

No. _____

In the Supreme Court of the United States

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

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(i) In the landmark case of *Basic Inc. v. Levinson*, 485 U.S. 224, 231-232, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988), this Court held that to satisfy the standard of materiality “there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available” quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). In the present case and before any investment decision, Petitioners made corrective disclosures available to prospective clients after placing advertisements that contained a non-compliant claim of compliance with the Global Investment Performance Standards (“GIPS”). The Eleventh Circuit held that “after-advertisement disclosures” cannot “negate the materiality of the earlier misrepresentation” since “materiality is determined at the time the false statement is made.”

The question presented is:

Whether for purposes of determining materiality, disclosures made after a false or misleading statement or omission is published in an advertisement that correct the nature of the false or misleading statement or omission should be included as part of the total mix of information considered by a reasonable investor in making an investment decision?

(ii) Petitioner Max E. Zavanelli held a sincere belief that an investment newsletter was not an advertisement that GIPS applied to. The Eleventh Circuit affirmed findings of the Securities and Exchange Commission (“Commission”) that Petitioners

included a false claim of GIPS-compliance in the newsletter with scienter.

The question presented is:

Whether a sincere opinion that an investment newsletter is not an advertisement can satisfy the requisite legal standard for scienter to establish a violation of the Investment Advisors Act of 1940, as amended?

**PARTIES TO THE PROCEEDING AND
CORPORATE DISCLOSURE STATEMENT**

The Petitioners in this case are ZPR INVESTMENT MANAGEMENT, INC. (“ZPRIM”) and MAX E. ZAVANELLI (“Zavanelli”) (collectively referred to as the “Petitioners” below).

The Respondent is the SECURITIES AND EXCHANGE COMMISSION (“Commission” below).

RULE 29.6 STATEMENT

ZPR INVESTMENT MANAGEMENT, INC., is a private company, does not have a stock symbol or any other public exchange related identification and has no parent company. There is no parent or publicly held company owning 10% or more of the corporation’s stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, ZPR INVESTMENT MANAGEMENT, INC. (“ZPRIM”) and MAX E. ZAVANELLI (“Zavanelli”) (collectively “Petitioners”) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Opinion of the Eleventh Circuit is reported at 861 F.3d 1239 and reproduced at App.1-31. The Order of the Commission Denying Motion for Reconsideration is reported at Release No. 4417 (S.E.C. Release No.), Release No. IA-4417, 2016 WL 3194778 and is reproduced at App.32-57. The Opinion of the Commission is reported at Release No. 4249 (S.E.C. Release No.), Release No. IA-4249, 112 S.E.C. Docket 4608, 2015 WL 6575683 and reproduced at App.58-145. The Initial Decision of the Administrative Law Judge (“ALJ”) is reported at Release No. 602 (S.E.C. Release No.), 108 S.E.C. Docket 4502, Release No. ID-602, 2014 WL 2191006 and is reproduced at App.148-281. The Order of the Eleventh Circuit denying a Petition for Rehearing and Rehearing En Banc is not reported but is reproduced at App.282-283.

JURISDICTION

The Eleventh Circuit entered its judgment and opinion on June 30, 2017 and denied rehearing and rehearing en banc on September 14, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

15 U.S.C. §80b-6(1), reproduced at App.284.

15 U.S.C. §80b-6(2), reproduced at App.284.

15 U.S.C. §80b-6(4), reproduced at App.284.

17 C.F.R. §275.206(4)-1(a)(5), reproduced at App.284-287.

STATEMENT OF THE CASE

This case involves the creation of a new test for materiality under the federal securities laws that directly conflicts with the standard established by this Court. To evaluate materiality, this Court has announced that “there must be a substantial likelihood the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.” *TSC Indus.*, 426 U.S. at 449. This Court has rejected a bright-line rule application for materiality by reasoning that “any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality must necessarily be over-or under inclusive.” *Basic*, 485 U.S. at 236. This Court has made clear that the standard for materiality shall be uniformly applied to all situations, and has been cautious not to create varying standards for materiality. “Devising two different standards of materiality, one for situations where insiders have traded in abrogation of their duty to disclose or abstain (or for that matter when any disclosure duty has been breached), and another covering affirmative misrepresentations by those under no duty to disclose

(but under the ever-present duty not to mislead), would effectively collapse the materiality requirement....” *Id.* at 240 n.18. The *Basic* decision did not “concern the timing of a disclosure,” but instead, “its accuracy and completeness.” *Id.* at 235. The Court made clear that “materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information.” *Id.* at 240. Conversely, the Eleventh Circuit narrowed the materiality test for purposes of the Advisors Act when it refused to consider significant disclosures made available by Petitioners to prospective clients after magazine advertisements were placed in 2008 and 2011 (“Advertisements”). These disclosures included performance results required by the GIPS Advertising Guidelines (“Guidelines”) that were omitted from the Advertisements, which the Eleventh Circuit excluded from the “total mix of information” by reasoning that “materiality is determined in light of the circumstances existing at the time the alleged misstatement occurred.” The Eleventh Circuit limited its inquiry for materiality to information prospective investors knew when the purported false statements were made in the Advertisements and not at the time of an investment decision¹ by following an underinclusive bright line test based solely on the timing of curative disclosures. The court’s holding that “later disclosures cannot negate the materiality of the earlier misrepresentations” placed no importance on the accuracy and completeness of those disclosures and prematurely closed the

¹ During the administrative proceedings before the Commission as discussed, *infra*, it was determined that ZPRIM received no new clients as a result of the Advertisements.

investment making decision window for prospective investors. The exclusion of “after-advertisement disclosures” from the “total mix” did exactly what the *Basic* Court sought to prevent: it established a different standard for the materiality test based on a bright-line test; discouraged full and fair disclosure; and limited what information a reasonable investor would consider important as part of the total mix. The Eleventh Circuit’s application of the materiality test cannot be reconciled with decisions of this Court or those of other sister circuit courts. The decision (“Decision”) also extinguished the legal duty for Petitioners, as investment advisors, to correct any prior false, misleading statements or omissions of material fact with subsequent accurate and truthful information as recognized by other circuit courts. The abrogation of this duty also presumes prospective investors do not consider accurate, complete, or curative information to be significant when making an investment decision.

