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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re
NAVELLIER & ASSOCIATES, INC.,

Debtor.

U.S. Securities and Exchange Commission,

Plaintiff,

v.
Navellier & Associates, Inc.,

Defendant.

Case No. 25-50820-hlb

Chapter 11

Adversary Proceeding: 25-_____

**COMPLAINT BY U.S. SECURITIES
AND EXCHANGE COMMISSION TO
DETERMINE DISCHARGEABILITY
OF DEBT, OWED BY NAVELLIER &
ASSOCIATES, INC., UNDER
SECTIONS 523(a)(2) AND 1141(d)(6)(A)
OF THE BANKRUPTCY CODE**

1 Plaintiff, U.S. Securities and Exchange Commission (“Plaintiff” or “SEC”), a creditor in
2 the above-referenced Chapter 11 case, files this Complaint against Navellier & Associates, Inc.
3 (“Defendant”) for a determination that Defendant’s judgment debt to Plaintiff in the amount of
4 \$31,369,890 (comprised of \$22,734,487 in disgorgement, \$6,635,403 in prejudgment interest
5 and \$2,000,000 in civil penalties), plus post-judgment interest, is excepted from discharge
6 pursuant to Sections 523(a)(2) and 1141(d)(6)(A) of the Bankruptcy Code, and in support,
7 Plaintiff alleges as follows:

8 **PARTIES**

- 9 1. Plaintiff is an executive agency of the United States government.
- 10 2. Plaintiff is the federal agency responsible for regulating the securities markets in
11 the United States and enforcing the federal securities laws.
- 12 3. Defendant is an investment adviser that has been registered with the SEC since
13 October 1987.
- 14 4. Defendant maintains its principal place of business in Reno, Nevada.
- 15 5. Defendant was founded by Louis Navellier (“Navellier”). Navellier has served as
16 Defendant’s Chief Investment Officer and Chief Executive Officer since Defendant’s formation.
- 17 6. Since August 2013, Navellier has held a 100% ownership interest in Defendant.
- 18 7. On September 5, 2025, Defendant filed a voluntary petition for relief under
19 Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the
20 District of Nevada.

21 **JURISDICTION AND VENUE**

- 22 8. This Court has subject matter jurisdiction over this proceeding pursuant to 28
23 U.S.C. §1334(b).
- 24 9. This proceeding is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I).
- 25 10. Venue is proper in this district pursuant to 28 U.S.C. §1409(a).
- 26 11. Pursuant to LR 7008, Plaintiff does not consent to the entry of a final order or
27 judgment by the bankruptcy court if it is determined that the bankruptcy judge, absent consent of

the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

FACTUAL BACKGROUND

A. The SEC's Enforcement Action Against Defendant.

12. On August 31, 2017, Plaintiff commenced a civil action against Defendant and Navellier by filing a complaint in the United States District Court for the District of Massachusetts (the "District Court"), entitled *Securities and Exchange Commission v. Navellier & Associates, Inc., and Louis Navellier*, Case No. 1:17-cv-11633 (D. Mass.) (the "Civil Action"). A true and correct copy of Plaintiff's complaint in the Civil Action (the "Complaint") is attached hereto as Exhibit 1.

13. In the Complaint, Plaintiff alleged that from 2010 to 2013, Defendant (while acting as an investment adviser) and Navellier defrauded their clients and prospective clients by misleading them about the performance track record of the "Vireo AlphaSector" investment strategies that Defendant offered.

14. The Complaint alleged that Defendant's and Navellier's conduct violated Section 206(1) of the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. §80b-6(1), which makes it unlawful for an investment adviser to employ any device, scheme, or artifice to defraud a client or prospective client.

15. The Complaint also alleged that Defendant's and Navellier's conduct violated Section 206(2) of the Advisers Act, 15 U.S.C. §80b-6(2), which makes it unlawful for an investment adviser to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon a client or prospective client.

16. In the Complaint, Plaintiff sought injunctive relief, an order requiring Defendant and Navellier to disgorge ill-gotten gains, and civil monetary penalties.

17. Defendant was represented by counsel in the Civil Action.

18. On October 6, 2017, Defendant and Navellier filed an answer to the Complaint.

1 19. On June 19, 2018, the District Court entered an order granting, in part,
2 Defendant's and Navellier's motion to amend their answer and affirmative defenses.

