terminating their client relationship), Defendants had a substantial incentive

not to disclose their misrepresentations and the reason they were selling the business. D. 224-5, p. 34. Additionally, Navellier appears to have wanted to sell the Vireo business before the fraud became public and the firm faced a "big SEC enforcement fine," instead of disclosing to clients the problems. Ex. 15. Thus, there is no "clear break in or considerable attenuation of the causal connection between the illegality and the ultimate profits" from the sale. *Happ*, 392 F.3d at 32 (quoting *First City Fin. Corp., Ltd.*, 890 F.3d at 1232).

37. Adding the sale proceeds to the Vireo AlphaSector revenues discussed above, the total revenues equals $36,775,867 ($14,000,000 plus $22,775,867).

V. Non-Fraud Expenses May Be Deducted. Fraud-Furthering Expenses Should Not Be.

38. In *Liu*, the Court suggested that it is the province of the District Court, in the first instance, to determine what expenses equitably should be deducted from the disgorgement award. 140 S. Ct. at 1950 ("we leave it to the lower court to examine whether including those expenses in a profits-based remedy is consistent with the equitable principles underlying" the disgorgement-authorizing statute).

39. Expenses relating to the conduct of the legitimate business of providing investment advice to Defendants' clients will be deducted here because those expenses "arguably have value independent of fueling a fraudulent scheme." *Id.*

40. Plaintiff and Defendants start from essentially the same list of expenses, which have been apportioned to the Vireo business and do not include the non-Vireo part of NAI's investment advisory business. *See* Ex. 1; D. 278 at 13.

A. Legitimate Expenses That Should Be Deducted From Revenues

41. Expenses related to the legitimate investment advisory business conducted by NAI on behalf of Vireo clients should be deducted from revenues to determine the net profits of the wrongdoing.

42. The investment advisory agreements between Defendants and their victimized clients describe what investment advisory services Defendants contracted to provide them to after they had been fraudulently induced to sign up as clients. *E.g.*, Ex. 16, p. 2-3.

1. Research Expenses

43. These agreements indicate that the investment advisory fee clients paid was primarily to implement the AlphaSector Strategy for clients (i.e., periodically determining what trades should be made in their accounts so that their investment followed the strategy). *Id.* ("to invest in securities in the market segment(s) designated ... through the use of Navellier's proprietary fundamental and quantitative analysis.").

44. For the Vireo AlphaSector strategies, those trade instructions were exclusively supplied by F-Squared.

Ex. 17 at 2. NAI paid F-Squared for those instructions. *Id.* As the Commission stated in its initial memorandum in support of its Motion for Entry of Final Judgment (D. 262 & 263), the amounts paid by Defendants to F-Squared for these trade signal represents expenses of the business of providing the AlphaSector trading strategy to the clients.

45. During the relevant time period, Defendants paid $13,502,785 to F-Squared to license the strategy. That expense is represented by the "Research" line of the Vireo Income Statement. Alex Decl., ¶ 10. That amount will be deducted from the revenues.

2. Salaries for Transmitting Instructions to Brokers, Trading and Other Administrative Tasks

46. NAI had to implement the AlphaSector trading instructions in client accounts. Once a week or once a month (for each of the strategies), NAI needed to send the trade instructions that arrived from F-Squared to the clients' brokers or custodians, or to implement the trades in the client accounts itself. The cost of the time of the employee who transmitted these instructions and/or implemented the trades, to the extent it can be substantiated by the Defendants, can be deducted from the disgorgement award as a cost of managing client accounts.

47. Investment advisory fees also were used to pay for administrative tasks for client accounts, including setting up new client accounts, handling

account paperwork, billing and processing account terminations. The portion of salaries of people performing these administrative tasks that are attributed to Vireo in the income statement can be deducted from revenues in this disgorgement calculation.

48. The Commission has estimated the amount of salary that should be deducted for trade instructions, trading, and administrative expenses, by estimating (below) the salaries of the Vireo marketing/sales staff and deducting that amount from total salaries. The amount left (the non-marketing salaries) is the Commission's reasonable approximation of salaries deductible from revenues in the disgorgement calculation. This method conservatively assumes that all non-marketing salaries at Vireo were for work done for the Defendants' clients, and is consistent with the Commission providing a reasonable approximation of disgorgement.

B. Expenses That Should Not Be Deducted

49. Many of the expenses listed on the NAI income statement do not have a value independent of Defendants' fraudulent scheme. Both *Liu* and long-standing equitable principles dictate that these expenses should not be deducted from revenues in the disgorgement calculation. *See Liu*, 140 S. Ct. at 1950 (emphasizing the deduction of "legitimate expenses"); Restatement (Third) of Restitution and Unjust Enrichment, § 51(5)(c) ("A conscious wrongdoer or a

defaulting fiduciary ... will ordinarily be denied any credit for ... expenditures incurred directly in the commission of a wrong to the claimant."); *id.*, cmt. (h) ("The defendant will not be allowed a credit for the direct expenses of an attempt to defraud the claimant, even if these expenses produce some benefit to the claimant.").

1. Marketing Expenses

50. Defendants employed a large Vireo sales and marketing staff. The purpose of this sales and marketing staff was unrelated to providing services to Defendants' clients, the "legitimate" part of Defendants' Vireo business. To the contrary, the sales and marketing staff's purpose was to increase the number of clients who invested through NAI in Vireo AlphaSector strategies. Ex. 18 (R. 30(b)(6) Depo. of NAI) at 21:8-22:4. As determined in the Order and Memorandum granting partial summary judgment, the sales and marketing staff used the fraudulent marketing materials to induce prospective clients to sign up. In other words, Defendants' expenditures on sales and marketing amplified the harm caused by the Defendants' fraudulent marketing.

51. Defendants' marketing expenses can also be seen as the reinvestment of profits in expanding the fraud, rather than as an actual expense of the business. Defendants chose to take the money they were making from their fraud and reinvest it to acquire more clients and, in turn, additional fraud revenues, through the fraudulent marketing.

52. For these reasons, Defendants' sales and marketing expenses should not be deducted from revenues in this disgorgement calculation.

53. The Vireo income statement lists the following expenses which are not deducted in the Commission's calculation of disgorgement: salaries (for the sales and marketing staff), "marketing" costs, as well as meals, lodging, travel, entertainment, and automobile. Restatement (Third), Restitution and Unjust Enrichment, § 51, cmt. h (conscious wrongdoer's attempt to deduct the cost of services that the victim didn't ask for (here, marketing to other prospective clients) will "predictably be denied").

54. The Commission has provided a reasonable estimate of the salaries of the sales and marketing staff: $1,574,729, in the aggregate over the relevant time period. Declaration of William Donahue ("Donahue Decl."), ¶ 8.

55. This total represents roughly 76 % of the salaries listed on the Vireo income statement over the relevant time period.[1] Alex Decl., ¶ 16.

56. The Vireo Income Statement also lists expenses characterized as "marketing." For the reasons already stated, these expenses are not deducted.

---

1. This percentage will be used to apportion other expenses (such as lease) into marketing and non-marketing expenses, below.

57. Expenses for meals, lodging, travel, entertainment, and automobile also all appear to relate to sales and marketing efforts, rather than to the provision of investment advisory services to existing clients. Thus, these expenses are not deducted.

2. Incentive Pay and Bonuses

58. At NAI, incentive pay and bonuses were tied, generally speaking, to the assets under management for Vireo in that year. Exs. 5, 9, 13. In other words, the incentive pay and bonus amounts were tied to the increases in managed client assets that Defendants were able to attain through their marketing. Because incentive pay and bonuses were closely related to the acquisition of more client assets, and not to the provision of services to clients, they are not (as applied here) legitimate business expenses and are not deducted.

3. Legal Expenses

59. At the end of the disgorgement period, a new $400,000 expense for "Legal & Accounting" appear that did not appear in prior years. Ex. 1

60. In 2013, NAI had two new legal expenses not previously incurred, both related to Vireo. First, the sale of the Vireo business to F-Squared. Second, NAI's response to the Commission's subpoena for documents. Similar to the expenses discussed above, neither is deductible as an expense related to the provision of services to Defendants' clients. The first

is related to the continuation of the fraud by selling clients' accounts to F-Squared without disclosing the fraudulent misrepresentations. D. 252 at 22-23. The second is a litigation expense related to both the F-Squared litigation and this one. Ex. 22. As these legal expenses are unrelated to the provision of legitimate investment advisory services to clients, they should not be deducted.

VI. Additional Expenses Should Be Apportioned to Separate the Legitimate Expenses from Those That Should Not Be Deducted

61. "In determining net profit the court ... may make such apportionments ... as reason and fairness dictate, consistent with the object of" disgorgement. Restatement, Third, Restitution and Unjust Enrichment, §51(5) (2011). Apportionment "may involve ... the proportion of overhead or other common expenses properly charged against these results in determining the net profits of the business in question." *Id.* at § 51, cmt g.

62. Here, the expenses listed as office/misc., delivery, postage, printing, all may relate to both the provision of investment advisory services to clients and to Defendants' marketing efforts. These expenses should be thus apportioned, and only the expenses related to the provision of client services deducted.

63. The total of these expenses over the relevant time period is $184,077. Alex. Decl., ¶ 16.

64. The Commission has suggested a reasonable method of apportioning these expenses, using the ratio of Vireo's marketing salaries (as estimated by the Commission) to total Vireo salaries. This ratio represents the portion of Vireo's other expenses that may be attributed to the marketing effort. The residual is deductible from revenues.

65. This ratio, as calculated by the Commission's accountant, is $1,574,729 (marketing salaries) to $2,069,327 (total salaries) over the relevant time period, or approximately 76%. Multiplying that percentage by the total office, delivery, postage, and printing expenses for the time period yields $140,080. The residual, $43,997, shall be deducted from revenues. Alex. Decl., ¶ 16.

VII. Disgorgement Total

66. Defendants' total gross profit from their fraudulent scheme equals $36,775,867 ($14,000,000 plus $22,775,867).

67. "Legitimate expenses" deductible from revenues equals $14,041,380 (Research = $13,502,785, Non-Marketing Salaries = $494,598, and Related Non-Marketing Expenses (Office, Postage, Delivery and Printing) = $43,997). Alex Decl., ¶¶ 10-16.

68. Defendants' total disgorgement (*i.e.*, their net profits) equals $22,734,487. Alex Decl., ¶ 18.

VIII. Prejudgment Interest.

69. A district court has "broad discretion" to order a defendant to pay prejudgment interest on the disgorgement amount. *SEC v. First Jersey*, 101 F.3d 1450, 1476 (2d Cir. 1996).

70. "Courts have recognized that an assessment of prejudgment interest, like the disgorgement remedy, is intended to deprive wrongdoers of profits they illegally obtained by violating the securities laws." *Sargent*, 329 F.3d at 40 (citation omitted).

71. Without an award of prejudgment interest, a securities law violator receives an "interest-free loan" on his unjust enrichment. *Id.* at 41.

72. In SEC cases, courts typically calculate prejudgment interest using the rate established by the Internal Revenue Service for tax underpayment, which reasonably approximates the unjust benefit of a defendant's use of the money. *See First Jersey*, 101 F.3d at 1476; *Druffner*, 517 F. Supp. 2d at 512-13.

73. Using the Internal Revenue Service's interest rate for unpaid balances, prejudgment interest on $22,734,487 is $6,635,403, calculated through April 30, 2020. Alex Decl., ¶¶ 17-19.

74. Defendants are hereby ordered to pay disgorgement of $22,734,487 plus prejudgment interest of $6,635,403, for a total of $29,369,890.

Dated: January 19, 2021

Respectfully submitted,

SECURITIES AND EXCHANGE COMMISSION

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APPENDIX H — APPELLANTS' SUBSTITUTED OPENING BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED NOVEMBER 1, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal Nos. 20-1581, 21-1857, 22-1733 and 23-1509

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

NAVELLIER & ASSOCIATES, INC.,
AND LOUIS NAVELLIER,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1: 17-cv-11633
Hon. Denise J. Casper

APPELLANTS' SUBSTITUTED OPENING BRIEF

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* * *

[18] LN insisted that he would not be the investment adviser or portfolio manager for any of the Vireo strategies, and he was not. **(2 JA 312; 1 JA 171, p. 11:10–15; 1 JA 235)**

Peter Knapp was the portfolio manager for the Vireo strategies. **(1 JA 171 at page 11:10–12)**

NAI Marketing of Vireo

After licensing F2's AlphaSector Allocator and Premium index strategies, NAI created its own Vireo marketing material. NAI policy was that Vireo marketing material was only allowed to be distributed after Peter Knapp, Arjen Kuyper, and NAI's compliance team reviewed and approved said material. **(1 JA 155)**

NAI's Vireo Allocator and Vireo Premium marketing brochures contained the F2 Index hypothetical performance graphs calculated by NASDAQ OMX of the corresponding F2 AlphaSector Index but cautioned that the index performance shown in the brochure was the purely hypothetical performance of the F2 Index. **(2 JA 430, ¶ 2)**

The performance graphs for the F2 AlphaSector Allocator Index **(11 JA 2877; 11 JA 2886)** that were contained in NAI's Vireo AlphaSector Allocator or Vireo Premium brochures were clearly labeled as the performance track records of the respective *F2* ***Index***. (*Id.*) [The SEC, in its motion for partial summary judgment, specifically stated that it was not claiming that the F2 AlphaSector performance track records shown in

NAI's Vireo marketing materials violated 206(1) or 206(2). **(8 JA 1915)**]

[19] The NAI Vireo brochures further cautioned that a real person could not invest in the F2 index **(2 JA 430, ¶ 4)**, that a client investing in NAI's ***actual*** Vireo strategy **(2 JA 347, ¶ 1) (2 JA 384, ¶ 1)** would receive "significantly lower" performance results than those shown for the hypothetical F2 index performance graph **(2 JA 347, ¶ 1; 2 JA 384, ¶ 1)**, that a prospective Vireo investor should first consult with his/her investment professional before deciding whether to invest in that Vireo strategy **(2 JA 385)** and that, as with any investment, there was a risk that the investor could lose some or all of his/her investment. **(2 JA 431; 2 JA 385)**.