The Decision also conflicts with the Third Circuit’s holding in *McLean v. Alexander*, 599 F.2d 1190 (3d Cir. 1979) on the issue that a sincere opinion cannot satisfy the requisite mental state for scienter. The Eleventh Circuit disregarded a factual finding that Zavanelli genuinely believed that investment newsletters published by ZPRIM were not advertisements when it determined Petitioners violated the Advisors Act with scienter by including a claim of GIPS-compliance in the April 2009 newsletter issue.

This Court should grant this Petition to address the Eleventh Circuit’s deviation from precedent of this Court and restore uniformity among the circuit courts with respect to these important and recurring

questions of federal law. Absent this Court's review, the Eleventh Circuit will have created a different and more narrow test for materiality by focusing on timing, rather than the accuracy and completeness of the information made before an investment decision is reached; call into question the existence and effect of an investment adviser's duty to disclose and correct information; and establish a precedent that scienter can be inferred despite a factual finding of a genuine statement of opinion. These compelling reasons are sufficient to warrant review by this Court.

1. BACKGROUND

ZPRIM is a registered investment advisor located in Orange City, Florida and was founded by Zavanelli, its former President and shareholder. ZPRIM initially registered with the Commission in 1994, and has been continuously registered as an investment advisor since 2006. ZPRIM established and manages several investment composites² for its clients that include the Small Cap Value Composite ("SCV"), the Global Equity Composite ("Global Equity") and the All-Asian Composite ("All-Asian"). App.157.

2. GLOBAL INVESTMENT PERFORMANCE STANDARDS

Since the issues presented in this Petition involve the GIPS, a discussion of its standards and their application is warranted.

² A composite is an aggregation of individual investment portfolios that represent a similar objective or strategy. App.158.

The GIPS are a universal set of voluntary ethical standards that investment firms may follow to report performance results. GIPS was developed to standardize performance result reporting worldwide and to provide comparability and facilitate investor confidence in reported returns.

A fundamental requirement of GIPS is that a firm claiming compliance must make every reasonable effort to provide a compliant presentation of its investment composites (“GIPS-Presentation”) to all “prospective clients”³ if it has not done so within the previous 12 months. A GIPS-Presentation must include a minimum of five years of annual performance returns calculated according to GIPS. A GIPS-Presentation sets forth mandatory disclosures which include the number of portfolios and the amount of assets in each composite; the percentage of total firm assets represented by the composite or the amount of total firm assets at the end of each annual period; benchmark returns; and disclosures about the firm and the composites. App.165. GIPS encourages, but does not require, that firms claiming compliance with GIPS be verified by a third-party verifier. The primary purpose of GIPS verification is to ensure that a firm claiming compliance has adhered to GIPS and that the firm’s procedures and processes are designed to calculate and present performance results in compliance with GIPS. App.166.

³ A prospective client is identified by GIPS to be any person or entity that is qualified and expresses an interest to invest in a strategy. App.165 n.6.

GIPS has two principal components: Performance Standards and the Guidelines. The Performance Standards define how a firm constructs composites, calculates performance and presents that performance through a GIPS-Presentation. A firm who has complied with the Performance Standards may advertise that it is GIPS-compliant. App.64-65.

If a GIPS-compliant firm chooses to advertise its investment performance, then the Guidelines require that certain performance results be disclosed. Under the 2005 Guidelines, advertisements claiming GIPS-compliance must include, along with other information, period-to-date composite returns and either (A) one, three and five-year cumulative annualized composite returns with end-of-period date clearly identified; or (B) five years of annual composite returns with end-of-period date clearly identified. App.167,168.

3. ZPRIM GIPS VERIFICATION AND COMPLIANCE

In 2006, ZPRIM hired Ashland Partners & Company, LLP (“Ashland”) to verify its returns for GIPS-compliance under the Performance Standards between December 31, 2000 and December 31, 2005, and for subsequent periods. Ashland was also retained to provide quarterly performance exams for several of ZPRIM’s composites. App.174. Ashland verified ZPRIM for GIPS-compliance through December 31, 2009. ZPRIM then engaged Alpha Performance Verification Services (“Alpha”), which verified its compliance with the Performance Standards through, at least, December 31, 2011. App.187.

In early 2008, ZPRIM placed advertisements that claimed compliance with GIPS in the January, February, and April monthly issues of *SmartMoney* magazine and the January issue of *Kiplinger* magazine. These Advertisements included period-to-date returns and at least five years of annual returns for ZPRIM's SCV-Composite as required by the Guidelines. App.68.

4. FALL 2008 ADVERTISEMENTS

In the fall of 2008, ZPRIM placed additional advertisements for its SCV-Composite in the October, November and December monthly issues of *SmartMoney* magazine that each included a claim of GIPS-compliance. These Advertisements provided accurate performance returns but omitted performance returns required by the Guidelines which, if included, would have shown the SCV-Composite was underperforming the market and lagging behind its benchmark, the *Russell 2000 Index*, during 2008. App.69,70.

However, ZPRIM made these omitted performance returns available to prospective clients before any investment decision was made. Consistent with its standard business protocol, any interested person who contacted ZPRIM in response to an Advertisement or for any other reason was provided with a package of marketing materials about the firm. App.172. Included in the firm's standard package was a one-page fact sheet with updated performance return information for composites a prospective client was interested in. An example of this fact sheet sent in August 2008, disclosed negative returns for ZPRIM's SCV-Composite through the first quarter of 2008 and reported its poor

performance for the prior 12 month period, and year to date including the SCV-Composite's underperformance against the *Russell 2000 Index*. App.195,196. The fact sheet also contained one, three and five year annualized returns the Guidelines required as well as annualized returns for other periods. App.377-381.

During 2008, ZPRIM also provided updated performance results for its SCV-Composite to interested persons together with annualized tables. This information identified the SCV-Composite's underperformance in 2008 against the market and the *Russell 2000 Index*. App.364-376. Once an interested person was determined by ZPRIM to be a "prospective client," a GIPS-Presentation was also provided. App.172.