3 **B. The District Court Enters Summary Judgment Against Defendant.**

4 20. On August 12, 2019, Plaintiff filed in the Civil Action a motion for summary
5 judgment against Defendant and Navellier on, among other things, the Section 206(1) and 206(2)
6 counts of the Complaint. That same day, Defendant and Navellier moved for summary judgment
7 on several issues, including their selective enforcement affirmative defense. The parties each
8 filed their respective oppositions and replies in connection with the summary judgment motions.

9 21. On February 13, 2020, the District Court issued a *Memorandum and Order* (the
10 ("SJ Order") denying Defendant's and Navellier's motion for summary judgment, and granting
11 Plaintiff summary judgment against Defendant and Navellier on both the Section 206(1) and
12 206(2) counts of the Complaint. A true and correct copy of the SJ Order is attached hereto as
13 Exhibit 2.

14 22. In its ruling, the District Court explained that to prevail under Sections 206(1) and
15 206(2), Plaintiff was required to show that Defendant, while acting as an investment adviser,
16 made a material misrepresentation with a culpable mental state. (SJ Order at p.14). The District
17 Court further explained that Section 206(1) required Plaintiff to show that Defendant willfully or
18 recklessly employed a device, artifice, or scheme to defraud and Section 206(2) required Plaintiff
19 to show that Defendant failed to disclose or omitted material facts in their dealings with clients.
20 (Id.).

21 23. The District Court found that Defendant made false claims about Vireo
22 AlphaSector strategies, stating "[t]he record includes multiple examples of [Defendant]-created
23 marketing materials that include false and misleading statements regarding the performance of
24 the AlphaSector strategies." (SJ Order at p.15).

25 24. The District Court found that Defendant's false and misleading statements were
26 material because whether the historical performance of Vireo AlphaSector had been back-tested,
27 or instead, was based on actual performance, would likely be considered important to a

1 reasonable investor in deciding whether or not to invest in the strategy. (SJ Order at p.16). The
2 court noted that Defendant's President – Arjen Kuyper – “admitted that the historical
3 performance of a strategy would be material to an investor, in particular whether a strategy had
4 been back-tested or was based on actual performance.” (Id.).

5 25. The District Court found that Defendant's false statements were made with
6 scienter because the evidence demonstrated that Defendant intended to defraud clients, or at
7 least, acted with a high degree of recklessness. (SJ Order at pp.16-18). In support, the court
8 found that Defendant's personnel, including Navellier, “were aware that the marketing was not
9 supported by sufficient data, but that they took no steps to inform clients of the false statements
10 and, instead, continued to sell the AlphaSector strategies despite their knowledge that
11 representations about the strategies were false and misleading.” (SJ Order at pp.16-17). The
12 court also found that Navellier had acknowledged in an email to management that Defendant was
13 selling AlphaSector strategies based on fraudulent representations. (SJ Order at p.17). The court
14 referenced additional internal communications between Defendant's President and a compliance
15 officer, demonstrating their awareness of the misleading statements in Defendant's marketing to
16 clients. (SJ Order at p.18). The District Court found that Defendant did not attempt to halt sales
17 or inform clients of the fraudulent statements, despite knowing of the inadequate due diligence
18 and the misleading statements in the marketing, and instead, began to explore opportunities to
19 sell the Vireo AlphaSector business. (Id.). These actions, the District Court concluded,
20 “demonstrate an intention to defraud clients or, at least, a high degree of recklessness in violation
21 of Section 206(1).” (Id.).

22 26. The District Court also concluded that Defendant and Navellier violated Section
23 206(2) of the Advisers Act because “the undisputed record shows that [Defendant and Navellier]
24 engaged in a course of business that operated a fraud or deceit upon their clients.” (SJ Order at
25 p.19).

26 27. On March 12, 2020, Defendant filed in the Civil Action a motion for
27 reconsideration of the SJ Order, which motion the District Court denied on April 2, 2020.

28. Following entry of the SJ Order, the District Court entered a final judgment dated June 2, 2020 (the “Original Final Judgment”) setting the amount of disgorgement, prejudgment interest and civil penalties owed by Defendant and Navellier for their violations. The District Court ordered joint and several liability for disgorgement in the amount of \$28,964,571 and prejudgment interest in the amount of \$6,513,619. The court also imposed a civil penalty upon Defendant in the amount of \$2,000,000, and upon Navellier in the amount of \$500,000. Defendant’s total liability under the Original Final Judgment was \$37,478,190.