Peter Knapp and Arjen Kuyper were responsible for the presentation of historical performance of the F2 indexes in NAI's Vireo marketing materials. **(1 JA 155)**

LN refused to market the Vireo strategies and never did so. **(2 JA 308)**

The Actual Statement That Appeared In NAI's Vireo Allocator And Vireo Premium Marketing Materials Between 2010 And August 31, 2011

The SEC brought its partial summary judgment motion solely on the ground that NAI supposedly did not have support for its supposed statement in its Vireo Allocator and Vireo Premium marketing brochures that ". . . the strategy underlying the Vireo products had been "live traded" since 2001 . . . " **(2 JA 337)** and . . . was "not back tested" **(2 JA 339)**

NAI's Vireo AlphaSector Allocator and Vireo AlphaSector Premium marketing materials, from March 2010 through August 31, 2011, contained a statement in the "Important Disclosures" section in context that actually reads in pertinent part:

> [20] Navellier Vireo AlphaSector Allocator Premium is a *new strategy* that attempts to track an *index* known as the AlphaSector Allocator Premium Index . . .
>
> . . .
>
> AlphaSector Allocator Premium Index is the exclusive property of F-Squared Investments, Inc. . . .
>
> . . .
>
> Navellier & Associates, Inc. has entered into a Model Manager Agreement with F-Squared pursuant to which it timely receives any changes made to the AlphaSector Allocator Premium Index holdings.
>
> . . . the AlphaSector Premium Index, with the strategy that the AlphaSector Premium Index is based on having an inception date of April 1, 2001. The process of converting the active strategy to an index implies that the returns

> presented, while not back-tested, reflect theoretical performance an investor would have obtained had it invested in the manner shown and does not represent returns that an investor may have actually attained, as an investor cannot invest directly in an index.
>
> . . .
>
> There is no guarantee the advisor will be successful in achieving returns similar to the AlphaSector Premium Index, and in fact client returns will be significantly lower than the index returns . . .
>
> **(2 JA 347)**

The subject statement in NAI's Vireo Allocator and Vireo Premium marketing was true. **(3 JA 600, 3 JA 601, 3 JA 603, 3 JA 609 at pages 97:7 - 98:12)**

[21] Only the 2010 through August 31, 2011 Vireo Allocator and Vireo Premium marketing material contained the statement. **(11 JA 2868–12 JA 3020) (8 JA 1915; 2 JA 435-444)** NAI's other Vireo strategies did not contain this statement. **(11 JA 2868–12 JA 3020)** The source of that statement was the NASDAQ OMX letters. **(1 JA 193)**

LN Orders The Statement Removed

Beginning in the Third Quarter of 2011, LN had NAI Vireo staff remove from its Vireo Allocator and

Vireo Premium marketing materials, the 'based on live traded, not back tested' statement **(2 JA 435–439)** and to remove it from the Vireo AlphaSector Premium marketing materials. **(3 JA 522)**

NAI's Vireo assets under management ("AUM") (and clients) increased dramatically by more than One Billion Dollars after the statement was removed from its Vireo marketing materials. **(8 JA 1910)** assets under management compared to $73 Million before removal. **(2 JA 513 and 3 JA 547)**

NAI marketed its Vireo strategies to other investment advisory firms and investment professionals **(7 JA 1830-1831; 3 JA 724-730; 2 JA 468)** for one-on-one distribution. **(2 JA 468-510** at the bottom left of each page**)** If an individual approached NAI about Vireo, NAI required the person to retain an investment professional (his/her broker) to deal with NAI. **(2 JA 385)**

Each page of the brochure directed the investment professionals to read the "Important Disclosures" at the back of the brochure. **(2 JA 468-510** at the bottom left of each page**)**

* * *

[32] **Docket Nos. 236-1 through 236-8, Docket No. 244, Docket Nos. 244–1 through 244–9)** NAI also produced evidence showing that it did have support for the statement. **(1 JA 193)**

Defendants also moved for summary judgment in their favor as to all four of the SEC's claims (violations of 206(1), 206(2), 206(3), and 206(4)) and for summary judgment in their favor on their selective enforcement defense. **(Docket No. 223, Docket No. 224, Docket Nos. 224–1 through 224–6, Docket No. 227, Docket No. 238, and Docket No. 238–1)**

Oral argument was heard on October 2, 2019. **(6 JA 1532-1568)**

The District Court Decision

On February 13, 2020, the District Court granted the SEC partial summary judgment as to its claims for 206(1) and 206(2) violations as to NAI and as to LN, and dismissed Defendants' selective enforcement defense. The Court also denied Defendant's summary judgment motion. **(ADDM 90–ADDM 112)**

The District Court held that NAI and LN each violated 206(1)and 206(2) despite the fact that the SEC produced no evidence, or even argument, that NAI's allegedly false statement was false, and despite undisputed evidence that the statement was *true*. **(3 JA 600-601, 603 and 609 at pages 97:7-98:12)**. Instead, the District Court held that NAI and LN violated 206(1) and 206(2) because the SEC *argued* that NAI and LN marketed that the "*Vireo* . . . strategy had been live traded since 2001 and that Defendants were aware that they did not have any documentation to support those assertions." **(ADDM 103)** As discussed infra, NAI [33] never claimed that any of its

Vireo strategies had been live traded since 2001. The SEC produced no evidence showing any such statement. **(11 JA 2868–12 JA 3020)** To the contrary, NAI's Vireo marketing materials clearly and truthfully stated that NAI began live trading its Vireo strategies in 2010 **(2 JA 513–514; 3 JA 547–548)**, not in 2001, as the District Court erroneously held. The District Court also disregarded the fact that NAI *did* have documentary support for its statement. **(1 JA 190–193, 193; Docket No. 224–1, pp. 299-302)**

The District Court cited no legal authority for its holding that disseminating a true statement, even supposedly without documentary support, is a 206(1) or 206(2) violation, despite contrary legal authority, including the holding in *ZPR Inv. Mgmt., Inc. v. SEC*, 861 F.3d 1239 (11th Cir. 2017) ["{T}o establish a violation, each of these sections requires the SEC to show the investment adviser made a material misrepresentation . . . "] **(ADDM 103)** and despite cited authority that making a true statement is not an anti-fraud violation. *Lululemon Sec. Litig.*, 14 F.Supp.3d 553, 571 (S.D.N.Y. 2014) *See also Smith & Wesson Holding Corp. Sec. Litig.*, 836 F.Supp.2d 1, 11-13 (D. Mass. 2011) ["Plaintiffs' claims . . . fail because the undisputed evidence shows those statements were, in fact, true."]; citing *Carney v. Cambridge Tech. Partners, Inc.*, 135 F.Supp.2d 235,251 (D. Mass. 200 1) [the accurate reporting of historical information cannot be the basis for a securities fraud claim]; citing also *Matrixx Initiatives, Inc. v. Siracusano*, 131 S.Ct. 1309, 1318 (2011); I*n re iRobot Corp. Sec. Lit.*, 527 F. Supp.3d 124, 134 (D. Mass.

* * *

APPENDIX I — EXCERPTS FROM ERRATA TO APPELLANTS' REPLY BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED FEBRUARY 26, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 20-1581, 21-1857, 22-1733, 23-1509

US SECURITIES & EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

LOUIS NAVELLIER, NAVELLIER & ASSOCIATES, INC.,

Defendants-Appellants.

Filed February 26, 2024

On Appeal from the United States District Court
for the District of Massachusetts
No. 1:17-cv-11633
Hon. Denise J. Casper

ERRATA TO APPELLANTS' REPLY BRIEF

* * *

Appendix I

ERRATA TO APPELLANTS' REPLY BRIEF

INTRODUCTION

The District Court's judgment must be reversed because there is no evidence that NAI or LN schemed to defraud NAI's Vireo clients or engaged in any transactions or course of business to defraud those clients. To the contrary, NAI made $221 Million in profits for its Vireo clients. **(8 JA 1890)** Neither NAI nor LN disseminated any false statement. Both of NAI's two allegedly violative statements were true. First, F-Squared's *Index* strategy *was* indisputably based on another investment advisor's ("Morton's") investment strategy which he had live traded for his clients since April 2001. **(1 JA 193)** Second, the performance records for *F2*[1]*'s* AlphaSector *Index,* and the performance records for the only two NAI strategies that were the subject of the SEC's motion for summary judgment, *were* indisputably true and correct **(1 JA 190–193; 4 JA 863–866; 3 JA 609, pp. 97:7–98:12; 3 JA 603)** and calculated by NASDAQ OMX. **(1 JA 190–193; 4 JA 863–866)**

Contrary to the SEC's argument and the District Court's summary judgment decision, NAI *did* have independent support for its statements **(1 JA 193 and 4 JA 863–866)** and did not omit any material facts.

1. The terms "F-Squared" and "F2" are used interchangeably throughout this brief.

ARGUMENT

I. NAI'S STATEMENTS WERE TRUE

The District Court's judgment was erroneous because it was built on a "house of cards" comprised of SEC repeated mischaracterizations of what NAI *actually* said in its Vireo marketing to clients. *Oklahoma Firefighters Pension & Ret. Sys. v. Biogen Inc.,* 665 F. Supp.3d 125 at 131-132 (D. Mass. 2023) The District Court here, based on the SEC's repeated unfounded mischaracterizations, granted the SEC's motion for summary judgment, holding that:

> [t]he SEC *argues* that the evidence shows that Defendants marketed to potential and current clients that the *Vireo* AlphaSector Strategy *had been live traded since 2001* and that Defendants were aware that they did not have *any* documentation or confirmation to support those assertions. (Emphasis added by Appellants)
>
> **(ADDM 103)**

What NAI *actually* said and did was to provide a two-page performance chart and disclosure stating correctly that its Vireo AlphaSector Premium live-traded strategy began in "2010" and provided its live-traded performance track record of a 13.18% increase through December 31, 2010. **(11 JA 2909; 2 JA 513–514; 3 JA 547–548)**

The District Court's summary judgment must be reversed because NAI[2] made no false or misleading statement about its two Vireo AlphaSector strategies[3], which statement was the subject of the SEC's summary judgment motion. The District Court's summary judgment that Appellants disseminated a false statement was wrong because the District Court mischaracterized what NAI actually said. *Oklahoma Firefighters Pension & Ret. Sys. v. Biogen Inc.,* 2023 WL 2693793.

Thus, the District Court granted summary judgment because the SEC *argued* that the evidence showed that Appellants supposedly stated that NAI's Vireo AlphaSector strategy had been live traded since 2001 but knew that they did not have any documentation to support that assertion. **(ADDM 103)**

The District Court was absolutely wrong and committed reversible error in its holding both legally and factually. Contrary to the District Court's summary judgment and the SEC's repeated mischaracterization

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2. Although the District Court made repeated conclusory holdings that "Defendants" (NAI and LN) disseminated the allegedly fraudulent statement **(ADDM 103),** it cited no evidence that LN disseminated the allegedly false statement, and there was no such evidence. In fact, the undisputed evidence established that he did not make or disseminate the allegedly false statement. **(3 JA 308)**

3. NAI had nine different Vireo AlphaSector strategies. **(3 JA 600–606; 3 JA 785)** The SEC claimed and produced "evidence" that only two of NAI's Vireo strategies' marketing materials contained the allegedly violative statement. **(11 JA 2868–12 JA 3020)**

here (OB, pp. 3, 9, 10, 11, 19, 24, 25, 27, 28 and 29), NAI's Vireo marketing material **(11 JA 2968–12 JA 3020)** did not state that its *Vireo* AlphaSector strategies had been live traded since 2001. To the contrary, the undisputed summary judgment evidence shows that NAI clearly and truthfully stated that each of its Vireo AlphaSector strategies was a "new" strategy **(2 JA 347)** which NAI began to *actually* trade for its clients in 2010. **(11 JA 2909; 2 JA 513–514; 3 JA 547–548)** Thus, the District Court's holding—that NAI violated 206(1) and 206(2) by "marketing that its *Vireo* AlphaSector strategy had been live-traded since 2001"—is a totally erroneous mischaracterization of what NAI actually said. What NAI actually stated was true. The statement was not a violation of the anti-fraud provisions of the security laws. *Oklahoma Firefighters Pension & Ret. Sys. v. Biogen Inc.*, 2023 WL 2693793, at *1.

There, as here, the plaintiff asserted a securities fraud action alleging that the defendant corporation had made statements about its new Alzheimer's drug that it said it was about to market. The District Court dismissed plaintiff's Rule 10b-5 securities fraud case because the plaintiff mischaracterized what the defendants actually stated, in order to make it appear that the statements were false, when in fact, what defendants actually stated was true:

> Oklahoma Firefighters alleged that Defendants made twenty-five false and misleading statements . . .
>
> . . .

> Ultimately fatal to Oklahoma Firefighters' case is the constant misrepresentation of what the Defendants said.
>
> . . .
>
> A securities fraud complaint cannot rest on a house of cards made of mischaracterized statements. *(Oklahoma Firefighters Pension & Ret. Sys. v. Biogen Inc.,* 2023 WL 2693793, at *1)

Accord *Kin–Yup Chun v. Fluor Corp.,* No. 3:18-cv-01338-X, 2021 WL 1788626, at *7 (N. D. Texas May 5, 2021) (holding that statements were not false or misleading, where plaintiff mischaracterized statements and/or defendants "never said" what plaintiff alleged)

The SEC did the same thing (mischaracterized NAI's statement) in the District Court and repeatedly does so again here (OB[4], pp. 3, 9, 10, 11, 14, 15-16, 17, 19, 24, 25, 27, 28, 29 and 30) in a desperate attempt to uphold the erroneous summary judgment by making it appear that NAI said something it did not say.

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4. "OB", p. ___ refers to pages of the Brief of the Securities and Exchange Commission, Appellee filed January 8, 2024 in this appeal. The terms "Opposition Brief" and "OB" are used interchangeably throughout this Brief.