Quarterly composite performance returns and tables that reported annualized returns for one, three and five year periods through each quarter were also posted by ZPRIM on its website. App.172;297-363. The website included bar charts for certain periods that provided comparisons of the firm's composites against their respective benchmarks. These charts showed that during 2008, the SCV-Composite was underperforming and lagging against the *Russell 2000 Index*. App.364-366. Throughout 2008, ZPRIM also maintained its GIPS-Presentation for the SCV and Global Equity Composites on its website. App.172. The 2008 fall Advertisements stated in large print "To Learn More Call" followed by ZPRIM's phone number and website address, www.zprim.com. App.288-296. Anyone interested in obtaining additional information received performance results for composites that

contained the GIPS required returns together with other marketing materials.

5. 2011 ADVERTISEMENTS

In 2011, ZPRIM placed advertisements in the February and May monthly issues of *SmartMoney* magazine and in a March issue of *Barron's* magazine that compared performance returns of its Global Equity and All-Asian Composites against returns achieved by other investment managers. App.382-383;392-393;427-428. The performance returns in all three of these Advertisements had been reprinted from previous advertisements published by *Pensions and Investments*⁴ that listed the Global Equity and All-Asian Composites as top performers. The 2011 Advertisements also included a claim of GIPS-compliance but did not include performance returns required by the Guidelines.

Had these performance returns been included, they would have shown that the Global Equity Composite yielded positive returns and significantly outperformed its benchmark, the MSCI EAFE Index, during the required one, three and five year annualized periods. The All-Asian Composite also produced positive performance results from its inception of January 1, 2007, and for the annualized periods the Guidelines required⁵ and outperformed its benchmark, the MSCI

⁴ ZPRIM entered into an agreement with *Pensions & Investments* to reprint the performance returns tables exactly as they had been previously published without alteration. App.201.

⁵ Because the All-Asian Composite had existed for less than five years, the Guidelines required different data. App.81 n.35.

EAFE Index, for the relevant periods. App.384-391;394-426;429-436. These omitted positive returns would not have rendered the Advertisements as misleading, but rather, would have complimented the favorable performance results and ratings as presented.

The performance returns required by the Guidelines along with other marketing information were similarly sent to any interested person consistent with ZPRIM's customary practice and a copy of ZPRIM's most recent GIPS-Presentation was sent to any "prospective client." App.384-391;394-426;429-436. Quarterly performance returns for the Global Equity and All-Asian Composites were made available on the ZPRIM website along with tables that reported annualized performance returns for one, three and five year periods through each quarter. App.172;297-363.

The 2011 Advertisements also directed any reader to ZPRIM's website and provided a telephone number under the caption "To Learn More Call," and a footnote disclosed that the returns presented were gross of fees and that "ZPR [ZPRIM] net of fees performance and details are available on our website (www.zprim.com)."

App.382-383;392-393;427-428.

6. INVESTMENT NEWSLETTERS

ZPRIM published a monthly investment newsletter ("Newsletter") that was distributed to its clients, certain investment consultants and others in the industry. App.207.

In the 2009 April issue, ZPRIM included performance results for its SCV-Composite to illustrate the negative impact of the Commission's newly

implemented uptick rule. On page 3 of this Newsletter, ZPRIM included a statement that it had been verified for GIPS-compliance by Ashland but omitted the performance returns required by the Guidelines. App.444-446.

Notably, Zavanelli did not consider the Newsletters to be advertisements and was of the sincere belief and opinion that the Guidelines were not applicable. App.255.

7. PROCEEDINGS BEFORE THE COMMISSION

On April 4, 2013, the Commission issued an Order Instituting Administrative and Cease and Desist Proceedings (“OIP”) alleging that Petitioners violated Sections 203(e), 203(f), and 203(k) of the Advisors Act and Section 9(b) of the Investment Company Act of 1940 by falsely claiming GIPS-compliance in six (6) Advertisements and two (2) Newsletters.⁶

After a seven (7) day hearing during which seven (7) witnesses testified and 205 exhibits were admitted into evidence, the Administrative Law Judge (“ALJ”) issued an Initial Decision (“ID”) on May 27, 2014, and found ZPRIM violated Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5) of the Advisors Act through material misrepresentations of GIPS-compliance in the Advertisements and Newsletters and that Zavanelli aided and abetted and caused each of ZPRIM’s

⁶ The OIP contained additional allegations concerning false representations made by Petitioners in two (2) *Morningstar* reports. Those issues are not before the Court and will not be discussed in this Petition.

violations and was primarily liable for violating Sections 206(1) and (2) of the Advisors Act. As sanctions, the ALJ issued a cease-and-desist order, assessed civil penalties of \$250,000 for a single violation of the Advisors Act and imposed a censure against ZPRIM. He also issued a cease-and-desist order, civil penalties of \$660,000 for eleven (11) violations of the Advisors Act, and a permanent bar from association with any investment advisor, broker dealer, municipal securities dealer, municipal advisor, transfer agent and nationally recognized statistical rating organization (“Industry Bar”) against Zavanelli. App.59,60.

Petitioners thereafter requested the Commission to review the ID and on October 30, 2015, an Opinion and Order (“Opinion”) was issued that upheld the sanctions and civil penalties imposed against ZPRIM. The Opinion reduced the civil penalties against Zavanelli relating to matters not before the Court but upheld the remaining sanctions against Zavanelli including the Industry Bar. App.60;144.

The Opinion found that ZPRIM’s claims of GIPS-compliance in the Advertisements and Newsletters were false and material and determined prospective clients would have considered it significant that ZPRIM claimed it was GIPS-compliant but had not complied with the Guidelines. The Commission also found that the claim of GIPS-compliance in the 2008 Advertisements was false and material since the omitted performance returns would have disclosed the ZPRIM SCV-Composite was underperforming the market and its benchmark, which was significant to a reasonable investor’s investment decision. App.92,93.

The Opinion rejected Petitioners' argument that the claims of GIPS-compliance in the Advertisements were rendered immaterial because accurate and complete information was made available to prospective clients before making an investment decision. App.93-96.

Despite the ALJ's finding that Zavanelli held a sincere belief that the Newsletter was not an advertisement, the Opinion found that Zavanelli's conduct was reckless since his opinion about the Newsletter was "objectively unreasonable" and Zavanelli "must have been aware of the risk of misleading investors." App.115.