29. On June 4, 2020, Defendant filed a notice of appeal to the First Circuit Court of Appeals (the “First Circuit”).

C. The District Court Makes Amended Findings and Enters an Amended Judgment.

30. After Defendant appealed the Original Final Judgment, on June 22, 2020, the United States Supreme Court decided the case of Liu v. SEC, 591 U.S. 71 (2020), which held that a disgorgement award that does not exceed a wrongdoer’s net profits and is awarded for victims is permissible equitable relief under Section 21(d)(5) of the Securities Exchange Act of 1934, and provided guidance about how such disgorgement awards may be ordered. As a result, Plaintiff requested that the First Circuit remand the case back to the District Court to make additional factual findings and conclusions of law regarding the disgorgement award entered against Defendant and Navellier, consistent with the Liu opinion.

31. On remand, on September 21, 2021, the District Court made *Amended Disgorgement Findings of Fact and Conclusions of Law* (“Amended Findings”) and entered an *Amended Final Judgment* (“Amended Final Judgment”). A true and correct copy of the Amended Findings and Amended Final Judgment is attached hereto as Exhibit 3 and Exhibit 4, respectively.

32. On remand, the District Court ruled that disgorgement was “appropriate to deprive [Navellier] and [Defendant] of unjust profits they made from their repeated fraudulent marketing misrepresentations and failures to disclose material information to clients about the Vireo products.” (Amended Findings at ¶11).

33. The District Court also made additional findings regarding Navellier's knowledge of Defendant's misrepresentations. The court found that Navellier "knew the marketing was misleading, had the power to stop [Defendant] from its fraudulent marketing efforts, and authorized his [] staff to continue the marketing campaign anyway." (Amended Findings at ¶16). The court also found that Navellier "authorized the selling of the Vireo AlphaSector products, even though he was well aware that the Vireo AlphaSector performance claims were unsupported." (Id. at ¶17).

34. In ordering disgorgement, the District Court found that Defendant's clients were harmed by Defendant's conduct. The court found that Defendant breached its duty to act in the utmost good faith and to avoid misleading its clients, to the detriment of its clients and prospective clients. (Amended Findings at ¶¶21-22). The District Court noted that, under Liu, the SEC is generally required to return a defendant's gain to the wronged investors (Id. at ¶20), and that the SEC intends to distribute the disgorged funds to the Vireo AlphaSector clients (Id. at ¶23).

35. The District Court also found that Defendant failed to provide material information to clients when they needed to decide whether to transfer their accounts to the purchaser of the AlphaSector business, or to terminate their client relationship. (Amended Findings at ¶36). The District Court found that Defendant's failure to disclose this information leading up to the sale benefitted Defendant because "[a]s 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." (Id.).

36. The District Court made amended findings with respect to the amount of disgorgement warranted in the case. The court determined that Defendant's fraudulent marketing scheme and failure to disclose Defendant's fraudulent misrepresentations allowed Defendant to obtain money in the form of advisory fees paid by clients, and from the sale of the Vireo AlphaSector business. (Amended Findings at ¶31). From these two sources, the court

1 found that Defendant obtained a gross profit of \$36,775,867 (Id. at ¶37). The court then
2 deducted \$14,041,380 in legitimate expenses, for a net profit of \$22,734,487. (Id. at ¶¶67-68).

3 37. In its analysis, the District Court ruled that certain categories of expenses were not
4 incurred in furtherance of the Defendant's legitimate business of providing investment advisory
5 services to clients, and thus, could not be deducted. One such category was the expenses related
6 to Defendant's employment of sales and marketing staff. (Id. at ¶52). The court found that sales
7 and marketing expenses were not incurred to benefit Defendant's clients, but instead, were
8 incurred to increase the number of clients who invested in the AlphaSector strategies. (Id. at
9 ¶50). The court summarized Defendant's expenditures on sales and marketing "as the
10 reinvestment of profits in expanding the fraud, rather than as an actual expense of the business."
11 (Id. at ¶51). The court further explained, "Defendants chose to take the money they were making
12 from their fraud and reinvest it to acquire more clients and, in turn, additional fraud revenues,
13 through the fraudulent marketing." (Id.)

14 38. In addition to the \$22,734,487 in net profits that the District Court ordered
15 Defendants to disgorge, the court also found that Defendants were liable for prejudgment interest
16 in the amount of \$6,635,403, resulting in total disgorgement and prejudgment interest of
17 \$29,369,890. (Amended Findings at ¶74).