A. SEC Repeated Mischaracterizations

The SEC repeatedly mischaracterizes what NAI's Vireo marketing material actually said. Thus, at page 10 of its Opposition Brief, the SEC argues:

> "In disclosures to clients and prospective clients, appellants claimed the strategy underlying the Vireo AlphaSector strategies (i.e. F2's AlphaSector strategy) had successfully traded actual securities for actual clients since April 2001." citing ADDM 93-94.

First, "Appellants" made no such statement. The SEC produced no evidence that Appellant, Louis Navellier, recommended or marketed any of NAI's Vireo AlphaSector strategies to anyone.

Second, what NAI actually stated was that it began trading its Vireo strategy in 2010. **(11 JA 2909)**

Third, NAI did not state that the strategy underlying its Vireo AlphaSector strategies was some "F Squared AlphaSector strategy that had successfully traded actual securities for actual clients since 2001." What NAI actually stated was that its Vireo strategies were "new" strategies "that attempt to trade an *index* known as the AlphaSector Index" owned by F Squared, which sent trade signals from its F Squared AlphaSector *Index* strategy, but that index signals represent theoretical performance of what an investor would have obtained if it invested in the manner shown, but does not represent returns that an investor may have actually attained, as an investor cannot invest directly in an index. **(2 JA 347)**

NAI further disclosed, as a matter of important disclosure, that some of the returns reflect hypothetical performance and "does not represent returns that an investor actually obtained". "Hypothetical back tested performance has many inherent limitations." The Index should be considered as Model Portfolio results and are mere "paper" or proforma performance results. The performance results [for the F-Squared AlphaSector Index] presented are from an index, not an actually funded portfolio" and may not reflect the impact that material economic factors . . . might have had on the adviser's decision making if the adviser were actually managing clients' money." "No real money has been invested in the index." The index results do not represent actual funded trades." "The reported performance of indexes presented in the accompanying charts and graphs do not reflect the performance results of Navellier's actually funded and traded Investment Products." **(12 JA 2994)**

Thus, contrary to the SEC's mischaracterizations, NAI's Vireo marketing did *not* claim that F2's AlphaSector *Index* strategy had traded actual securities for actual clients since 2001.

The SEC tries to squirm out of its mischaracterizations and the District Court's unsupported decision by claiming that the true statement in NAI's Vireo marketing—that F2's AlphaSector Index strategy was based on some unnamed advisor's (Morton's) strategy which he actively traded for his clients since 2001—was false because it was an algorithm developed years later by a college student who had no access to actual data, citing (10 JA 2555–2557). It wasn't, and the evidence established that it was true. **(1 JA 193)**

Again, the SEC mischaracterizes the "evidence". The SEC's "evidence" is a portion of its coerced, self-serving *inadmissible settlement* with F2. **(10 JA 2539–2615)** Statements in a settlement with a third party (F2) to which neither NAI nor Mr. Navellier were parties, and to which neither NAI nor Mr. Navellier agreed, is not admissible as evidence to support the SEC's claims against NAI or Mr. Navellier.

As a matter of law, a statement of fact "in or attached to a settlement agreement with a third party [F2] who is not a party to the present action are not admissible as evidence (Fed. R. Evid. 408(a)(1)) and cannot be used as evidence [by the SEC] to support a motion for summary judgment." *Massachusetts Mut. Life Ins. Co v. DLS Mortg. Capital Inc.,* 251 F. Supp.3d 329, 331 (D. Mass. 2017); *Portugues-Santana v. Rekomdiv Intl,* 657 F.3d 56, 63 (1st Cir. 2011); *McInnis v. AMF Ins.,* 765 F.2d 240, 247 (1st Cir. 1985).

The SEC made clear and agreed in that settlement with F2 that "[t]he findings herein are made pursuant to Respondent's [F2] Offer *and are not binding on any other person or entity [such as NAI] in this or any other proceeding" [such as this one]* **(10 JA 2540, n 1)** Therefore, the SEC is estopped from and cannot use or assert the clearly hearsay "facts" or "findings" by F2 in its settlement (10 JA 2539) and Appendix attached thereto (10 JA 2539 and 2540) as "evidence" that the Wealth Manager (Morton) did not use a moving average ETF sector rotation strategy to invest some of its clients' assets going back to 2001.

In fact, the actual admissible evidence before the District Court in this case was that Morton admitted that his firm used such a strategy to live trade real money for some Morton clients' accounts going back to 2001. **(3 JA 609 at pages 97:7–98:12; 3 JA 600; 3 JA 601; 3 JA 603)** NASDAQ OMX confirmed this fact. **(1 JA 193)**

The SEC presented no evidence to disprove that the Morton strategy—the strategy on which F2's index strategy was based—was live traded since 2001[5].

The SEC, for the first time here on appeal, improperly attempts to use the judgment in the Howard Present case as, "collateral estoppel evidence" that Morton did not live trade its strategy since 2001. (OB, p. 28) But that

5. The SEC refers to (11 JA 2765), the uncontested administrative proceeding against Howard Present, which the SEC improperly submitted below, as "evidence" to oppose NAI's and LN's selective enforcement defense, not as evidence that NAI's marketing statement was false. After NAI repeatedly pointed out to the District Court that the SEC had produced no evidence that NAI's statement was false, the SEC, at oral argument on summary judgment, attempted to argue that the F2 settlement, not the administrative proceeding against Howard Present, was "evidence" that the subject statement in NAI's Vireo marketing was false but NAI objected to such "evidence" as inadmissible (and does so again here), and it was inadmissible. *Massachusetts Mut. Lift Ins. Co v. DLS Mortg. Capital Inc.,* 251 F. Supp.3d at 331.

judgment, which is not in the record, is inadmissible and cannot be used by the SEC in this case or in this appeal. *United States v. Gary,* 74 F.3d 304, 313-314 (1st Cir. 1996)

A party [the SEC] cannot use a judgment from a different case, here in this case against Appellants, who were not parties to the other case and had no opportunity to litigate the issues in the prior case. *Hansberry v. Lee,* 311 U.S. 32, 40 (1940); *Guzman-Ruiz v. Hernandez-Colon,* 406 F.3d 31, 36 (1st Cir. 2005) [can't use evidence in another case as substitute for lack of evidence in this case]

Contrary to the SEC's assertion (OB, p. 28), Docket Entry 388 in the *SEC v. Present* case was *not* part of the record below and cannot be used in this appeal.

The SEC presented no evidence, and in fact did not dispute, that F2's Index strategy was based on Morton's live traded investment strategy **(8 JA 1915)** (because it knew it could not).

Instead, the SEC attempted to satisfy the fraud element of its 206(1) and 206(2) claims by way of an incorrect factual and legal argument—that it is a securities fraud violation to disseminate a true statement without support for the statement. **(2 JA 237)**[6]

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6. The only evidence the SEC presented to supposedly support its *argument* that NAI's Vireo marketing statement—that F2's index strategy was based on an advisor's live traded strategy since 2001—was false, consisted of excerpts from NAI's Vireo Premium and Vireo Allocator marketing material **(11 JA 2868–12 JA 3020)** which excerpts merely showed what NAI said. Those exhibits did not show that what NAI said was false. (Id.)

The SEC further mischaracterizes the "evidence" by arguing, at pages 28 and 11 of its Opposition Brief, that F2's Index strategy was not based on Morton's live trading strategy because Howard Present supposedly admitted that Morton's strategy was not live traded back to 2001, in his March 2011 conference call with an analyst [Joe Guerin] and [Peter] Knapp" (OB, p. 28) during which Mr. Present supposedly "admitted that the AlphaSector strategy *performance* was not based on actual trades beginning in April 2001", citing **(9 JA 2158).** But the SEC's characterization is a total mischaracterization of the "evidence" **(9 JA 2158)** it cites, and of the actual facts. First, there was no conference call between Mr. Guerin (an analyst at RBC), Mr. Knapp, and Howard Present. The cited March 11, 2011 email (9 JA 2158) refers to a call between Knapp and Mr. Tomney of F2. Mr. Present was not on the call. He also did *not* admit to ever having told Mr. Guerin or anyone else that the F2 Index was not based on a wealth manager's live traded strategy. **(9 JA 2153)** In fact, when Mr. Present first heard about Mr. Guerin's misrepresentation, he strenuously denied making such a statement and offered to send Mr. Guerin his written denial. **(1 JA 187)**

In short, contrary to the SEC's misrepresentation, Mr. Present did not "admit" that the F2 Index strategy was not based on Morton's live traded strategy. The NASDAQ OMX letter was not hearsay. Knapp asked for confirms.

B. "AlphaSector's Performance History"

The SEC again makes a scrambled, vague, mischaracterized reference to some unidentified

"AlphaSector's performance history" (OB, p. 27) in an effort to make it appear that NAI's Vireo marketing said something it did not say. The only references to "AlphaSector's performance history" were to the actual performance history of NAI's own *Vireo* AlphaSector strategies from 2010 forward, when NAI actually began managing its Vireo clients' accounts according to its Vireo AlphaSector strategies **(11 JA 2908–2909),** and to the clearly described and NASDAQ OMX confirmed "hypothetical" performance record of F2's AlphaSector Index strategy. **(11 JA 2877)**

NAI did not "lie" to prospective clients about "AlphaSector's performance history". There were no references in NAI's Vireo marketing materials to "AlphaSector's performance history". The only performance histories referenced in NAI's Vireo marketing were to F2's AlphaSector Index performance **(11 JA 2886)** and to the performance history of NAI's actually traded Vireo strategies. **(11 JA 2877)**

* * *

Likewise, contrary to the SEC's unsupported argument, it was not a breach of NAI's[9] fiduciary duty for NAI to sell its Vireo business goodwill to F2.

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9. Mr. Navellier had no fiduciary duty to NAI's Vireo clients. He was not their "investment advisor" because he did not provide them with investment advice **(2 JA 308)** and did not receive compensation for Vireo investment advice he did not give them. 15 U.S.C. § 80b-2(11), *Belmont v. MB Inv. Partners,* 708 F.3d 470, 486 (3rd Cir. 2013).

D. F2's Index Performance

The SEC continues its mischaracterizations by misstating Appellants' argument that NAI making a true statement is not a 206(1) or 206(2) violation. Thus, the SEC claims, at page 29 of its Opposition Brief, that Appellants argue (Br 45-47) that their claims about AlphaSector were not false because they referenced an "index". But that is not Appellants' argument. What Appellants argued, in their Opening Brief at pages 45 through 50, was that the District Court committed reversible error because it mischaracterized NAI's statement in its Vireo marketing material, to make it appear that NAI was stating in its marketing material that *its Vireo* AlphaSector strategy was live traded since 2001 **(ADDM 103)** when in fact, NAI's Vireo marketing material made no such claim. **(11 JA 2908–2909)** Instead, it clearly disclosed that NAI's Vireo strategies tracked F2's AlphaSector Index strategy and that *F2 's* Index strategy was based on an adviser's live-traded strategy in 2001. That statement is indisputably true. NAI's Vireo AlphaSector strategy began live trading ***in 2010.***

The SEC next argues (OB, p. 29) that NAI's statement was "materially misleading" because the District Court concluded that NAI stated that "the *index* was based on real assets trading in real time since April 1, 2001." But NAI did not state that F2's index was based on real assets trading in real time. What NAI's marketing *actually* stated was that the F2 Index *strategy* was *based on an* unidentified advisor's [Morton's] live-traded investment strategy. But NAI made clear that F2's Index strategy did not invest real money in real time because an index only makes hypothetical trades, not real trades with real money for real investors. **(12 JA 2994)**

The SEC further dissembles when it argues (OB, p. 29) that Appellants violated § 206's prohibition against failure to disclose material information "when they repeatedly told clients that 'F Squared AlphaSector's performance' history was based on live trading without disclosing the "*crucial*" information that *they* had asked Present and F Squared for "supporting" information but were never provided any."

However, the anonymous adviser's trade confirmations were not material. The anonymous adviser's 10-year-old performance was irrelevant because NAI was not marketing his strategy. It was marketing its own Vireo strategies, not his. Investors were hiring NAI, not him.

Contrary to the SEC's unfounded assertion (OB, p. 29), NAI and LN[10] *never* told, let alone "repeatedly" told, any client that F2's "AlphaSector performance history" was based on live trading. There was no "F2 AlphaSector performance history". What NAI truthfully stated was the performance history of F2's AlphaSector *Index*. NAI made no statement about the anonymous adviser's performance. Significantly, NAI never represented how the anonymous adviser's strategy performed **(1 JA 193)** and, contrary to the SEC's assertion (OB, p. 10), never

10. Mr. Navellier never made any representations to clients about F-Squared's AlphaSector performance.

represented that the anonymous adviser's strategy was "successful".

Equally meritless is the SEC's argument at OB, page 29—that NAI's [true] statement that F2's Index strategy was based on an active strategy, was false—because the District Court held that NAI "omitted" to disclose to clients that it had asked F2 for data to confirm that the advisor (Morton) had live traded, but that NAI never received confirmations. However, as just discussed, the District Court's holding is incorrect because the anonymous adviser's confirmations were irrelevant. NAI did have support and received a spreadsheet for the F2 Index's hypothetical performance. **(1 JA 119–130)** There are no real trade confirmations for an index's "trades" because they are hypothetical "trades".

The SEC argues that NASDAQ OMX's letter is not support because its 'advisor live traded' statement was "hearsay", but it wasn't. NAI produced confirmation from Jay Morton that he had live traded his strategy since 2001. **(3 JA 609 at pp. 97:7–98:1) (8 JA 1966) (3 JA 603)** NAI also produced Morton's spreadsheets showing that his strategy started trading in 2001. In an attempt to refute Morton's admissions, the SEC improperly resorts to F2's inadmissible supposed "admission", in its settlement agreement with the SEC, that no data of Morton live trading exists. Again, that settlement is inadmissible. It is not evidence on the question of whether Morton live traded his strategy. Moreover, just because the data no longer exists (after 10 years), that is not evidence that it never did, or that live trades were not made.