Following the Opinion, Petitioners moved for reconsideration based, in part, on the then recently issued opinion in *Flannery v. SEC*, 810 F.3d 1 (1st Cir. 2015) which held when a reasonable investor conducts due diligence to make an investment decision, "the availability of actual and accurate information is relevant." *Id.* at 11 n.8. The Commission denied the Motion for Reconsideration on June 9, 2016.⁷

8. THE ELEVENTH CIRCUIT'S DECISION

Petitioners subsequently sought review of the Opinion, which was a final order disposing of all parties' claims, before the Eleventh Circuit Court of Appeals pursuant to 15 U.S.C. 80b-13, 80a-42(a).

The Eleventh Circuit Decision affirmed the Commission's finding that ZPRIM violated Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5) of the Advisors Act and that Zavanelli violated Sections

⁷ App.32-57.

206(1) and (2) of the Advisors Act by making false or misleading claims of GIPS-compliance in the Advertisements and in the April 2009 Newsletter. The Decision also affirmed two (2) violations not at issue here but vacated the Commission's finding that Petitioners violated the Advisors Act with respect to the December 2009 Newsletter, which contained disclaimers that the Newsletter was not GIPS-compliant. The monetary penalty assessed against ZPRIM was vacated and remanded to the Commission for a determination of any reduction to that monetary penalty. The Court also vacated the \$75,000 monetary penalty imposed against Zavanelli for the December 2009 Newsletter violation. All other sanctions and monetary penalties imposed against Petitioners including the Industry Bar were affirmed. App.30,31.

The Eleventh Circuit held that reasonable investors would consider it important that the ZPRIM Advertisements did not comply with the Guidelines despite claiming compliance with GIPS. App.12,13. The court found that the claim of GIPS-compliance was material since it caused prospective clients to wrongfully believe the performance results in the Advertisements complied with the Guidelines. App.13. For purposes of the 2008 Advertisements, the court found that materiality of the GIPS claim was even stronger since the omitted performance returns would have revealed that "ZPRIM was significantly underperforming its benchmark" which was misleading. App.13,14. The court found the 2011 Advertisements, which omitted positive returns, were false and material, again, reasoning that an investor would have considered Petitioners' untrue claim of

compliance significant without consideration of any other fact.

In stark contrast, however, to decisions announced by this Court and followed by other circuit courts, the Eleventh Circuit crafted a new and narrower test for materiality by excluding disclosures from the total mix of information Petitioners made available to prospective clients. The Decision limited its inquiry for materiality strictly to information that recipients of the Advertisements knew at the time the statements of GIPS-compliance were made without considering that an investment decision process was still ongoing.⁸ Due to the determination that the only disclosures in the total mix of information for reasonable investors to consider would be limited to those known at the time a false statement or omission was made, the Eleventh Circuit departed from decisions of this Court and other circuit courts by holding “later disclosures cannot negate the materiality of the earlier misrepresentations.” App.14,15. The court further stated that “focusing the materiality inquiry on the time when the misrepresentations were made is especially important where, as here, the context of the false statements is advertising to attract new investors.... The problems caused by a false ad cannot be cured by passing along corrected information to the very customers the company attracted through the misinformation in the first place.” App.15.

⁸ It was undisputed that ZPRIM did not gain any new clients as a result of the Advertisements. App.247 n.38. During the hearing before the ALJ, there was also no evidence presented that anyone ever responded to the 2008 Advertisements.

This restrictive view employs an underinclusive bright line test for materiality based on information made available to potential clients at the time a misleading statement, claim or omission is made. All other information made available including “after-advertisement disclosures” would be disregarded, irrespective of their significance, accuracy or corrective effect. The Decision determined materiality in a vacuum and leaves Petitioners and countless other investment advisors in an untenable position with no remedy to cure a misleading statement or omission despite efforts to overcome the inaccuracy before an investment decision is made. The Eleventh Circuit’s exclusion of “after-advertisement disclosures” from the “total mix” also deprives the reasonable investor of information that would be considered important.

The Eleventh Circuit also ignored Zavanelli’s sincere belief that the Newsletter was not an advertisement that the Guidelines applied to⁹ and simply found that Petitioners violated the Advisors Act with scienter by including a claim of GIPS-compliance in the April 2009 Newsletter.

Petitioners filed a Petition for Rehearing and Rehearing En Banc which the Eleventh Circuit denied on September 14, 2017. App.282,283.

⁹ The ALJ found that Zavanelli genuinely believed the Newsletter was not an advertisement for purposes of GIPS because it was not used for marketing purposes. App.255.

REASONS FOR GRANTING THE PETITION

The Petition should be granted for the following compelling reasons:

A. The Eleventh Circuit devised a new and different test for materiality under the securities laws, which departed from the standard established by this Court and followed by the circuit courts. The Eleventh Circuit excluded disclosures from the total mix of information made available by Petitioners after the Advertisements were placed and before any investment decision. This approach followed a bright line test that excluded information that would otherwise be considered significant to a reasonable investor. The Decision also denied Petitioners the opportunity as fiduciaries, to correct any misstatement with accurate and complete information. The effect of the Decision creates different standards for materiality which will produce inconsistent results if courts choose to follow this holding. For example, if an issuer published a misleading advertisement about a debt or equity offering but then provided a prospectus to the prospective investor which corrected the misleading advertising, then under the rational of the Eleventh Circuit, delivery of the prospectus would be irrelevant to evaluating the total mix of information for materiality because it occurred after the time the misleading statement had been made. The new test for materiality adopted by the Eleventh Circuit is under inclusive and undermines the philosophy of full and fair disclosure, which this Court has recognized to be the cornerstone federal securities laws are based on.

B. In conflict with the Third Circuit, the Eleventh Circuit disregarded a sincere and genuine opinion that

the Newsletter was not an advertisement and held a false claim of GIPS-compliance in the Newsletter was made with scienter in violation of the Advisors Act.

The Eleventh Circuit's Decision is in conflict with decisions of this Court and other circuit courts on these important and recurring questions of federal law that this Court should review.