18 39. Based on the Amended Findings, the District Court entered the Amended Final
19 Judgment, which ordered Defendant to pay, to the Commission, disgorgement in the amount of
20 \$22,734,487, prejudgment interest in the amount of \$6,635,403, a \$2,000,000 civil penalty, for a
21 total of \$31,369,890. (Amended Final Judgment at pp.2-3).

22 40. All amounts owed by Defendant under the Amended Final Judgment are payable
23 to Plaintiff. (Amended Final Judgment at pp. 2,4).

24 41. On October 19, 2021, Defendant moved the District Court to alter or amend the
25 Amended Final Judgment. That motion was denied and Defendant appealed to the First Circuit.
26
27

D. The First Circuit Affirms the District Court's Rulings.

42. On July 16, 2024, the First Circuit issued an opinion (the "Opinion") affirming the District Court's SJ Order, the Amended Findings and the Amended Final Judgment. A true and correct copy of the Opinion is attached hereto as Exhibit 5.

43. The First Circuit affirmed the District Court's conclusions that Defendant made false misrepresentations to clients regarding Vireo AlphaSector, stating "the undisputed facts establish that the relevant statements were false and therefore misrepresentations within the scope of section 206 [of the Advisers Act]." (Opinion at p.21).

44. The First Circuit also affirmed the District Court's conclusion that there was no genuine issue of material fact as to the materiality of the Defendants' misrepresentations. (Opinion at pp.24-28). Because Defendant's misrepresentations related to the degree of investment risk, the First Circuit concluded that the misrepresentations were so "obviously important" to investors that they were material as a matter of law. (Id. at 26-27).

45. Next, the First Circuit affirmed the District Court's conclusion that Defendant and Navellier acted with scienter for purposes of Section 206(1) of the Advisers Act, in that each either possessed a conscious intent to defraud or acted with a high degree of recklessness. (Opinion at p.28-30). The court concluded that Defendant and Navellier knew that their misrepresentations presented a danger of misleading current and prospective clients. (Opinion at p.30).

46. The First Circuit affirmed the disgorgement order over Defendant's argument that disgorgement was not appropriate because Defendant's clients did not suffer pecuniary harm. (Opinion at pp.34-37). The First Circuit reasoned, in part, that Defendant's misrepresentations induced clients into paying fees, and the SEC's distribution of disgorgement to harmed investors "will remedy a direct harm to Vireo AlphaSector clients." (Opinion at p.36, fn. 14). The First Circuit also explained, however, that direct economic loss was not necessarily required since Defendant was acting in a fiduciary capacity and had secured an undue advantage over its clients by virtue of its position. (Opinion at p.36).

47. Finally, the First Circuit rejected Defendant's arguments that there was no "causal connection" between the advisory fees paid by clients and Defendant's violations, or between the proceeds from the sale of the AlphaSector business and Defendant's violations. (Opinion at pp.40-42).

48. The First Circuit affirmed the District Court's rulings in their entirety.

49. Defendant's petition for certiorari to the United States Supreme Court was denied.

CLAIM FOR RELIEF

Count I – Nondischargeability Under 11 U.S.C. §§523(a)(2) and 1141(d)(6)(A)

50. Plaintiff incorporates by reference the allegations set forth in paragraphs 1 through 49 above.

51. During the period from 2011 to 2013, Defendant falsely represented to clients and prospective clients that the AlphaSector strategies it offered were based on an actual performance record dating back to 2001.

52. During the period from 2011 to 2013, Defendant falsely represented to clients and prospective clients that the AlphaSector returns it represented to clients and prospective clients were not back-tested.

53. During the period from 2011 to 2013, Defendant falsely represented to clients and prospective clients that the AlphaSector strategy had been used to manage client assets from April 2001 until September 2008.

54. Defendant knew its misrepresentations were false at the time they were made.

55. Defendant knew that its marketing materials for the AlphaSector strategy were misleading and that the performance claims were unsupported.

56. Defendant's false statements and misrepresentations about the AlphaSector strategy were made with scienter because Defendant intended to defraud clients, or acted with a high degree of recklessness.

57. Each of the false claims and misrepresentations that Defendant made to clients and prospective clients were material.