The SEC continues to mischaracterize by erroneously arguing that NAI knew it had no support and "omitted" to tell potential clients that Peter Knapp (NAI's chief compliance officer) indicated that F2's lack of confirmation for Morton's live traded strategy should have knocked AlphaSector "out of contention from being an NAI strategy". (OB, p. 30) Of course, that is not what Mr. Knapp's due diligence report *actually* said. What Mr. Knapp *actually* said was that ordinarily, the lack of trading confirmation for a strategy [Morton's] would have knocked F2's AlphaSector *Index* strategy out of contention "*but for the following factors*", and Knapp goes on to list them, including NASDAQ OMX's letter; the confidentiality agreement; the fact that the F2 Index strategy had avoided the 2008 stock market crash; and the fact that F2 provided Knapp with NASDAQ OMX's spreadsheet of the F2 Index's hypothetical trades back to 2001 which backed up the F2 Index strategy's performance back to 2001. **(1 JA 119–130)** The foregoing gave Mr. Knapp "no reason to doubt" what Mr. Present said. **(12 JA 3029)** Mr. Knapp went on to recommend that NAI license the F2 Index strategy.

1. Sale of Goodwill "Omissions"

The SEC switches gears and argues that it was a fraudulent omission for Appellants to not tell NAI's *existing* clients that NAI was selling its Vireo business

* * *

3. The Supposedly Violative Statement Was Not Material

NAI's reference to an unnamed advisor's live traded strategy, as some undefined, undescribed "basis" for F2's Index strategy, even if false (it was not), was not material.

Admittedly, no investor cared or paid attention to an unnamed advisor's undisclosed performance, if any. How could they? It says nothing. It provided no information that an investor could use as part of the mix to decide whether to invest in NAI's Vireo strategy.

Contrary to the SEC's assertion, reference to some undisclosed investment advisor's undescribed performance, did not, in any way, "speak to the inherent risk" in the *NAI Vireo* investment strategy. (OB, p. 32) It was obviously not material since NAI deleted the reference after July of 2011 and thereafter, marketed Vireo without it, and raised more investors, with over One Billion Dollars invested in Vireo strategies, after the advisor reference was deleted. **(8 JA 1910) (2 JA 513 and 3 JA 547)**

The SEC produced no investors that said the advisor reference was important to them or that they relied on it. *Flannery v. S.E. C.,* 810 F.3d 1, 9 (2015) In fact, they claimed it was not important. **(6 JA 1447 at pages 52:7–53:5) (3 JA 718)**

The SEC embellishes its mischaracterizations by misleadingly arguing that a reasonable investor would find it obviously important that "AlphaSector did not use real investments to navigate two bear markets. (OB, pp. 31-32) But NAI never said "AlphaSector" used real money to navigate bear markets. NAI clearly disclosed that it was F2's *Index* that outperformed its benchmark in two bear markets, and it indisputably did. **(12 JA 2983)** Contrary to the SEC's mischaracterization, NAI clearly disclosed that F2's Index performance disclosed in NAI's Vireo marketing was not based on real money trades by real people. **(12 JA 2994)** NAI correctly and truthfully said that F2's Index hypothetical performance outperformed two bear markets **(ADDM 105)** and it did. **(12 JA 2983)** The SEC does not dispute those performance figures. Thus, there was no misrepresentation, let alone a material representation.

Contrary to the SEC's attempt to make it appear that NAI's reference to the mysterious advisor led investors to believe that F2's Index performance was the advisor's "live" traded performance, that concocted theory is meritless. NAI clearly disclosed that F2's performance was hypothetical, not real money performance. **(12 JA 2994)**

The SEC next argues that a hypothetical investor would find it important to know that NAI sold its Vireo accounts, managed according to the "concededly fraudulent strategy", "back to Howard Present." (OB, p. 31) That is another huge mischaracterization. The Vireo strategy was not "concededly fraudulent". NAI invested Vireo clients' monies exactly according to the criteria of its strategy and made $221 Million of profits for its clients. **(8 JA 1890)** What was important to investors is that Vireo invested according to its stated strategy, and it undisputedly did so.

The SEC repeats its mischaracterization when it argues that it is materially misleading to "falsely represent that a strategy's performance history is based on real trades when in fact it is based on a hypothetical model. (See supra at 8)" (OB, pp. 33-34) But that is not, even remotely, what NAI said or did. As the undisputed evidence shows, what NAI actually said was that *F2's* AlphaSector Index was an index, i.e., a *model* of hypothetical trades, with no real money invested by no real people. **(12 JA 2994)**

The SEC argues that NAI knew it couldn't claim that F2's Index's performance was based on real trades because it had "warned" Appellants. Aside from the fact that those disputed "warnings" were merely unproven SEC accusations, NAI never claimed that the F2 Index performance was based on real trades **(12 JA 2994)** and NAI's clients were all wrap fee clients co-advised by investment professionals who knew that index performance is not based on real trades.

Contrary to the SEC's mischaracterization of Arjen Kuyper's out-of-context, incomplete snippet of his testimony, Mr. Kuyper testified that hypothetically, the performance history of NAI's strategy would be material. Mr. Kuyper's opinion was/is not expert opinion and is not addressed to the facts herein.

As for the importance attached to the statement by those who knew about it, the evidence is clear that those who knew (the investors and NAI) about the allegedly false statement (about the mysterious investment advisor) clearly thought it was completely immaterial. The SEC produced no clients that testified that they relied on it or thought it was important. *Flannery v. S.E.C.,* 810 F.3d at 9. In fact, the SEC's own counsel testified that F2's old *(historical)* model hypothetical performance was not material. **(8 JA 1881)** Ken Zanonni, the investment advisor who referred NAI's clients with $100 million invested in Vireo, thought that it was irrelevant, and that model performance was irrelevant and that what *was* material was NAI Vireo's actual performance.

NAI clearly thought and treated the statement as immaterial, and deleted it in 2011, and raised nearly a Billion Dollars in client assets after removing the statement.

The SEC argues that a lack of investors' reliance on the statement does not mean that it wasn't material. (OB, pp. 33-34) Of course, it does. Lack of investor reliance is strong evidence that it wasn't important to them.

In any event, materiality is a highly factual issue for a jury to decide. *SEC v. Lemelson,* 57 F.4th at 27. It was reversible error for the District Court to hold that the statement was material.

E. Fraud Is A Jury Issue

Even if the SEC had presented admissible evidence of a material omission, as opposed to inadmissible pure speculation about a material omission, at a minimum, fraud is a jury question which cannot be decided by summary judgment. *Geffon v. Micrion Corp.,* 249 F.3d 29 (1st Cir. 2001)

* * *

IV. THE DISTRICT COURT'S AWARD OF REMEDIES (DISGORGEMENT, INTEREST, CIVIL PENALTIES AND PERMANENT INJUNCTIVE RELIEF) WAS REVERSIBLE ERROR

A. Standard of Review

This Court's standard of review of the District Court's disgorgement award, of both NAI's advisory fees and of the proceeds of its sale of its Vireo goodwill, is de novo review. *SEC v. Sanchez-Diaz,* 88 F.4th 81, 86–87 (1st Cir. 2003) ["Disgorgement is an equitable remedy and Nile availability of an equitable remedy presents a question of law engendering de novo review."]

B. As A Matter of Law, The District Court Had No Authority To Award Any Disgorgement Because NAI's Vireo Client Investors Suffered No Pecuniary Harm As A Result of Appellants Purported 206 Violations

For the reasons set forth above, the District Court committed reversible error in holding that NAI and LN violated 206(1) and 206(2). However, even if *arguendo* they had violated 206(1) or 206(2), the District Court's disgorgement award must be reversed in its entirety because NAI's clients suffered no *pecuniary* harm.

The SEC argues that it can seek disgorgement of NAI's and Mr. Navellier's supposedly "ill-gotten" gains under 15 U.S.C. § u(d)(5) and (d)(7) (OB, pp. 42–51) even though NAI's Vireo clients suffered no pecuniary harm. The SEC is wrong.

Even if NAI or LN violated 206(1) or 206(2), disgorgement is still not authorized, as a matter of law, because there were no "victims" of Appellants' purported securities fraud violations. Any disgorgement award has to be for "victims", i.e. investors who suffered a pecuniary loss. *Liu v. SEC,* 140 S.Ct. 1936, 1940 (2020); *SEC v. Govil,* 86 F.4th 89, 98 (2d Cir. Dec. 31, 2023)[13] ["{a}n investor who suffered no pecuniary harm as a result of the fraud is not a "victim" and therefore disgorgement is not allowed];

13. The *Govil* case was decided after Appellants filed their Opening Brief. The SEC mentions it in its Opposition Brief (OB, p. 50) but does not, and cannot, refute the correctness of its reasoning.

SEC v. Muraca, No. 17-cv-11400, 2019 WL 6619297, at *9 (D. Mass. Dec. 5, 2019) [Each investor has been given the opportunity to have his or her investment returned in full. Therefore, disgorgement would not benefit the investors. Disgorgement would, as a practical matter, serve only as an additional penalty"]; *SEC v. Lemelson,* 596 F. Supp.3d 227, 238 (D. Mass. 2022) [In light of the lack of victims, the court will not order disgorgement. The Supreme Court recently made clear that disgorgement is a tool intended to benefit investors, not to further punish the defendant.]

Since it is undisputed that NAI's investor clients suffered no pecuniary harm as a result of Appellants' purported fraud but rather, *made* $221 Million in *profits,* the District Court's *entire* disgorgement award is improper and must be reversed.

In *Govil,* the founder of a company engaged in three fraudulent securities offerings whereby he represented to investors that he would use the proceeds from the offerings to satisfy outstanding corporate debts. Instead, he diverted $7.3 Million of the offering proceeds to his own private accounts. The district court ordered $5.8 Million in disgorgement. Govil appealed, arguing that disgorgement was not authorized under 15 U.S.C. §§ u(d)(5) or (d)(7) because it did not comport with equitable limitations recognized in *Liu v. SEC,* 140 S.Ct. at 1240—that disgorgement must be "awarded for victims." *Govil,* 86 F.4th at 93-94 ["A defrauded investor is not a 'victim' for equitable purposes if he suffered no pecuniary harm.". *Id.* at 94.]

The Second Circuit, in *Govil,* went on to hold that a defendant is only required to give back the proceeds of his securities fraud once *(Govil,* 86 F.4th at 94.) and that a wrongdoer makes a payment in satisfaction of disgorgement when he returns property to a wronged party. *Id.*

The District Court below ordered disgorgement **(ADDM 110–112),** relying on pre-Liu decisions and mischaracterizing Appellants' arguments. It ordered disgorgement, even though it is undisputed that NAI's Vireo investor clients suffered no pecuniary losses and made $221 Million in profits as a result of allegedly being "fraudulently" induced to hire NAI and even though NAI Vireo investors received back a return of all their approximately $1.2 Billion in investment principal, plus all of the $22-Million in investment advisory fees they paid to NAI **(ADDM 19, ¶32)** (AB, pp. 68). It ordered LN (who gave no advice, received no fees, and committed no fraud) to disgorge $22,734,487 (incorrectly calculated by the SEC and the District Court) plus $6,635,403 in interest thereon for NAI's advisory fees and proceeds from its sale of *its* Vireo goodwill. The Supreme Court, in *Liu,* and recently the Second Circuit in *Govil,* disagree. In *Govil,* 86 F.4th at 94, the Court, citing *Liu,* 140 S.Ct. at 1940, held:

> (u) "disgorgement must be awarded for victims" . . . An investor who suffered no pecuniary harm as a result of the fraud is not a victim. The

* * *

Nor does *SEC v. Ahmed,* 72 F.4th 379 (2d Cir. 2003) support the SEC's position that disgorgement of NAI's gains is proper without pecuniary harm. In *SEC v. Ahmed,* the Second Circuit held that for purposes of disgorgement, the disgorged amounts had to be paid for the "victims" who were harmed. The Second Circuit in *Govil* clarified that the harm had to be pecuniary harm. *Govil,* 86 F.4th at 94.

C. No Causal Connection Between NAI's Gains and Its Alleged Wrongdoing

Even if disgorgement could be awarded for victims who suffered no pecuniary harm (it can't be), disgorgement would still be improper because there was no causal connection between NAI's alleged "wrongdoing" and its gains which were earned in exchange for providing valuable consideration.

The SEC again mischaracterizes by arguing that disgorgement was allowed because supposedly there was an "obvious" causal connection between Appellants' alleged fraud and NAI's profits. (OB, pp. 52-54) The SEC presents no evidence, only incorrect argument, and speculation. The SEC argues that investor reliance on the allegedly false statement is not necessary for an award of disgorgement. (OB, p. 52) Of course, it is. If, as here, there is no evidence that investors relied on the statement, then there is no evidence of any causal connection between the "wrongful" statement and investors paying NAI the advisory fees that the District Court ordered disgorged. Just because an immaterial, allegedly false statement appeared for a year (before being removed) in two of

NAI's marketing brochures, that in no way establishes that Vireo investors paid any of the $22 Million in advisory fees to NAI as a result of that statement, as opposed to the evidence—that they paid the fees for valuable consideration (profitable investment advice) and continued to do so for years. Indeed, the evidence[15] was—that the investors did not care about some unnamed adviser having used a precursor to F2's Index strategy, or about F2's *hypothetical* index performance. **(6 JA 1447 at pages 52:7–53:5) (3 JA 718) (3 JA 718)** What they cared about, and what induced them to become and *remain* NAI Vireo clients, was—NAI's actual Vireo performance.

The SEC makes the factually and legally unsupported speculative leap that—once investors became NAI Vireo clients, they paid NAI advisory fees while Appellants continued recommending the Vireo AlphaSector products using fraudulent representations—by continually failing to tell their clients the truth about "AlphaSector's performance record" (OB, p. 53). NAI did not continuously recommend some "AlphaSector performance record" and the SEC produced no evidence, and there is none, that NAI

15. Contrary to the SEC's unsupported argument (OB, p. 53), Appellants did *not* "admit" that they distributed misleading Vireo materials to prospective clients. LN never distributed Vireo materials to prospective investors or to their professional investment advisors or to anyone else. **(2 JA 308)** NAI has vehemently denied and shown that its Vireo materials were not misleading. They were, in fact, true. But even if they were misleading (they were not), any causal connection between a misleading statement and thereafter continuing to pay advisory fees in exchange for profitable investment advice, was broken by the valuable investment advice they received.

investors paid NAI any advisory fees and continued to do so because of some undefined AlphaSector track record. The evidence is (and reasonable inferences therefrom are) that the investors paid NAI advisory fees, and continued to do so for years, because they liked the profitable investment advice they were getting from NAI—which was investing for them exactly as it promised.