I. "AFTER-ADVERTISEMENT DISCLOSURES" SHOULD BE CONSIDERED AS PART OF THE TOTAL MIX OF INFORMATION TO EVALUATE THE MATERIALITY OF A FALSE STATEMENT UNDER THE FEDERAL SECURITIES LAWS WHEN THOSE DISCLOSURES NEGATE THE MATERIALITY OF THE FALSE STATEMENT AND ARE DISCLOSED PRIOR TO ANY INVESTMENT DECISION

The Eleventh Circuit refused to include disclosures as part of the total mix of information that Petitioners made available to prospective clients following publication of the Advertisements. Contrary to the decisions of this Court and the circuit courts who have followed the test of materiality set forth in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the Eleventh Circuit constructed a barricade at the time the Advertisements were published to preclude subsequent disclosures from the court's analysis of materiality, even though the disclosures negated the materiality of any previous misstatements made within the Advertisements and were made available before any investment decision was reached. The Decision further eliminated the duty to correct a prior false or misleading statement as pronounced by other circuits, a conclusion that

undermines the obligations of investment advisors as fiduciaries under the federal securities laws. The effect of the Eleventh Circuit's Decision creates strict liability for false or misleading representations or omissions contained in advertisements by limiting the total mix of information to what was made available at the time the advertisements were published, not when an investment decision is reached. According to the Eleventh Circuit, there is simply no opportunity to correct such a deficiency.

A. THE TEST TO DETERMINE MATERIALITY SHOULD INCLUDE INFORMATION THE REASONABLE INVESTOR WOULD CONSIDER IMPORTANT UP TO THE TIME AN INVESTMENT DECISION IS REACHED

In *Va. Bankshares v. Sandberg*, 501 U.S. 1083, 1097, 111 S. Ct. 2749, 115 L. Ed. 2d 929 (1991), this Court held that “true statements may discredit the other one so obviously that the risk of real deception drops to nil.” The Eleventh Circuit’s refusal to consider the “true statements” made by Petitioners after the Advertisements were published contradicts the philosophy of full and fair disclosure. The Decision held, “These after-advertisement disclosures do not carry the day. Materiality is ‘determined in light of the circumstances existing at the time the alleged misstatement occurred’” citing *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 165 (2d Cir. 2000); and *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1253 (11th Cir. 2012). The Eleventh Circuit further held that “because our inquiry is limited to what investors knew at the time the false statements were made, ZPRIM’s later disclosures cannot negate the materiality of the earlier

misrepresentations.” The Decision focused on a single factor, timing of a misrepresentation, to define what disclosures would and would not be included in the total mix of information. This approach disregarded information a reasonable investor would consider important in making an investment decision and eliminates any opportunity, whether voluntarily or statutorily required, to correct a prior misstatement or omission. Such a result directly conflicts with decisions of this Court and various circuit courts and certiorari should be granted to provide a unified framework upon which to judge materiality.

The Decision acknowledged that “GIPS-required information” was provided to prospective clients and was also presented on ZPRIM’s website, which was identified in the Advertisements. By providing contemporaneous and “after-advertisement disclosures,” ZPRIM negated the materiality of its allegedly false claim of GIPS-compliance in the advertisements. *See Va. Bankshares v. Sandberg*, 501 U.S. at 1097. These disclosures contained the performance results required by GIPS that were not included in the Advertisements themselves, and clearly would have been important to prospective clients in making an investment decision. This is especially true for the fall 2008 Advertisements, since the performance results showed the SCV-Composite underperforming the market and its benchmark during the relevant periods. The disclosures should have been considered by the Eleventh Circuit as part of the total mix of information to evaluate the materiality of the GIPS-compliance claims.

The Eleventh Circuit's reliance on the *Ganino* and *Morgan Keegan* decisions to limit the inquiry of materiality to the date a false statement was made is misplaced. In *Ganino*, investors made an investment decision to purchase stock based upon misleading statements that concealed material information. 228 F.3d at 158, 159. The court's application of the materiality test considered information made available to investors at the time the misstatements were made and was appropriate since the investors were unaware of the false statements at the time they purchased stock. *Ganino*, *Id.* at 165. Any subsequent disclosures made would have been moot to that investment decision. By contrast, the ZPRIM Advertisements were the start of an investment decision process, not the end, and excluding subsequent disclosures while the decision making window was still open cannot be reconciled with *Ganino*. To further illustrate this distinction, *Ganino* cites with approval, the case of *Spielman v. General Host Corp.*, 402 F. Supp. 190, 194 (S.D.N.Y. 1975) ("The determination of materiality is to be made upon all the facts as of the time of the transaction and not upon a 20-20 hindsight view long after the event.") For purposes of determining materiality of the claim of GIPS-compliance, the "transaction" had not occurred and therefore the "after-advertisement disclosures" made by ZPRIM should have been included in the "total mix." The context of the disclosures is obviously relevant to the materiality inquiry and should not have been arbitrarily truncated by the court to a point in time during the decision making process. Under the rationale of the Eleventh Circuit, a misleading proxy statement or prospectus could never be corrected with an amendment before an investment decision is made. The Decision would hold

that the proxy statement or prospectus was false and therefore, no subsequent disclosures could cure that deficiency. This interpretation emasculates “total mix” to nothing more than surplusage or window dressing.

Morgan Keegan dealt with disclosures claimed to have been provided to actual purchasers of auction rate securities. The *Morgan Keegan* court held that written disclosures could not correct oral misrepresentations made by brokers to their customers since there was no evidence that investors ever received the written disclosures either before or after they purchased the securities during the relevant periods. *Id.* at 1252. The court also held that disclosures made in trade confirmations issued “after” the *Morgan Keegan* investors had already acquired their auction rate securities were inadequate. *Id.* at 1253. The court acknowledged that the “materiality test requires the court to consider all the information available to the hypothetical reasonable investor....” *Id.* at 1248. Since ZPRIM provided GIPS required disclosures to prospective investors who never made an investment decision, then under its rational in *Morgan Keegan*, the Eleventh Circuit should have included those disclosures as part of the total mix of information Petitioners made available.

Instead, the Eleventh Circuit followed a bright line litmus test by focusing on a single factor to evaluate materiality, an approach that has been uniformly rejected by this Court. The Decision proposes to establish new precedent that the “total mix” of information made available is limited the moment an alleged false statement or omission [claim of GIPS-compliance] is made with no consideration to the

investment decision. Creating a new standard of materiality conflicts with decisions of this Court and other circuit courts, and establishes a novel and dangerous precedent by permitting courts to define what makes up the “total mix” based on the timing of a misleading statement or omission and ignore the context of all disclosures made available that the reasonable investor would consider important.