1 58. Information about whether the AlphaSector strategy results had been back-tested,
2 or instead, were based on actual performance, would be important to a reasonable investor in
3 deciding whether or not to invest in the strategy.

4 59. As an investment adviser, Defendant owed its clients an affirmative duty of
5 utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative
6 obligation to employ reasonable care to avoid misleading its clients.

7 60. Through its false representations and failure to disclose material information,
8 Defendant breached the duties required of it as an investment adviser.

9 61. Defendant's clients reasonably relied upon Defendant's representations about the
10 performance of the AlphaSector strategies.

11 62. Defendant's false statements and misrepresentations about the AlphaSector
12 strategies proximately caused harm to Defendant's clients.

13 63. Defendant's false statements and misrepresentations about the AlphaSector
14 strategy caused clients to pay \$22,775,867 in advisory fees to Defendant from 2011 to 2013.

15 64. Defendant's failure to disclose material information at the time of Defendant's
16 sale of the AlphaSector business was for Defendant's own financial gain, and deprived clients of
17 information relevant to their decision of whether to transfer their account to the purchaser or to
18 terminate their client relationships.

19 65. Defendant's false statements and misrepresentations about the AlphaSector
20 strategy resulted in Defendant obtaining \$14,000,000 from the sale of the Vireo AlphaSector
21 business in 2013.

22 66. The \$22,734,487 in disgorgement ordered under the Amended Final Judgment
23 represents money that Defendant received as a result of its false pretenses, false representations
24 or actual fraud.

25 67. The disgorgement portion of the Amended Final Judgment was ordered to deprive
26 Defendant of unjust profits it received from its repeated fraudulent marketing misrepresentations
27 and failures to disclose material information to clients.

1 68. The \$2,000,000 civil penalty imposed under the Amended Final Judgment was
2 imposed for Defendant's fraudulent marketing scheme and false misrepresentations.

3 69. The total amount owed by Defendant under Amended Final Judgment is a debt
4 for money obtained by Defendant under false pretenses, by making false representations or by
5 actual fraud.

6 70. Plaintiff holds the right to payment of the amounts due under the Amended Final
7 Judgment.

8 71. Defendant has not made any payments to Plaintiff under the Amended Final
9 Judgment.

10 *[Remainder of Page Intentionally Left Blank]*

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, U.S. Securities and Exchange Commission, requests that this Court enter judgment in favor of Plaintiff determining that Defendant's debt to Plaintiff under the Amended Final Judgment, in the amount of \$31,369,890 (comprised of \$22,734,487 in disgorgement, \$6,635,403 in prejudgment interest and \$2,000,000 in civil penalties), plus post-judgment interest, is excepted from discharge pursuant to Sections 523(a)(2) and 1141(d)(6)(A) of the Bankruptcy Code, and providing such other and further relief as the Court deems appropriate.

Dated: December 5, 2025

Respectfully submitted,

U.S. Securities and Exchange Commission

/s/ David Baddley
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____	)	
SECURITIES AND EXCHANGE COMMISSION,	)	
	)	Case No.
Plaintiff,	)	
	)	
v.	)	JURY TRIAL DEMANDED
	)	
NAVELLIER & ASSOCIATES, INC., and	)	
LOUIS NAVELLIER,	)	
	)	
Defendants.	)	
_____	)	

COMPLAINT

Plaintiff United States Securities and Exchange Commission (“the Commission”) alleges the following against Defendants Navellier & Associates, Inc. (“Navellier”) and its principal, Louis Navellier (“Mr. Navellier”), and hereby demands a jury trial:

SUMMARY OF THE ACTION

1. From 2010 to 2013, investment adviser Navellier and its principal, Mr. Navellier, defrauded their clients and prospective clients, misleading them about the performance track record of the “Vireo AlphaSector” investment strategies that Navellier offered.

2. Through their conduct, Navellier and Mr. Navellier violated the fiduciary duty that every investment adviser has to its clients and prospective clients—to put client interests first, to deal with them with the utmost honesty, to disclose to them all conflicts or potential conflicts of interest, and to use reasonable care in providing them with investment advice.