The District Court further diverged from the evidence and the law by awarding disgorgement for all Vireo advisory fees, not just the advisory fees from the Vireo clients who invested in the only two strategies that contained the allegedly false statement. That was a legal error and therefore, an abuse of discretion. There is no causal connection to fees earned from clients who were not in strategies whose marketing did not contain the allegedly wrongful statement. The District Court abused its discretion by not following the law in *Liu* requiring it to only award disgorgement of fees causally connected to the allegedly wrongful marketing, i.e., at most, $360,935. **(6 JA 1416–1470)**

As discussed supra, there was no causal connection between NAI's sale of its goodwill and the alleged fraud. Contrary to the SEC's assertions, NAI did not breach its fiduciary duty or mislead its Vireo clients, by sending to them notice of sale of its goodwill. **(9 JA 2229)** NAI did not have to disclose any misrepresentations because there were none. NAI did not have to disclose that it was selling its goodwill in order to avoid liability because that wasn't the reason it was selling. Indeed, the notice NAI sent specifically stated that the sale would not relieve NAI of any possible liability. **(9 JA 2229)**

NAI was selling because the Vireo defensive strategies were ruining NAI's core aggressive growth strategies. Contrary to the SEC's unfounded speculation, there was no theoretical incentive for NAI to not disclose its alleged misrepresentations that it supposedly lacked support for its statements because it did have support. NAI was selling the goodwill it had earned by providing years of excellent and profitable investment advice based on F2's investment advice. NAI disclosed to its Vireo clients that it was selling its goodwill to F2, which would provide Vireo clients with the same investment advice that they had profitably and honestly been receiving from NAI for years. **(9 JA 2229)**

Contrary to the SEC's improper argument, based on inadmissible evidence not properly in the record, NAI was not selling its goodwill to a known "fraudster". No charges had been asserted against F2 or Mr. Present at the time of NAI's sale. There was nothing fraudulent about the F2 *actual* investment strategy that F2 actually employed, which strategy generated large profits for its clients. The SEC did not and could not assert, as "evidence" for the District Court's summary judgment, the F2 settlement. *Massachusetts Mut. Life Ins. Co v. DLS Mortg. Capital Inc.*, 251 F. Supp.3d at 332. Likewise, the Howard Present judgment is not in the record and cannot be raised for the first time here on appeal, or even in this case as collateral estoppel evidence, because Appellants were not parties to that case or that administrative decision. *Hansberry v. Lee*, 311 U.S. at 40.

V. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN FAILING TO DEDUCT ALL OF NAI'S LEGITIMATE EXPENSES IN CONNECTION WITH VIREO AND IN FAILING TO CREDIT NAI'S PAYMENT AND RETURNS TO ITS VIREO CLIENTS

The SEC argues that NAI did not return its Vireo clients' advisory fees and that the District Court did not have to deduct them or credit the profits NAI earned for its Vireo clients in calculating the amount of disgorgement it awarded. (OB, p. 55-56) The District Court was wrong in not crediting NAI for those returns in calculating disgorgement, as required by *Liu* supra.

A. No Ill-Gotten Gains

There were no ill-gotten gains or unjust enrichment because NAI earned its gains and gave valuable consideration to its Vireo clients for the advisory fees it charged and to F2 for the sale of its goodwill. Payments received in exchange for consideration given are not disgorgeable, ill-gotten gains. *SEC v. Sanchez-Diaz,* 86 F.4th 81, 94-95 (1st Cir. 2023) ["Sanchez-Diaz provided value in exchange . . . accordingly, no basis exists to subject Sanchez-Diaz to disgorgement."]

The SEC's contra-reliance on *SEC v. Sanchez-Diaz,* 86 F.4th 81 is misplaced. There, the defendant was an ex-wife relief defendant who had no legitimate claim to the to the ill-gotten funds (BMW automobile) because she had given no valuable consideration in exchange for it. That is not remotely our case.[16]

* * *

because LN was a supposed fiduciary, he is jointly liable for disgorgement, is misplaced. LN was not a "fiduciary" for Vireo clients. He was not their investment advisor and did not have some generalized fiduciary duty to the world.

C. No Prejudgment Interest

Since there was no disgorgement, there could be no pre-judgment or post-judgment interest on the non-disgorgeable amounts. *Govil,* 86 F.4th 89.

VI. THE SEC'S SELECTIVE ENFORCEMENT

Contrary to the SEC's argument and the District Court's holding, Appellants established that the SEC enforced against them while not enforcing at all against others (e.g., Wells Fargo Advisors ("WFA") and Beaumont Financial Partners ("Beaumont") and others) similarly

16. The SEC's reliance on—Restatement (Third) of Restitution and on Unjust Enrichment § 1, comment a, and §51, comment d and on *SEC v. Blevin,* 706 F.2d 706 (6th Cir. 1985) and on its self-serving Vernazza Advisers Act Release No. 1994, 2001 WL 1359521 and on Palmer's Law of Restitution §2.12 as supposed support for its argument that disgorgement can be awarded for investors who suffered no pecuniary harm—is misplaced since those treatises cite no cases so holding, and were written before *Liu* and before *Govil* which reject that concept.

situated to Appellants, in all relevant aspects for the same alleged violations. WFA had wrap fee agreements ($1.4 Billion worth) with NAI for the same 4,000 clients as WFA and disseminated the same allegedly violative statements as NAI. In fact, it was WFA, not Appellants, that disseminated the statements to their clients, before referring them to NAI.

Contrary to the SEC's argument (OB, pp. 60-61), this is not a case of the SEC "merely" failing to prosecute other offenders. This is a case of the SEC enforcing against Appellants but not others or enforcing more harshly against Appellants than against other named, similarly situated "offenders" for malicious reasons, in order to punish Appellants for having the temerity to initially not agree to void their settlement with the SEC. Even after Appellants agreed to the SEC's new, harsher settlement offer, the SEC refused its own settlement. (See AB, pp. 28-29) Thus, the SEC's reliance on *Le Clair v. Saunders,* 627 F.2d 606, 610 (2nd Cir. 1980), where there was no showing of malice, and *Startzell v. City of Philadelphia,* 533 F.3d 183 (3rd Cir. 2008), where there was no malice or improper motive and there was a rational basis for police action, are inapposite and do not support the District Court's decision.

Nor are the SEC's three purported "warnings" a relevant distinguishing factor. Those warnings were not about NAI's Vireo marketing, and the SEC never pursued those "warnings" after NAI responded to them. Indeed, the SEC never even mentioned them as any basis for bringing this action, and only raised them years after instituting this action, as an after-the-fact excuse to claim a non-existent, immaterial difference between Appellants and their comparators.

A. Class Of One—Selective Enforcement

Contrary to the SEC's argument, Appellants did establish that they were similarly situated to other comparators in all *relevant* aspects and that the SEC enforced with malicious intent so as to satisfy the "class of one" requirements. *Vill. of Willowbrook v. Olech,* 528 U.S. 562 (2000).

Unlike *Cordy-Allen v. Conlon,* 494 F.3d 245 (1st Cir. 2007), the SEC has not sought similar enforcement against similarly situated parties. The SEC did not settle on terms as harsh as the terms it has subsequently pursued here (after settling with Appellants). In *Cordi-Allen,* there were no similarly situated parties. The comparators sought much smaller variances on different terrain than defendant.

* * *

APPENDIX J — SAMUEL KORNHAUSER LETTER, FILED FEBRUARY 28, 2024

LAW OFFICES
SAMUEL KORNHAUSER

February 28, 2024

VIA E-FILING

Jerry Claude
Appellate Case Manager
U. S. Court of Appeals for the First Circuit
John Joseph Moakley U.S. Courthouse
1 Courthouse Way
Boston, MA 02210

Re: SEC v. Navellier & Associates, Inc. and Louis Navellier Consolidated Appeals Nos. 20-1581, 21-1857, 22-1733 and 23-1509

Clerk of the Court,

Pursuant to FRAP 28(j), Appellants hereby wish to notify the Panel assigned to this case of a recent First Circuit case—*Santiago-Martinez v. Fundación Damas Inc.* 2024 WL 656915 (1st Cir. Feb. 16, 2024)—issued February 16, 2024. That case came to the undersigned's attention yesterday, February 27, 2024, while preparing for oral argument, and after the briefs in this appeal had been filed.

Appellee, the SEC, in its Opposition Brief at pages 28 and 66-67, made reference, for the first time on appeal, to a not-before-mentioned-or-argued, not-in-the-record judgment and to pleadings therein, against Howard Present, as support for its repeated characterizations of him as a "fraudster". Although the SEC, in its Opposition Brief, did not explicitly assert that the Present judgment was a collateral estoppel bar or evidence in this case, and made no argument for such a claim (nor could it), it impermissibly and prejudicially implied as much by simply referencing the Present judgment. NAI and LN were not parties to the Present case and had no due process opportunity to litigate and oppose the issues in that case. Therefore, that judgment (which was never referenced or argued at all as a collateral estoppel bar in the District Court in this case) cannot be raised or considered in this appeal. Appellants raised this objection at pages 9 and 42 of their Reply Brief citing *Hansberry v. Lee.* This Court's recent decision in the *Santiago-Martinez* case further confirms Appellants' argument for preclusion of any consideration of the Present judgment or pleadings therein because Appellants were not parties to that case.

The SEC also impermissibly referred to inadmissible "admissions" of "fact" purportedly made by F-Squared in its settlement with the SEC. (OB, pp. 28 and 30) The *Santiago-Martinez* case also confirms the inadmissibility of the F-squared settlement.

Sincerely,

/s/ Samuel Kornhauser
Samuel Kornhauser

APPENDIX K — NASDAQ OMX LETTER, DATED OCTOBER 26, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal Nos. 20-1581, 21-1857, 22-1733 and 23-1509

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

NAVELLIER & ASSOCIATES, INC.,
AND LOUIS NAVELLIER,

Defendants-Appellants

Filed October 16, 2023

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:17-cv-11633
Hon. Denise J. Casper, Judge

JOINT APPENDIX

Appendix K

NASDAQ *OMX*™

October 26, 2009

David Martin
Chief Compliance Officer
Virtus Investment Partners
100 Pearl Street
Hartford, CT 05103

Dear Mr. Martin,

The attached document is a summary of the activity that NASDAQ OMX conducted on behalf of F-Squared investments and the AlphaSector Rotation index. Please do not hesitate to contact me if I can be of further benefit.

I have also reviewed the letter from Howard Present of F-Squared Investments to you dated October 12, 2009, and find that it is factual and accurate in regard to all references to NASDAQ.

Sincerely,

Robert J. Hughes
Director – Index Services – Global Financial Products
NASDAQ OMX Group

The NASDAQ OMX Group – One Liberty Plaza – 50th Floor – New York, NY 10006 – USA – www.nasdaqomx.com

Appendix K

A Summary of Activity by NASDAQ OMQ on Behalf of F-Squared Investments' AlphaSector Rotation Index (ASRX and ASRN):

In August, 2008 F-Squared Investments approached our firm with the intent of having NASDAQ act as a calculation agent for purposes of calculating and disseminating the values of their index to various market data vendors. In early September, 2008 we completed the contract negotiations and began the process of converting their existing live investment strategy to a daily valued, public index.

F-Squared provided a broad spectrum of data to us in order for us to begin the project. Our delivery requirements were to calculate the historical return stream reflecting their active investment strategy in a manner that was as consistent as possible within an index environment, as well as to begin daily calculation and dissemination as soon as possible. We want live with the daily calculation component an October 13, 2008, with the ticker symbols ASRX (dividends and interest reinvested) and ASRN (price only).

F-Squared provided NASDAQ the following data and information:

- Portfolio Construction Methodology (which is included as Exhibit A);
- Constituents of the index, currently and historically;

- Portfolio trade decisions, which F-Squared referred to as "Signals". These Signals reflected the actual output of their proprietary analytical model historically, and when used in conjunction with the Methodology and Constituency allowed us to recreate their historical track record using our data feeds and calculation engine;

- Confirmation that the data was approved by their Index Investment Committee.

F-Squared is the Manager for the Index, has provided confirmation that they, through their subsidiary Active Index Solutions, own the IP associated with the index, and provide us the ongoing data feeds that allows NASDAQ to rebalance and reconstitute the Index on a monthly basis.

The aspects of this strategy that facilitated its conversion to a daily valued index are the following:

- A rule based portfolio construction methodology;

- A quantitatively driven investment decision process;

- Historical output reflecting the actual strategy trading decisions;

- Supervision and oversight by a credible Index Investment Committee;

- Periodic trading decisions (e.g. monthly).

There were a few items that had to be worked through in order to successfully recreate the historical track record and prepare daily calculations. These were resolved in a manner that met industry standards as we define them regarding index calculations.

First, the ETF that is used as cash proxy was not available back to the inception date of the track record. We worked with F-Squared to identify an appropriate non-ETF return proxy to use for periods prior to the availability of the Treasury ETF.

Second, the timing of data feeds from F-Squared to NASDAQ needed to be worked through. The agreed to final approach was for F-Squared to deliver to our operations team the updated index holdings and weights on the Monday prior to the last Friday in the month. We construct the Index on a pro forma basis based on start of day pricing for that Monday, but do not implement the new index structure until the close of business on the following Friday. The final weights used reflect the appropriate market impact from Monday through Friday's close. This approach was used consistently in the calculation of all historical index values.

I understand that some of the drivers behind requesting this letter are in regard to the assessment of the inception data of the Index. We understand that this is a situation that occurs from time to time, especially when index calculation agents are claimed after inception of an index, and is not necessarily unique to ASRX. There is of course a material difference between backtested data and historical data. The key facts as I understand them are:

1. NASDAQ OMX began publishing and disseminating the index value on a daily basis beginning October 13, 2008. We began generating the index values prior to October 13, 2008 for internal purposes, but these data points were not disseminated on a live basis.