The standard for materiality was first addressed by this Court in *TSC Indus.* to determine whether certain omissions from a proxy statement were materially misleading in violation of Section 14(a) of the Securities Exchange Act of 1934 (“Exchange Act”). This Court stated that “The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor.” *Id* at 445. The Court declined to adopt a test for materiality followed by the Seventh Circuit which involved “facts that a reasonable shareholder ‘might’ consider important” as an unnecessarily low standard. *Id* at 448,449. The Court instead announced a general standard for materiality for purposes of Rule 14a-9 of the Exchange Act that, “An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote”. *Id* at 449. “Put another way, there must be a substantial likelihood that disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information provided.” *Id*.

This Court next dealt with materiality in *Basic* where it applied the materiality requirement of Section

10(b) of the Exchange Act to preliminary corporate merger discussions. 485 U.S. at 226. The Court was urged to adopt a test adopted by the Third Circuit that such discussions are not material until an “agreement-in-principle” as to the price and structure of the transaction had been reached. *Id.* at 233. In refusing to embrace a bright-line test for materiality, this Court held that “[A]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.” *Id.* at 236. As a result, the *Basic* Court extended the standard for materiality established in *TSC Indus.* for purposes of Section 10(b) and Rule 10b-5 of the Exchange Act. *Id.* at 232.

The Court addressed materiality once again in *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011), to determine whether a cause of action could be stated under Section 10(b) and Rule 10b-5 of the Exchange Act for reports that did not disclose a “statistically significant number of adverse events” associated with a pharmaceutical product. *Matrixx*, 563 U.S. at 30. The Court reaffirmed its position in *Basic* that materiality cannot be reduced to a bright-line test and that the significant statistical criteria established by *Matrixx Initiatives, Inc.* to determine materiality of its reports would “artificially exclude information that would otherwise be considered significant to the trading decision of a reasonable investor.” *Id.* at 40.

While it does not appear that the Court has specifically addressed the issue of materiality under Sections 206(1), (2) and (4) of the Advisors Act, various

circuits have held the standard in *TSC Indus.* and followed by *Basic* and *Matrixx* should equally apply to all federal securities law cases. *See, e.g., SEC v. Steadman*, 967 F.2d 636, 643 (D.C. Cir. 1992) (test adopted in *TSC Indus.* appears to be the accepted definition of materiality under federal securities laws), *Dupuy v. Dupuy*, 551 F.2d 1005, 1015 (5th Cir. 1977) (materiality test should be the same in both an SEC enforcement action and private enforcement action); *Morgan Keegan* at 1247 n.16 (citing *Dupuy* with approval).

The Advisors Act was the last in a series of legislative acts promulgated to address abuses in the securities industry that contributed to the stock market crash of 1929 and the Great Depression of the 1930s. The Advisors Act was preceded by the Securities Act of 1933; the Securities Exchange Act of 1934; the Public Utility Holding Act of 1935; the Trust Indenture Act of 1939; and the Investment Company Act of 1940. *See SEC v. Capital Gains Research Bureau Inc.*, 375 U.S. 180, 186, 84 S. Ct. 275, 11 L. Ed. 2d 237 (1963). These statutes were designed with a common purpose to “substitute a philosophy of full disclosures for the philosophy of caveat emptor....” *Id.*

The *Basic* court further stated that, “We find no authority in the statute, the legislative history or our previous decisions for varying the standard of materiality depending on who brings the action or whether insiders are alleged to have profited.” 485 U.S. at 240 n.18. With no exception, the *Basic* decision held that “the Court also explicitly has defined a standard of materiality under the securities laws”. *Id.* at 231.

This standard should apply equally to the Advisors Act without variation. Notwithstanding, the Eleventh Circuit's Decision establishes a more restrictive test of materiality in conflict with decisions of this Court discussed above.

Eliminating disclosures from the total mix before an investment decision is reached was an underinclusive application of the *Basic* test for materiality by the Eleventh Circuit and creates a split with numerous other circuit court decisions. These decisions identify the "total mix" to be that information made available that a reasonable investor would consider important in making an investment decision and include the following:

Second Circuit– "Information is material if there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to [invest]." (Citations omitted). *SEC v. Mayhew*, 121 F.3d 44, 52 (2d Cir. 1977).

Third Circuit– "Material information is information that would be important to a reasonable investor in making his or her investment decision." (Citation omitted). Generally, undisclosed information is considered material if "there is a substantial likelihood that the disclosure would have been viewed by the reasonable investor as having altered the 'total mix of information available to that investor'." *Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir. 2000).

Fifth Circuit– "A material fact is one which a reasonable investor would consider significant in the decision whether to invest, such that it alters the "total mix" of information available about the proposed

investment.” *Krim v. Banc Texas Group*, 989 F.2d 1435, 1445 (5th Cir. 1993).

Sixth Circuit– “Purpose of the materiality requirement is not to attribute to investors a child-like simplicity, an inability to grasp the probabilistic significance of [opinion statements] but to filter out useless information that a reasonable investor would not consider significant, even as part of a larger mix of factors to consider in making his investment decision.” *KBC Asset Mgmt. N.V. v. Omnicare, Inc. (In re Omnicare, Inc. Sec. Litg.)*, 769 F.3d 455, 471-472 (6th Cir. 2014). (Citations omitted).

Seventh Circuit– “The definition of materiality in *TSC Indus.* and *Basic* covers whatever is important enough to reasonable participants in an investment decision to alter their behavior.” *SEC v. Jakubowski*, 150 F.3d 675, 681 (7th Cir. 1998).

Eighth Circuit– “A fact is material in the securities fraud context if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision.” *U.S. v. Mooney*, 401 F.3d 940, 945 (8th Cir. 2005).

Ninth Circuit– “The materiality of the misrepresentation or an omission depends upon whether there is ‘a substantial likelihood that [it] would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available’ for the purpose of decision making by stockholders concerning their investments.” *Retail Wholesale & Department Store Union Local 338 Retirement Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1274 (9th Cir. 2017).