3. First, when Navellier performed its (inadequate) due diligence, it ignored and concealed red flags indicating that the investment strategies had not performed as advertised. Instead, Navellier branded the strategy with a new name, “Vireo AlphaSector” and proceeded to

recommend it to clients. Second, Navellier created and distributed advertisements and client communications about Vireo AlphaSector's performance track record, even though it knew it lacked information to support such statements. These marketing materials, which were based on information originally obtained from the strategies' model manager, F-Squared Investments, Inc. ("F-Squared"), were materially false. Finally, when they fully understood that the track record from F-Squared had been fabricated, Navellier and Mr. Navellier recognized that their marketing materials with this false information could get them into legal trouble. Instead of truthfully informing their clients about their prior misrepresentations and telling clients the truth about the performance track record, Navellier and Mr. Navellier arranged to sell the Vireo line of business directly to F-Squared—profiting handsomely while keeping the fraud hidden.

4. Performing Inadequate Due Diligence and Ignoring Red Flags in the Results, and Marketing Vireo AlphaSector to Clients Anyway: When performing its due diligence on the AlphaSector strategies, and while marketing and selling Vireo AlphaSector to its clients and prospective clients, Navellier ignored and concealed several red flags that the performance track record of Vireo AlphaSector was not based on live trading since 2001—as F-Squared had represented—and that the track record was substantially inflated. Despite these red flags, Navellier recommended Vireo AlphaSector to clients and prospective clients, using performance track record statements it knew it could not verify and which it understood were probably false.

5. Misrepresenting Vireo AlphaSector's Performance Track Record in Navellier's Advertisements and Client Communications: Navellier disseminated marketing materials for its Vireo AlphaSector strategies, which falsely stated that the strategies and the performance track record for the period from April 2001 to September 2008 were real. In fact, the strategies had not even existed during this period and the performance track record was back-

tested, which is a way of constructing a “track record” for an investment strategy for the period before the strategy actually existed. Navellier knew that it had not—and could not—verify the performance track record it was advertising, but it touted that track record anyway. Even after F-Squared’s CEO admitted that the performance track record was back-tested, various Navellier representatives continued to misrepresent the track record and the company failed to correct its previous false statements. While Navellier modified its statements about the Vireo AlphaSector track record several times, neither Navellier nor Mr. Navellier ever told their Vireo AlphaSector clients that Navellier’s prior statements about Vireo AlphaSector’s track record had been false.

6. **Selling the Vireo Business Instead of Disclosing Prior Misrepresentations to Clients:** Mr. Navellier knew that the Vireo AlphaSector track record could not be validated and, over time, concluded the track record was fabricated and that Vireo AlphaSector was based on a fraud. Eventually, he worried that Navellier’s prior false statements about Vireo AlphaSector could get Navellier into legal trouble (including with the Commission) so, in the summer of 2013, he arranged to sell the Vireo AlphaSector line of business to F-Squared for approximately \$14 million. In this way, he profited from the company’s successful marketing of a fraudulent performance record, without correcting Navellier’s misrepresentations to its fiduciary clients or disclosing the conflicts-of-interest he and Navellier had in selling Vireo AlphaSector.

7. Through the activities alleged in this Complaint, Navellier and Mr. Navellier, while acting as investment advisers, have employed devices, schemes and artifices to defraud their investment advisory clients and have engaged in acts, transactions, practices and courses of businesses which operated as a fraud on their investment advisory clients, in violation of Sections 206(1) and (2) of the Investment Advisers Act of 1940 (“Advisers Act”). Mr. Navellier also aided and abetted Navellier’s violations of Advisers Act Sections 206(1) and (2). In

addition, Navellier violated Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder by publishing and distributing advertisements and other client communications containing untrue material information.

8. The Commission seeks:
 - a. entry of appropriate permanent injunctions, including an injunction prohibiting Defendants from further violations of the relevant provisions of the federal securities laws;
 - b. disgorgement of Defendants' ill-gotten gains, plus pre-judgment interest; and,
 - c. imposition of civil penalties due to the egregious nature of Defendants' violations.

JURISDICTION AND VENUE

9. The Commission seeks a permanent injunction and disgorgement pursuant to Section 209(d) of the Advisers Act [15 U.S.C. § 80b-9(d)]. The Commission seeks the imposition of a civil penalty pursuant to Section 209(e) of the Advisers Act [15 U.S.C. § 80b-9(e)].

10. The Court has jurisdiction over this action pursuant to Sections 209(d), 209(e) and 214 of the Advisers Act [15 U.S.C. §§ 80b-9(d), 80b-9(e), 80b-14].