2. NASDAQ calculated historical values of the Index back to the inception date as defined by F-Squared. It is our understanding that all ASRX and ASRN values that F-Squared publishes are the values calculated by NASDAQ.

3. NASDAQ calculated the historical data based on data feeds provided to us. This data was indicated to represent live, historical investment decisions, and was to have been reviewed and approved by their Investment Committee.

4. In the week preceding the date that NASDAQ initially began disseminating the ASRX and ASRN values, we distributed to the industry's market data vendors a package of information, including 1) index name and ticker symbol, 2) index description, and 3) historical track record as calculated by our firm. The historical track record went back to the inception date of April 1, 2001.

One question that has been asked of us is the availability of historical index values on our website, specifically index values that would proceed the date we began publicly disseminating index data.

The difficulty we have in providing this from our public database is that, prior to publishing the index values on our main production platform, we use a secondary database to calculate the historical returns, verify methodology accuracy, and run the index on a simulated basis for a test period prior to live production. Our systems do not currently allow us to transfer these historical index values to our production platform retroactively.

This is a concern that has appeared for other clients as well. To resolve this concern, we will shortly be making available the historical index values on our website for several clients, including F-Squared, however these data sets will still not be available on the production platform. It will clearly indicate that the index values have been calculated by NASDAQ using a methodology and approach identical to that currently in use. We anticipate completing this effort for F-Squared within the next several weeks.

If I can be of any further support please let me know.

Sincerely,

Robert J. Hughes
Director – Index Services – Global Financial Products
NASDAQ OMX Group

Appendix K

<u>Exhibit A: ASRX—AlphaSector™ Rotation: Index Construction Methodology</u>

The AlphaSector™ Rotation (ticker symbol ASRX, the "Index") is a quantitatively driven index that mirrors an investment strategy that dates back to 2001. The Index is governed by the Index Investment Committee of Active Index Solutions, LLC ("AIS"). AIS is a wholly-owned subsidiary of F-Squared Investments, Inc., and is exclusively in the business of constructing and licensing index products.

The AIS index Investment Committee is responsible for approving the analytical engine determining buy and sell signals for the Index, and requires a 80% approval vote for any changes to the model. The Committee meets at least annually to review the index and investment methodology.

The Index is calculated and disseminated on behalf of Active Index Solutions, LLC by NASDAQ OMX.[1]

Index Construction

The eligible investments within the Index are the nine Select Sector SPDRs exchange traded funds ("ETFs") and an ETF representing 1–3 month Treasuries (ticker BIL). The Index has the potential to be invested In any combination of the nine SPDRs including all nine at the same time, a combination of sector SPDRs and the Treasury ETF, or can be 100% invested in the Treasury ETF.

The index is re-evaluated for modifications to the existing constituency on a monthly basis, as well as rebalanced on a monthly basis. The decisions for which sector ETFs are included in the portfolio at any time is made by a proprietary analytical engine that evaluates "true" sector trends while adjusting for market noise and for changing levels of volatility in the market. This engine has been developed over a period time dating back to 2001, and has had Private Wealth Client assets managed based on its output over that entire time period.

The index uses a binary model for determining weights of represented sector ETFs. If a sector receives a positive signal for investing, it is included in the Index. If a sector receives a neutral or negative signal, it is removed from the Index. All sectors represented are equal weighted, with a maximum allocation capped at 25% of the Index at the time of rebalancing.

If there are 3 or fewer sectors represented at a given time, the remainder of the portfolio (reflecting the 25% maximum cap per sector) is invested in the short term Treasury ETF (ticker BIL) representing cash equivalents. The Index can be 100% invested in BIL if all sectors receive a neutral or negative rating at the time of reconstitution.

The Index is reconstituted and rebalanced at the close of trading on the last Friday of every month. If the market is closed on the last Friday, it would be reconstituted at the end of trading on the prior Thursday.

Appendix K

There are two performance track records generated for the Index, reflecting a Price Return (ASRN) and a Total Return (ASRX) calculation. ASRX reflects a reinvestment of all dividends and interest distributions made by any of the underlying ETFs.

APPENDIX L — VIREO PREMIUM IMPORTANT DISCLOSURES, FILED OCTOBER 16, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal Nos. 20-1581, 21-1857, 22-1733 and 23-1509

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

NAVELLIER & ASSOCIATES, INC.,
AND LOUIS NAVELLIER,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:17-cv-11633
Hon. Denise J. Casper, Judge

JOINT APPENDIX

* * *

Appendix L

Important Disclosures

Navellier Vireo AlphaSector Allocator Premium is a new strategy that attempts to track an index known as the AlphaSector Allocator Premium Index, owned and published by Active Index Solutions, LLC ("AIS"). The AlphaSector Allocator Premium Index is a quantitatively driven index that applies a weekly trading protocol to nine Select Sector SPDRs, a Treasury exchange traded fund, two international ETFs, five fixed income ETFs, two "alternative" ETFs, and a S&P 500 SPDR. There is no guarantee that the advisor will be successful in achieving returns similar to the AlphaSector Allocator Premium Index, and in fact, client returns will be significantly lower than the index returns after actual fees are taken into account, including management fees, brokerage or transaction costs, or other administrative or custodian fees a client may incur.

The "U.S. equity sleeve" referenced in the materials refers to the AlphaSector Premium Index, with the strategy that the AlphaSector Premium Index is based on having an inception date of April 1, 2001. The process of converting the active strategy to an index implies that the returns presented, while not back-tested, reflect theoretical performance an investor would have obtained had it invested in the manner shown and does not represent returns that an investor may have actually attained, as an investor cannot invest directly into an index. Theoretical and hypothetical performance have many inherent limitations. The performance is adjusted to reflect the reinvestment of dividends.

AlphaSector Allocator Premium Index is the exclusive property of F-Squared Investments, Inc. and AIS. AIS calculates and publishes the value of the index on a monthly basis. Source: Morningstar Direct. Although AlphaSector Indexes do not short securities nor utilize leverage or derivatives, the ETFs that AlphaSector tracks may make use of such financial instruments or strategies.

"AlphaSector" is a service mark of F-Squared Investments, Inc. and AIS. Neither AIS nor F-Squared Investments, Inc., is affiliated Navellier & Associates, Inc. Navellier & Associates, Inc. has entered into a Model Manager Agreement with F-Squared pursuant to which it timely receives any changes made to the AlphaSector Allocator Premium Index holdings. Investment products such as the Navellier Vireo AlphaSector Allocator Premium strategy that are based on the AlphaSector Allocator Premium Index are not necessarily sponsored by AIS or F-Squared, and AIS and F-Squared do not make any representation regarding the advisability of investing in them. One cannot directly invest in an index. Index returns presented represent past performance and are not a guarantee of future results or indicative of any specific investment.

APPENDIX M — EMAIL TO HOFFSTEIN RE HISTORIC INFORMATION IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED OCTOBER 16, 2023

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Appeal Nos. 20-1581, 21-1857, 22-1733 and 23-1509

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

NAVELLIER & ASSOCIATES, INC., AND LOUIS NAVELLIER,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Massachusetts
Case No. 1:17-cv-11633
Hon. Denise J. Casper, Judge

Filed October 16, 2023

JOINT APPENDIX

* * *

Appendix M

From: Howard Present <hpresent@f-squared investments.com>
Sent: Wednesday, September 3, 2008 12:49 PM
To: 'Corey Hoffstein' <corey@hoffstein.com>
Subject: RE: Spoke with Jay

If you would that would be ideal.

Howard Present

F-Squared Investments, Inc.,
Thought Leadership, Cost Leadership,TM

16 Laurel Avenue, Suite 150
Wellesley, MA 02481
hpresent@f-squaredinvestments.com
p: 781-237-3008; f: 781-235-9155; c: 617-610-5570

www.f-squaredinestments.com; www.activeindexsolutions.com

-----Original Message-----
From: Corey Hoffstein [mailto:corey@hoffstein.com]
Sent: Wednesday, September 03, 2008 12:11 PM
To: Howard Present
Subject: Spoke with Jay

Howard,

I spoke with Jay. He said before I began systemizing, he used the 60 week moving average. If you are interested, I can pull up the historic information for you.

Corey

APPENDIX N — PRESENT TESTIMONY RE MORTON IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED OCTOBER 16, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal Nos. 20-1581, 21-1857, 22-1733 and 23-1509

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

NAVELLIER & ASSOCIATES, INC.,
AND LOUIS NAVELLIER,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:17-cv-11633
Hon. Denise J. Casper, Judge

Filed October 16, 2023

JOINT APPENDIX

* * *

[97]Q. And when did you – when did Morton Financial start applying its sector rotation strategy to ETF's?

A. We were informed, or at least I was informed by him of April of 2001.

* * *

A. Well, he provided in writing an email confirmation that there is a five-year track record for the sector rotation strategy with live client assets, and then in subsequent communications [98]between him and Mr. Hoffstein or from him and Mr. Hoffstein, they indicated that they actually went prior to that, and I believe the final determination of April of 2001, which added a year and a half or so on to it, came from a phone conversation.

* * *

APPENDIX O — ZANONNI NOTES, FILED OCTOBER 16, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal Nos. 20-1581, 21-1857, 22-1733 and 23-1509

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

NAVELLIER & ASSOCIATES, INC.,
AND LOUIS NAVELLIER,

Defendants-Appellants

Filed October 16, 2023

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:17-cv-11633
Hon. Denise J. Casper, Judge

JOINT APPENDIX

* * *

Appendix O

3/13/17 B-03078 Navellier
10:00 Phone Interview w/Ken Zanonni

SEC

(BD) Bill Donahue
Kory Ally
Mave Jones
Janet Curfest

(KZ) Ken Zanonni
(LC) Luke Cadigan
(CM) Claire Metcalfe
(PL) Paul Lonergan

Bill Donahue went through the standard disclosures pursuant to 1974 Privacy Act—Form 1662

—Share information w/authorities
—Voluntary
—Must be truthful and not mislead
—Right to an attorney (LC-Cooley)
K-Z Comments to interview

First interview to Vireo product May 2016—F-Squared (F2) gave them names of companies wanted to use the product as a sub-advisor. Names were Narellas & Adhison.

Had been using the AlphaSector (A.S.S.) strategy, since 2009—through F2.

Initially placing trade in house.

Didn't want to do that any [illegible]—Decided to go w/ Navellier could also select Adhison but only used Navellier—

More familiar w/Navellier as an Investment Co Paula

Bodemgunal contact email from Kelly Howe but PB was primary. May have rec'd emails from others

Assumed wholesalers to asset probably had internal and external w/s.

Marketing Alpha Sector. Premium plans. Sales of different products. List of diff. strategies but only used this one.

Already understood A.S.S. Historical performance. It was apparent it was a hypothetical start up until start date of around 2008.

[Illegible] Grant driven sections S&P 500 ETF was included it was explained that if traded in this manner returns would be what 2001-2008 returns [illegible] traded 2001-08.

If it wasn't real I wasn't live

Talked about an Index they (F2) created.

Don't remember when the index started

Morning Star direct work sheet.

Appendix O

Assumed up until 2008 perform. was hypothetical because comp didn't exist before 2008.

[Had already used it for over a year. Unfortunately how it worked, it was more strategic to use Navellier.]

assumed it was back tested the original presentation by F2 was that *it was hypothetical*

Howard Present
George [Illegible]

[Focused on how strat. would behave going forward. Didn't care about back testing.]

[Pretty sure some contextual stuff stated something about returns not being live they didn't think it was live until 2001. Composite didn't exist only 2008.]

Provide wealth Mg in Boston Not an indepth understanding but it was a strat. being traded a persons idea could product create based on idea.

Trainings: No trainings provided. It was only the one product and had already been using it for a year.

Wealth manager = sell concept and now it put into a portfolio

Was less than 5% of their portfolio. Would send clients a Navellier document from website or a presentation from Howe

Assumed Material was updated quarterly but not sure— It was never 100% of someones portfolio. A small portion of portfolios.

[Sure there were questions about past performance and they would tell them it was hypothetical until 2008.]

If someone asked about a particular strategy they would send a fact sheet.

Assuming someone asked about past performance but can't remember anything specific.

Explained tactics—ability to get discovery recommend less volatility. Investors were concerned w/traditional approach of riding it out—sure general fund shifts clients had previously experienced down turns and wanted a more defensive strategy.

When you sell something on performance you are putting yourself into a box if it doesn't go well. Didn't focus on performance.

2013—first put a client into A.S.S. converted over to a New product were about 20-25 clients invested in F2. Converted over to Vireo

Explained strategy to clients they used a 3rd party to manage it

F2 didn't want to be in the client business, wanted to give it to advisors.

Presentations to clients would be F2 or Vireo Materials

Clients would request information on all the strategies they were interested in. Materials that were sent included [illegible] paper on [illegible] and concept of buy and hold not best way to do it

Never had to put client in contact with Navellier

In August or Sept 2013 Navellier sold Vireo back to F2

Did not move forward w/that thinks F2 assumed they would convert back to F2.

Never moved forward w/that. Exited the strategy at end of 2013. Shifted to a Congress Wealth product

Call ended at 10:53

APPENDIX P — NASDAQ OMX CALCULATION AGREEMENT WITH F-SQUARED OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED OCTOBER 16, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal Nos. 20-1581, 21-1857, 22-1733 and 23-1509

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

NAVELLIER & ASSOCIATES, INC.,
AND LOUIS NAVELLIER,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:17-cv-11633
Hon. Denise J. Casper, Judge

Filed October 16, 2023

JOINT APPENDIX

* * *

Appendix P

NASDAQ OMX AND F-SQUARED INVESTMENTS, INC. CALCULATION AGREEMENT

THIS CALCULATION AGREEMENT (this "***Agreement***") is dated as of October 1, 2008 (the "***Effective Date***") and is made by and between Active Index Solutions, LLC, a wholly owned subsidiary or F-Squared Investments Inc., (collectively "***AIS***") a Delaware limited liability corporation with its principal place of business located at 16 Laurel Avenue, Suite 150, Wellesley, MA 02481 and The NASDAQ OMX Group, Inc,. a Delaware corporation with its principal place of business located at One Liberty Plaza, 165 Broadway, New York, NY 10006. The NASDAQ OMX Group, Inc., and its subsidiaries and affiliates are collectively referred to herein as "***NASDAQ OMX***") AIS and NASDAQ OMX are collectively referred to herein as the "***Parties***" and individually as a "***Party***".