Tenth Circuit— “A statement is material only if ‘a reasonable investor would consider it important in determining whether to buy or sell stock’.” *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1197 (10th Cir. 2013) (quoting *Grossman v. Novell*, 120 F.3d 1112, 1119 (10th Cir. 1997).

In each of these decisions, materiality was measured against the importance of disclosures considered by a reasonable investor in making an investment decision. These circuit court decisions would, therefore, include rather than exclude information made available before an investment decision is reached and are in conflict with the Decision of the Eleventh Circuit.

The *Basic* materiality test has also been followed by the Eleventh Circuit in *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233 (11th Cir. 2012), which held that “in other words, the materiality test requires the court to consider all the information available to the hypothetical reasonable investor, which necessarily includes private communications.” *Id.* at 1248.

Thus, any information made available to assist in the form of “after-advertisement disclosures” should have been included by the Eleventh Circuit in the “total mix” for purposes of evaluating the materiality claims of GIPS-compliance in the Advertisements.

The recent decision of *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 873 F.3d 85 (2d Cir. 2017), is also in direct conflict with the Eleventh Circuit’s Decision. In *Fed. Hous. Fin. Agency*, the defendant sold residential mortgage-backed securities and delivered a supplementary prospectus (“ProSupps”) after the trade

date. The plaintiffs argued that the ProSupps contained misrepresentations and omitted material facts while the defendants replied that the ProSupps could not be material since it was delivered after the trade-date. The Second Circuit dismissed the defendant's position by stating "[I]t is clear that the ProSupps, although transmitted after the GSEs initially committed to purchase Certificates, could be material to the GSEs' purchase decisions." *Id.* at 149. The Second Circuit concluded the purpose of the ProSupps was to fill informational gaps omitted in the initial prospectus and to confirm the loan quality representations thus convincing the GSEs to finalize the transactions. *Id.* Discussing materiality, the Second Circuit held that "A court must, of course, consider the statement at issue in the context of the objective features surrounding the *sale* and *the seller*. That context includes, for example, all facts related to the statement or omission, its surrounding text, the offering documents, the securities, the structure of the transaction, and the market in which the transaction occurs." *Id.* at 151. This decision is squarely at odds with the Decision, which determined that any surrounding information after a false statement was made should be excluded from the materiality analysis.

By removing the disclosures Petitioners made available from the total mix of information before the investment decision, the Eleventh Circuit narrowed and redefined the test for materiality announced in *Basic*. Congress did not intend to impose strict liability for a false statement contained in an advertisement when it enacted the Advisors Act and yet, this is exactly the result produced by the Eleventh Circuit's Decision. The overwhelming case law from this Court

and other circuits would not restrict the total mix of information made available at any time before an investment decision was made.

Disclosures made before an investment decision is reached that negate the materiality of a prior false statement, therefore, must be considered as part of the total mix to determine materiality consistent with decisions of this Court and those of other circuit courts.

B. THERE IS A DUTY TO CORRECT FALSE AND MISLEADING STATEMENTS

It has been widely held that “a duty to disclose under federal securities laws may arise when there is insider trading, a statute requiring disclosure or an inaccurate, incomplete, or misleading prior disclosure.” *Oran v. Stafford*, 226 F.3d 275, 285-286 (3d Cir. 2000); *In re Omnicare, Inc. Securities Litigation*, 769 F.3d 455, 471 (6th Cir. 2014); *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015).

Likewise, the First, Second, and Seventh Circuits have held there is a duty to disclose information previously omitted to correct a prior statement that was incorrect at the time it was made:

First Circuit – “A duty to disclose information earlier omitted arises only when affirmative statements were made and the speaker fail[ed] to reveal those facts that are needed so that what was revealed would not be so incomplete.” *In re Genzyme Corp Securities Litigation*, 754 F.3d 31, 41 (1st Cir. 2014) quoting *In re Bos. Scientific Corp. Sec. Lit.*, 686 F.3d 21, 27 (1st Cir. 2012).

Second Circuit– “And because the FSA Report shows that the statements were not untrue, there was no duty to correct them.” *IBEW Local Union No. 58 Pension Trust Fund & Annuity v. The Royal Bank of Scotland Group, PLC*, 783 F.3d 383, 390 (2d Cir. 2015).

Seventh Circuit– “A statement may be ‘corrected’ only if it was incorrect when made....” *Gallagher v. Abbott Laboratories*, 269 F.3d 806, 810 (7th Cir. 2001).

The Eighth, Tenth, and even the Eleventh Circuits have expanded this principle to require voluntary disclosures of information to be made truthfully.

Eighth Circuit– “A duty arises, however, if there have been inaccurate, incomplete, or misleading disclosures.” *In re K-tel Intern, Inc. Securities Litigation*, 300 F.3d 881, 898 (8th Cir. 2002) quoting *Sailors v. Northern States Power Co.*, 4 F.3d 610, 612 (8th Cir. 1993).

Tenth Circuit– “However, where a party without a duty elects to disclose material facts, he must speak fully and truthfully and provide complete and non-misleading information with respect to the subjects on which he undertakes to speak.” *SEC v. Curshen*, 372 Fed.Appx. 872, 880 (10th Cir. 2010).

Eleventh Circuit– “By voluntarily revealing one fact about its operations, a duty arises for the corporation to disclose such other facts, if any, as are necessary to ensure that what was revealed is not ‘so incomplete as to mislead’.” *In re Galectin Therapeutics, Inc. Securities Litigation*, 843 F.3d 1257, 1275 (11th Cir. 2016). (Citations omitted).

The Ninth Circuit declined to recognize a duty to correct materially false and misleading statements, but nevertheless, held that “appellees have not violated such a duty because they corrected the prior statements within a reasonable time.” *In re Yahoo! Inc. Securities Litigation*, 611 Fed.Appx. 387, 390 (9th Cir. 2015) (citing *Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1331 (7th Cir. 1995)).