WHEREAS, AIS is an investment management firm that owns rights in and to the *AlphaSector Rotation Index* (the "Index);

WHEREAS, AIS has developed the eligibility criteria for the Index and shall determine the components of the Index initially and going forward on a monthly basis;

WHEREAS, AIS is desirous of obtaining the services of a calculation agent for purposes of calculating and disseminating the values of the Index to various market data vendors;

WHEREAS, NASDAQ OMX possesses certain data (ticker symbol, price, total shares outstanding and market value (collectively, the "***Data***") necessary for the compilation of the Index; and

WHEREAS, NASDAQ OMX, for and in consideration of payment by AIS of fees as described in tis Agreement, is willing to act as a calculation agent for AIS and to calculate and disseminate the Index values to various market data vendors;

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements contained herein it is agreed as follows:

Section 1. ***Calculation Services.***

1.1. For and in consideration of the annual fee set forth in Section 4 herein, NASDAQ OMX agrees to calculate and disseminate the Index on each day NASDAQ OMX is open for business during the term of this Agreement (collectively, the "***Calculation Services***"). NASDAQ OMX agrees to disseminate the Index on a "Real Time" basis every fifteen (15) seconds through the Nasdaq Information Dissemination Service "N.I.D.S".

1.2. The Parties agree that the Index shall be the product of the selection of the Index components by AIS and the coordination, arrangement, and editing of the Data by NASDAQ OMX. AIS will review the components monthly and provide the Index component changes to NASDAQ OMX on the Monday prior to an end of week reconstitution of the components and weights of the monthly Index re-constitution effective date (last Friday of every month) during the Term.

1.3. NASDAQ OMX shall calculate the Index, and AIS shall have no responsibility for such calculation. Such calculation shall be based on proven reliable sources and methodologies. The Index shall be calculated using an equal weighting methodology designed to ensure that each of the Index's component securities are represented in approximately equal dollar amounts in the Index as more completely set forth on Attachment I, attached hereto.

1.4. NASDAQ OMX shall use reasonable efforts to ensure the correct and timely calculation and dissemination of the Index, which shall mean at a minimum computing and making available for transmission to and reception by authorized vendors the value of the Index every fifteen (15) seconds (or another interval of time determined by NASDAQ OMX solely in NASDAQ OMX's own discretion) while The NASDAQ Stock Market is open for trading.

Section 2. *Trademark License.*

2.1. AIS grants NASDAQ OMX a royalty free non-exclusive right to use the AIS trade name and trademark solely in the name of the Index and in materials referring or relating to the Index during the Term of this Agreement and pursuant to the terms and conditions of this Agreement. No license is granted to use the AIS name or mark for any other use without the Consent of AIS.

2.2. NASDAQ OMX grants AIS a royalty free non-exclusive right to use NASDAQ OMX's trade name and the NASDAQ OMX® registered trademark solely in materials referring or relating to the Calculation Services for the Index during the Term of this Agreement and pursuant to the terms and conditions of this Agreement. No license is granted to use the NASDAQ OMX trade name or the NASDAQ OMX® registered trademark for any other· use, without the Consent of NASDAQ OMX.

Section 3. *Term.*

3.1. The initial term of this Agreement shall commence on October 1, 2008 (the "***Effective Date***") and continue in effect for a period of two (2) years unless earlier terminated in accord with the provisions of Section 13 herein. Thereafter, the Term of this Agreement shall renew for subsequent one year terms, unless either Party gives Notice to the other Party, at least ninety (90) days prior to the end of the then-current term, of its intent to terminate this Agreement at the end of the then current term. The initial term and all renewal terms, if any shall collectively be the "***Term***" of this Agreement.

Section 4. *Fee.* AIS will pay NASDAQ OMX the Set-Up Fee upon execution of this Agreement and the Calculation Fee on a quarterly basis following of the Effective Date during the Term.

4.1. AIS agrees to pay NASDAQ OMX a one time index set-up fee of $2,500 for services provided in connection with the calculation and dissemination of the Index (the "***Set-Up Fee***") during the Term of this Agreement.

4.2. AIS agrees to pay NASDAQ OMX an additional annual fee of $15,000 per year for the calculation and dissemination of the Index (collectively the "***Calculation Fee***") during the Life of this Agreement.

4.3 In any country or geographic region in which The NASDAQ OMX Group, Inc. may own, operate, or be affiliated with an organized trading market venue on which financial products linked to the Index would be eligible to be listed, and for financial products where the decision to list such products is controlled by AIS, such NASDAQ OMX trading market venue will be granted the right of first refusal to list the financial products before the product may be licensed for listing or trading on another exchange or market.

Section 5. *Data.*

5.1. NASDAQ OMX will obtain the information which is used to compute the Index and perform the Calculation Services from sources which it reasonably believes to be reliable, will maintain reasonable control checks on the procedures by which the Index values are computed, and will take reasonable measures to maintain its computer equipment and software in good operating condition Notwithstanding the foregoing, NASDAQ OMX DOES NOT GUARANTEE THE ACCURACY AND COMPLETENESS OF THE DATA ON WHICH THE INDEX CALCULATIONS ARE BASED OR THE ACTUAL COMPUTATION OF THE VALUE OF THE INDEX, NOR SHALL IT E RESPONSIBLE FOR ANY DELAYS IN THE COMPUTATION OR DISSEMINATION OF THE INDEX VALUES. NASDAQ OMX will exercise reasonable efforts to correct or cause to be corrected any error or omission in the Index values of which it becomes aware and to minimize any delays in the computation or dissemination thereof.

5.2. AIS must include the following notice if and to the extent AIS uses or refers to an Index on a web site or in any brochures, advertisements or other promotional materials:

> *"AlphaSector Rotation Index is the exclusive property of F-Squared Investments, Inc. and Active Index Solutions, LLC (Collectively "AIS"). AIS has contracted with The NASDAQ OMX Group, Inc. (collectively, with its subsidiaries and affiliates, "NASDAQ OMX") to calculate and main the AlphaSector Rotation Index . NASDAQ OMX shall have no liability for any errors or omissions in calculating the AlphaSector Rotation Index."*

Section 6. *Limitation of Liability.* In no event will either Party be liable to the other for special, incidental, punitive, indirect or consequential damages or damages from loss of use, profits, or business opportunities, in contract, tort or otherwise, even if a Party has been advised in advance of the possibility of such loss, cost or damages, arising out of or in connection with this agreement. In no event will the liability of Nasdaq OMX, for any reason whatsoever arising out of or in any way related to this agreement, exceed the total fee to be paid by ais to Nasdaq OMX for the Calculation Services. Notwithstanding the foregoing, the limitations on liability of this section 6 will not apply to the indemnification obligations pursuant to section 8 nor to breaches of confidentiality pursuant to Section 9. Both Parties understand and agree that

* * *

Appendix P

F-Squared Investments, Inc. ("AIS")	**The NASDAQ OMX Group, Inc. ("NASDAQ OMX")**
By: /s/ Howard Present____	By: /s/ John L. Jacobs________
Name: _Howard Present__	Name: John L. Jacobs
Title: _President and CEO_	Title: Executive Vice President

APPENDIX Q — $221 MILLION IN PROFITS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal Nos. 20-1581, 21-1857, 22-1733 and 23-1509

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

NAVELLIER & ASSOCIATES, INC.,
AND LOUIS NAVELLIER,

Defendants-Appellants

Filed October 16, 2023

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:17-cv-11633
Hon. Denise J. Casper, Judge

JOINT APPENDIX

Appendix Q

Years Open	**Column Labels**		
Row Labels	**Alpha Sector Premium**	**Allocator**	**Grand Total**
1	$27,735,527.71	$166,502,261.29	$194,237,789.00
2+	$915,296.78	$26,255,800.41	$27,171,097.19
Grand Total	**$28,650,824.49**	**$192,758,061.70**	**$221,408,886.19**

APPENDIX R — MARKETING MATERIALS THAT DID NOT MAKE THE ALLEGED MISREPRESENTATIONS, EXCERPTED FROM JOINT APPENDIX, FILED OCTOBER 16, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal Nos. 20-1581, 21-1857, 22-1733 and 23-1509

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

NAVELLIER & ASSOCIATES, INC.,
AND LOUIS NAVELLIER,

Defendants-Appellants

Filed October 16, 2023

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:17-cv-11633
Hon. Denise J. Casper, Judge

JOINT APPENDIX

* * *

statements do not change the substance of what Defendants said about the strategy being traded with live assets. On those live-trading statements, Defendants cannot genuinely dispute what they said.

Defendants also sow confusion by pointing to other Vireo marketing materials that did not make the live trading claims. But Defendants' use of some marketing materials that did not make these misrepresentations does not cure Defendants' creation and use of marketing materials that did. And it doesn't create a dispute of fact about those misrepresentations either.

Finally, Defendants argue that there can be no violation of Advisers Act §206, because their misrepresentations were contained in "brochures" that were not advertisements. Even accepting Defendants' false premise, there is no legal basis to limit Section 206 claims only to advertisements. To the contrary, Section 206(1) covers the use of "any device, scheme, or artifice" and Section 206(2) covers the use of any "transaction, practice, or course of business." Whether a document is an "advertisement" is only relevant to the Commission's Fourth Claim (violation of Advisers Act Rule 206(4)-1(a)(5)), which is not a part of Commission's motion. Defendants can violate Section 206 with their "brochures" (and their website, their oral sales pitches, and their other marketing material), whether they are "advertisements" or not.[1]

1. Rule 206(4)-1(b) defines "advertisement" (for the purposes of that rule). An "advertisement shall include any . . . written communication addressed to more than one person . . . which offers . . . investment advisory service with regard to securities."

B. Admissions and Other Undisputed Evidence Show Defendants Intended To, or Were Extremely Reckless in, Making Unsubstantiated Statements

Plaintiff and Defendants agree there is a high bar to finding scienter on summary judgment. But here Defendants have admitted that they did not know whether certain marketing statements they made were true or false. And undisputed evidence shows that, when they made those statements, they knew they lacked a factual basis for them. So Defendants intentionally made statements they

* * *

It is not clear why Defendants think their "brochures" fall outside this definition. The brochures are distributed to more than one person (Defendants discuss how they distributed these brochures to brokers and advisers) and they offered investment advisory services (clients signing up to have NAI invest their money according to the AlphaSector strategies.). But, as mentioned, the "advertisement" definition does not factor into Advisers Act Section 206.

APPENDIX S — MORTON APRIL 1, 2001 INCEPTION DATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal Nos. 20-1581, 21-1857, 22-1733 and 23-1509

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

NAVELLIER & ASSOCIATES, INC.,
AND LOUIS NAVELLIER,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:17-cv-11633
Hon. Denise J. Casper, Judge

JOINT APPENDIX

* * *

> the inception date of April 1, 2001
> (DKT#224-1 p. 201 of 309)
>
> . . . .
>
> This engine has been developed over a period of time dating back to 2001, and has had Private Wealth Client assets managed based on its output that entire time period.
> (DKT#224-1, p. 202 of 309)

79. In addition, Defendants presented further evidence that the AlphaSector Index (which the Vireo AlphaSector Premium strategy tracked) was based on a strategy (Morton's strategy) that was live traded since 2001:

> Q . . . When did Morton Financial start applying the sector rotation strategy to ETF's?
>
> A . . . I was informed by him April of 2001.
> (DKT#236-7, p. 179 of 465)
>
> I spoke with Jay . . . He said . . . he used the 60 week moving average . . . I can pull up the historic information . . .
>
> . . . .
>
> Attached [historic spreadsheet starting in 2001]
> (DKT#236-7, pp. 199 through 203 of 465) (Exhibit B)
> See Exhibits C and D

80. The law is clear that a materially *true* statement is not actionable under the securities laws as a device or scheme to defraud. *In re Lululemon Securities Litigation* 14 F.Supp.3d 553, 571 (S.D.N.Y. 2014) ["Neither immaterial false statements, nor material true statements are actionable." (citing *Basic Inc. v. Levinson* 485 U.S. 224, 238 (1998)]

81. Despite the SEC's failure to present evidence to prove that the statements were false, and evidence presented by Defendant that the statements were true, the Court determined the statements were "false." (DKT#252 p. 19)

82. Not only did the SEC fail to prove the statements were "false", it misstated to the Court

* * * *

APPENDIX T — VIREO ALPHASECTOR PREMIUM PERFORMANCE 2Q 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal Nos. 20-1581, 21-1857, 22-1733 and 23-1509

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

NAVELLIER & ASSOCIATES, INC.,
AND LOUIS NAVELLIER,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:17-cv-11633
Hon. Denise J. Casper, Judge

JOINT APPENDIX

* * *

Appendix T

Performance Returns

Annualized Returns through 6/30/11	Vireo AlphaSector Premium Wrap Composite		S&P 500 Index
	(Pure Gross)	Net	
2nd Quarter	1.78%	1.15%	0.10%
Year-to-Date	7.79%	6.80%	6.02%
Trailing 1 Year	35.90%	33.23%	30.69%
Since Inception (3/1/10)	17.48%	15.28%	16.62%
Cumulative Return (3/1/10-6/30/11)	23.96%	20.88%	22.75%

Appendix T

Yearly Returns

	Vireo AlphaSector Premium Wrap Composite (Pure Gross)	Vireo AlphaSector Premium Wrap Composite Net	S&P 500 Index
2010 (10 months)	15.00%	13.18%	15.77%

Source: FactSet. Zephyr StyleADVISOR.
[1] Annualized standard deviation since inception
[2] Calculated since inception vs. S&P 500 Index

Return/Risk Analysis

3/1/2010 to 6/30/2011	Vireo AlphaSector Premium Wrap Composite (Pure Gross)	Vireo AlphaSector Premium Wrap Composite Net	S&P 500 Index
Best Month	9.79%	9.27%	8.92%
Worst Month	-7.79%	-7.82%	-7.99%
% of Up Month	69%	69%	69%
% of Down Month	31%	31%	31%
Maximum Drawdown (%)	-13.67%	-13.72%	-12.80%

Appendix T

Comparative Returns/Risk Analysis

3/1/2010 to 6/30/2011	Vireo AlphaSector Premium Wrap Composite (Pure Gross)	S&P 500 Index
Alpha[(2)]	1.56%	0.00%
Beta[(2)]	0.95%	1.00%
Standard Deviation[(1)]	16.08%	16.43%
R-Squared[(2)]	94.01%	100.00%
Up Capture Ratio	96.40%	100.00%
Down Capture Ratio	90.40%	100.00%

Performance results presented herein do not necessarily indicate future performance. Investment in equity strategies involves substantial risk and has the potential for partial or complete loss of funds invested. Results presented include reinvestment of all dividends and other earnings. Please read important disclosures at the end of this presentation.

Appendix T

Vireo **AlphaSector Premium** 2Q
Confidence Rising 2011

VIREO ALPHASECTOR PREMIUM
WRAP COMPOSITE
Reporting Currency U.S. Dollar | June 30, 2011

Year
2010[1]

Firm Assets ($M)
2,365

Composite Assets ($M)
3

Percentage of Firm Assets
<1%

Number of Accounts
21

Composite Pure Gross Return (%)
15.00

Composite Net Return (%)
13.18

S&P 500 Index Return (%)
15.77

Composite Dispersion (%)
N/A[2]

[1]Performance calculations for the period ended December 31, 2010 only includes 10 months of history.
[2]N/A information is not statistically meaningful due to an insufficient number of portfolios in the composite for the entire year.

Appendix T

1. Compliance Statement—Navellier & Associates, Inc. claims compliance with the Global Investment Performance Standards (GIPS®) and has prepared and presented this report in compliance with GIPS standards. Navellier & Associates, Inc. has been independently verified for the periods January 1, 1995 through December 31, 2010 by Ashland Partners & Company LLP. A copy of the verification report is available upon request. Verification assesses whether (1) the firm has complied with all the composite construction requirements of the GIPS standards on a firm-wide basis and (2) the firm s policies and procedures are designed to calculate and present performance in compliance with the GIPS standards. Verification does not ensure the accuracy of any specific composite presentation.

2. Definition of Firm—Navellier & Associates, Inc. is a registered investment adviser established in 1987. Navellier & Associates, Inc. manages a variety of equity assets for primarily U.S. and Canadian institutional and retail clients.

3. Composite Description—The Vireo AlphaSector Premium Wrap Composite includes all discretionary Vireo AlphaSector Premium equity accounts that are charged a wrap fee and are managed with similar objectives for a full month, including those accounts no longer with the firm. The strategy attempts to track an index known as the AlphaSector Premium Index and Navellier & Associates, Inc. pays a licensing fee to F-Squared Investments, Inc. to provide a model of the index. The index is quantitatively driven and applies a weekly trading protocol to nine

Select Sector SPDRs and an exchange traded fund (ETF) representing 1-3 month Treasuries. The index has the potential to be invested in any combination of the nine SPDRs including all nine at the same time, a combination of sector SPDRs and the Treasury ETF, or can be 100% invested in the Treasury ETF. There is no guarantee that Navellier will achieve returns similar to the index, and in fact the strategy's returns may vary from the index due to the timing of trades and after fees are taken into account, including management fees, brokerage or transactions costs, or other administrative or custodian fees. Performance is calculated on a "time-weighted" and "asset-weighted" basis. Performance figures that are net of fees take into account advisory fees and any brokerage fees or commissions that have been deducted from the account. "Pure" gross-of-fees returns do not reflect the deduction of any trading costs, fees, or expenses, and are presented only as supplemental information. Therefore, actual returns will be reduced by advisory and other expenses incurred. Performance results include the reinvestment of any dividends. The composite was created March 1, 2010. As of April 2011, the Navellier Vireo AlphaSector Premium Wrap Composite has been renamed the Vireo AlphaSector Premium Wrap Composite. Valuations and returns are computed and stated in U.S. Dollars. Portfolio valuation sources are IDC, Factset, and Thompson. Performance is calculated using the "Modified Dietz Method." Policies for valuing portfolios, calculating performance, and preparing compliant presentations are available upon request.

4. Management Fees—The management fee schedule for accounts ranges from 75 to 100 basis points, depending on account sire and brokerage selected. Some incentive fee, fixed fee, and fulcrum fee accounts may be included. Fees are negotiable, charged the some rate. Bundled fee accounts make up 100% of the composite for all periods shown. Fee schedules are provided by independent sponsors and are available upon request from the respective sponsor. The bundled fees include custody, trading expenses, and other expenses associated with the management of the account. The client is referred to the firm's Form ADV Part II for a full disclosure of the fee schedule.

5. Composite Dispersion—If applicable, the dispersion of annual returns is measured by the standard deviation across asset-weighted portfolio returns represented within the composite for the full year.

6. Benchmark—The primary benchmark for the composite is the S&P 500 Index. The S&P 500 consists of 500 stocks chosen for market size, liquidity and industry group representation. It is a market value weighted index with each stock's weight in the index proportionate to its market value. The reported returns reflect a total return for each quarter inclusive of dividends. The asset mix of the composite may not be precisely comparable to the presented indices. Presentation of index data does not reflect a belief by the Firm that the S&P Index, or any other index, constitutes an investment alternative to any investment strategy presented in these materials or is necessarily comparable to such strategies.

7. General Disclosure—The three-year annualized standard deviation is not presented because 36 months of history is not available. Actual results may differ from composite results depending al upon the size of the account, custodian related costs, the inception date of the account and other factors. ***Performance results presented herein do not necessarily indicate future performance. Investment in equity strategies involves substantial risk and has the potential for partial or complete loss of funds invested. Results presented include reinvestment of all dividends and other earnings.*** The securities identified and described do not represent all of the securities purchased, sold, or recommended for client accounts. The results presented were generated during a period of improving and deteriorating economic conditions in the U.S. and both positive and negative market performance. There can be no assurance that these favorable market conditions will occur again in the future. Navellier has no data regarding actual performance in different economic or market cycles or conditions. It should not be assumed that any securities recommendations made by Navellier in the future will be profitable or equal the performance of securities made in this request. For a list of recommendations made by Navellier & Associates, Inc. for the preceding twelve months or to receive a complete list and description of Navellier & Associates, Inc.'s investment composites, contact Tim Hope at (800) 365-8471, extension 416, or write to Navellier & Associates, Inc., One East Liberty, 3rd Floor Reno, NV 89501, or e-mail timh@navellier.com.

All Information contained herein is stated as of the date referenced at the top of this page unless indicated otherwise. Past performance is no guarantee of future results.

Navellier & Associates, Inc.
One East Liberty, Third Floor
Reno, Nevada 89501
800-887-8671

APPENDIX U — NAI DISCLOSURES RE HYPOTHETICAL PERFORMANCE, FILED OCTOBER 16, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal Nos. 20-1581, 21-1857, 22-1733 and 23-1509

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

NAVELLIER & ASSOCIATES, INC.,
AND LOUIS NAVELLIER,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:17-cv-11633
Hon. Denise J. Casper, Judge

Filed October 16, 2023

JOINT APPENDIX

* * *

"AlphaSector" is a service mark of F-Squared Investments, Inc. ("F-Squared"), and AIS, Nether AIS nor F-Squared Investments, Inc. is affiliated with Navellier & Associates, Inc. ("Navellier"). Navellier has entered into a Model Manager Agreement with F-Squared pursuant to which it timely receives any changes made to the AlphaSector Premium Index holdings. Investment products such as the Vireo Premium strategy that are based on the AlphaSector Premium Index are not necessarily sponsored by AIS or F-Squared, and AIS and F-Squared do not make any representation regarding the advisability of investing in them.

As a matter of normal and imported disclosures to you, as a potential investor, please consider the following. Some of the returns presented reflect hypothetical performance an investor would have obtained had it invested in the manner shown and does not represent returns that an investor actually attained. Hypothetical backtested performance has many inherent limitations. The Index should be considered as Model Portfolio results and are mere "paper" or proforma performance results. There are material differences between Vireo Investment Product portfolios and the Index, research, and performance figures presented here. The Index and the research results (1) may contain stocks that are illiquid and difficult to trade; (2) may contain ETF holdings materially different from actual funded Vireo Investment Product portfolios; and (3) may not reflect prices obtained in an actual funded Vireo Investment Product portfolio.

As a matter of important disclosure regarding the hypothetical results presented in the accompanying charts and graphs, the following factors must be considered when evaluating the performance figures presented:

1) Historical or illustrated results presented herein do not necessarily indicate future performance; investment in securities involves significant risk and has the potential for partial or complete loss of funds invested.

2) The results presented were generated during a period of mixed (improving and deteriorating) economic conditions in the U.S. and positive and negative market performance. There can be no assurance that the favorable market conditions will occur again in the future. Navellier has no data regarding actual performance in different economic or market cycles or conditions.

3) The results portrayed reflect the reinvestment of dividends and other income.

4) LIMITATIONS INHERENT IN HYPOTHETICAL RESULTS: The performance results presented are from an Index, not an actually funded portfolio, and may not reflect the impact that material economic and market factors might have had on the adviser's decision-making if the adviser were actually managing clients' money, and thus present returns for informational purposes only. No real money has been invested in this Index. The Index performance results should be considered mere 'paper' or pro forma performance results. The Index results do not represent actual funded trades and may not reflect actual prices paid or received for actual funded trades.

5) The reported performances of Indexes presented in the accompanying charts and graphs do not reflect the performance results of Navellier's actually funded and traded Investment Products.

6) In most cases, the adviser's clients' investment results would be materially lower than the results portrayed in the Index.

7) The Index results may or may not related, or only partially related, to the type of advisory services currently offered by Navellier & Associates, Inc.

Navellier does not calculate the statistical information included herein. This material has been prepared solely for informative purposes. F-Squared is the source of all performance data related to the F-Squared AlphaSector indexes cited in these reports. Although information contained herein is based on sources Navellier believes to be reliable, Navellier does not guarantee its accuracy, and the information may be incomplete or condensed. Statistical analyses of the data presented are provided by Zephyr Associates, a company not related to Navellier. Information presented herein and the related Zephyr sourced information ius provided on an "as is" basis. The user assumes the entire risk of any use made of this information. Investors should consider the report as only a single factor in making their investment decision. The report is for informational purposes only and is not intended as an offer or solicitation for the purchase or sale of a security. Zephyr sourced information is the exclusive property of Zephyr Associates. Without prior written permission of Zephyr Associates, this information may not be reproduced, disseminated, or used to create any financial products.

The results portrayed include investment advisory fees paid to the adviser equal to 1.25% plus an estimated custodian/brokerage fee to account for transaction/brokerage costs equal to 1.75%, for total fees equal to 300%. The adviser believes these fees represent the highest fees a client may incur with a brokerage firm or other financial intermediary. However, it may be that some financial intermediaries charge fees greater than the adviser is aware of. The pure gross results portrayed do not include any investment advisory fees, administrative fees, or transaction expenses, or other expenses that a client would have paid or actually paid. The fees reflected in the net performance figures in this presentation may not include administrative fees, or transaction expenses, or other expenses that client would have paid or actually paid. The fees may also vary depending on the account size and estimated trading costs will be greater for smaller accounts. The ETFs invested in the model portfolios have their own expenses that are included in the gross and net returns presented.

The S&P 500 Index measures the performance of 500 stocks that are considered to be widely held by Standard & Poors, a division of the McGraw-Hill Companies, Inc., and comprises approximately three-quarters of the total capitalization of companies publicly traded in the United States. The S&P 500 Index is weighted by market value and its performance is thought to be representative of the stock market as a whole. It is reported that over 70%

of all U.S. equity funds are tracked by the S&P 500. The Index selects its companies based upon their market size, liquidity, and sector Most of the companies in the Index are mid cap or large corporations. This Index is composed of 400 industrial,

* * *

APPENDIX V — APPLICATION FOR EXTENSTION OF TIME TO THE SUPREME COURT OF THE UNITED STATES, DATED DECEMBER 27, 2024

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

December 27, 2024

Scott S. Harris
Clerk of the Court
(202) 479-3011

Mr. Samuel Kornhauser
Suite 1807
155 Jackson Street
San Francisco, CA 94111

Re: Navellier & Associates, Inc., et al.
v. Securities and Exchange Commission
Application No. 24A622

Dear Mr. Kornhauser:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Jackson, who on December 27, 2024, extended the time to and including January 30, 2025.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by /s/______________________
Rashonda Garner
Case Analyst

NOTIFICATION LIST

Mr. Samuel Kornhauser
Suite 1807
155 Jackson Street
San Francisco, CA 94111

Mrs. Elizabeth B. Prelogar
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Clerk
United States Court of Appeals for the First Circuit
United States Courthouse
1 Courthouse Way
Boston, MA 02210

APPENDIX W — APPLICATION FOR EXTENSTION OF TIME TO THE SUPREME COURT OF THE UNITED STATES, DATED JANUARY 23, 2025

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

January 23, 2025

Scott S. Harris
Clerk of the Court
(202) 479-3011

Mr. Samuel Kornhauser
Suite 1807
155 Jackson Street
San Francisco, CA 94111

Re: Navellier & Associates, Inc., et al.
v. Securities and Exchange Commission
Application No. 24A622

Dear Mr. Kornhauser:

The application for a further extension of time in the above-entitled case has been presented to Justice Jackson, who on January 23, 2025, extended the time to and including March 1, 2025.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by /s/______________________
Rashonda Garner
Case Analyst

NOTIFICATION LIST

Mr. Samuel Kornhauser
Suite 1807
155 Jackson Street
San Francisco, CA 94111

Mrs. Elizabeth B. Prelogar
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Clerk
United States Court of Appeals for the First Circuit
United States Courthouse
1 Courthouse Way
Boston, MA 02210