In addition, this Court held in *Capital Gains* that Congress recognized the fiduciary nature of the investment advisory relationship when it enacted the Advisors Act. *Id.* 375 U.S. at 191. The Court noted that fiduciaries are imposed with a duty of full disclosure of all material facts: “An investment adviser has an affirmative duty of utmost good faith and full and fair disclosure of all material facts.” *Id.* at 194. This decision clearly implies that investment advisors, as fiduciaries, are under an obligation to correct any misstatement or omission of material fact made to clients or prospective clients including any material false statement contained in an advertisement.

Despite the abundant weight of authority, the Eleventh Circuit inexplicably extinguished the duty to correct the claims of GIPS-compliance made by ZPRIM in the Advertisements. Despite Petitioners’ efforts to provide full disclosure of performance results omitted from the Advertisements, the duty to correct a prior misstatement or omission that is recognized by numerous sister circuits has seemingly been rejected by the Eleventh Circuit notwithstanding its previous decision in *Galectin Therapeutics, Inc.*, 843 F.3d 1257, 1275 (11th Cir. 2016) discussed, *supra*. See also *Finnerty v. Stiefel Labs*, 756 F.3d 1310, 1316 (11th Cir.

2014) (“we have held that a duty to disclose may arise from a defendant’s previous decision to speak voluntarily” citing *Rudolph v. Arthur Anderson & Co.*, 800 F.2d 1040, 1043 (11th Cir. 1986).

The elimination of the duty to correct previous misstatements or omissions of material fact by the Eleventh Circuit creates a circuit split. The Court should, therefore, grant review to restore uniformity among the circuits on this important and recurring question of federal law.

**C. CLAIM OF GIPS-COMPLIANCE IN 2011
ADVERTISEMENTS WAS NOT MATERIAL
BASED ON OMISSIONS OF FAVORABLE
INFORMATION**

Petitioners disclosed performance results required by the Guidelines to prospective clients that were not contained in the 2011 Advertisements. Nevertheless, because these performance results showed that the ZPRIM Global Equity and All-Asian Composites were significantly outperforming the market and their respective benchmarks, the claim of GIPS-compliance made in the 2011 Advertisements was not material.

The 2011 Advertisements reflected actual performance results that ZPRIM had achieved as compared to other money managers rated by *Pensions & Investments*. The ratings placed the Global Equity Composite as the top performer for World Stock Composites over one and five year periods, and the All-Asian Composite as the top performer for International Equity Composites for a one year period. The inclusion of positive performance results in the Advertisements alongside the *Pensions & Investments* ratings and

returns, would not have been considered by a reasonable investor to significantly alter the total mix of information presented by the Advertisements alone.

As a result, the Eleventh Circuit's Decision that held ZPRIM's sole claim of GIPS-compliance in the 2011 Advertisements was materially misleading conflicts with the decisions of this Court as previously discussed. See e.g. *TSC Indus., Basic*, and *Matrixx*.

The Decision also conflicts with the Second Circuit, which in *DeMaria v. Anderson*, 318 F.3d 170 (2d Cir. 2003) held that the omission of first quarter financial results that were positive and did not reflect a reversal of the company's growth trend "did not render the prospectus materially misleading." *Id.* at 180-181.

A claim of GIPS-compliance within an advertisement may require the disclosure of certain performance results prescribed by the Guidelines. But unless the underlying performance results are material, their omission from an advertisement cannot cause the advertisement to be material misleading. On this issue, the Eleventh Circuit decision conflicts with a recent Ninth Circuit case.

In *Retail Wholesale & Department Store Union Local 338 Retirement Fund v. Hewlett-Packard Co.*, 845 F.3d 1268 (9th Cir. 2017), the Ninth Circuit declined to hold the omission of a violation of a corporate code of ethics was material under the securities laws. *Id.* at 1278. Citing *Matrixx*, the court reasoned that "a duty to provide information exists only where statements were made which were misleading in light of the context surrounding the statements." *Retail Wholesale* at 1278. Thus, the context of the 2011 Advertisements

and the omission of favorable performance results did not cause the claim of GIPS-compliance to be materially misleading. *See also Basic* at 238 (not enough that a statement is false or incomplete if the misrepresented fact is otherwise insignificant).

Since the Eleventh Circuit's Decision is at odds with cases from this Court and other circuit courts, certiorari should be granted to resolve this important recurring issue of federal law.

II. ZAVANELLI'S SINCERE OPINION THAT THE ZPRIM'S NEWSLETTER WAS NOT AN ADVERTISEMENT CANNOT REPRESENT SCIENTER

The ALJ found that Zavanelli held a sincere belief and opinion that the Newsletter was not an advertisement and therefore, the Guidelines did not apply to that publication. Zavanelli's state of mind, therefore, could not embrace an intent to deceive, manipulate, or defraud required by this Court for scienter in *Ernst & Ernst v. Hochfelder*, 475 U.S. 185, 193-194 n.12, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976); or reflect "knowing misconduct or severe recklessness" that the Eleventh Circuit has established for scienter. *See SEC v. Carriba Air*, 681 F.2d 1318, 1324 (11th Cir. 1982).¹⁰

¹⁰ "Proof of recklessness requires a showing that the defendant's conduct was an extreme departure of the standard of ordinary care which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Id.*

The Eleventh Circuit's Decision that found Petitioners violated the Advisors Act with scienter¹¹ by including a claim of GIPS-compliance in the April 2009 Newsletter presumed the publication was an advertisement when Zavanelli's sincere opinion reflected that it was not an advertisement. Zavanelli cannot maintain his sincere opinion and at the same time act with scienter or "severe recklessness" or cause ZPRIM to act in such a manner. The Decision is in conflict with the Third Circuit's decision in *McLean v. Alexander*, 599 F.2d 1190 (3d Cir. 1979) which held that a finding of scienter could only be established against a party expressing an opinion if there was "no genuine belief that it had the information on which it could predicate that opinion." *Id.* at 1199.

The Petition should, therefore, be granted to resolve this circuit split on this important question of federal law.

¹¹ Scienter is required to establish a violation of Section 206(1) of the Advisors Act. *SEC v. Steadman*, 967 F.2d 636, 641 n.3 (D.C. Cir. 1992). Negligence is required to establish violations of Sections 206(2) and (4) of the Advisors Act. *Capital Gains* 375 U.S. at 194.

CONCLUSION

For the reasons previously stated, the Court should grant the petition for certiorari and accept the case for plenary review.

Respectfully submitted,

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