11. Venue is proper in this District because, at all relevant times, Navellier and Mr. Navellier served advisory clients in Massachusetts and directed advertisements and other client communications to clients and prospective clients in Massachusetts. The part of Navellier's business about which Navellier and Mr. Navellier made fraudulent representations and omissions and violated the advertising rule was based on a model manager agreement with F-Squared, a business based in Wellesley, Massachusetts. Finally, Navellier employed a marketing and client

services staff person in Marblehead, Massachusetts, who sold Vireo AlphaSector to Navellier's clients from there.

12. In connection with the conduct described in this Complaint, Defendants directly or indirectly made use of the mails or the means or instruments of transportation or communication in interstate commerce.

13. Defendants' conduct involved fraud, deceit, or deliberate or reckless disregard of regulatory requirements, and resulted in substantial loss, or significant risk of substantial loss, to other persons.

DEFENDANTS

14. **Navellier & Associates, Inc. ("Navellier")** is an investment adviser that has been registered with the Commission since October 1987 and is headquartered in Reno, Nevada. As of March 16, 2017, Navellier had approximately \$1 billion in assets under management. During the time period described here, Navellier had between approximately \$2.4 billion and \$3.5 billion in assets under management.

15. **Louis Navellier ("Mr. Navellier")**, age 59, resides in Manalapan, Florida and Reno, Nevada. Mr. Navellier is the founder and principal of Navellier. Since the founding of Navellier, Mr. Navellier has been its Chief Investment Officer and Chief Executive Officer. From 2009 to August 2013, Mr. Navellier owned at least 75% of Navellier. In August 2013, Navellier sold its Vireo AlphaSector business to F-Squared. At that time, Mr. Navellier acquired complete ownership of Navellier. Mr. Navellier reviewed Navellier's investment models at least weekly, according to Navellier's Form ADV, filed with the Commission on September 18, 2012. Mr. Navellier held final authority to decide what products and investment vehicles Navellier

offered its clients. His control of the business extended to the sale of business lines, such as the sale of the Vireo AlphaSector-related portion of Navellier's business. Mr. Navellier also exercised control of hiring, promoting, demoting and firing Navellier staff.

RELATED ENTITY

16. **F-Squared Investments, Inc. ("F-Squared")** was a Wellesley, Massachusetts-based investment adviser founded in 2006 and registered with the Commission from March 2009 until January 2016. In October 2009, F-Squared entered into a model manager agreement with Navellier whereby F-Squared provided Navellier with trading signals to carry out the Vireo AlphaSector strategies on behalf of Navellier's clients. On December 22, 2014, the Commission instituted a settled fraud action against F-Squared. F-Squared admitted to making the materially false claims that (a) the AlphaSector index strategy had been used to manage real client assets from April 2001 to September 2008, when in fact the strategy did not even exist during that time period and F-Squared had used a back-test to fabricate AlphaSector's performance "track record"; and that (b) AlphaSector had a performance track record that significantly outperformed the S&P 500 Index from April 2001 to September 2008, when the reported performance of AlphaSector was actually substantially inflated because of a computation error by F-Squared when fabricating AlphaSector's back-tested performance "track record."

STATEMENT OF FACTS

The Origins of the "Vireo AlphaSector" Strategies

17. In or around September 2009, Navellier started to explore doing business with F-Squared. Historically, Navellier and Mr. Navellier had focused their investment advice (and the

investment vehicles they offered) on “growth” strategies that performed well in rising markets. In contrast, F-Squared offered investing strategies, branded under the name “AlphaSector,” whose stated purpose was to protect investors from downturns in the stock market while still allowing those investors to profit when the stock market went up. Certain Navellier executives found the AlphaSector strategies attractive because they perceived their clients’ (and prospective clients’) growing appetite for downside protection strategies after the 2008 stock market collapse.

18. Navellier’s desire to offer an AlphaSector-related product led it to consider partnering with F-Squared through a “model manager agreement.” Under that “model manager agreement,” Navellier would establish investment products that followed F-Squared’s AlphaSector strategies. In other words, the Navellier investment product would invest Navellier’s clients’ money following the strategies – specifically, the buy and sell instructions – established and provided by F-Squared.

Navellier’s Due Diligence, Although Incomplete, Reveals Problems

19. As an initial step in determining whether to enter the model manager agreement with F-Squared, Navellier’s Chief Compliance Officer (“CCO”) conducted due diligence on F-Squared and the AlphaSector strategies. As part of the due diligence process, F-Squared gave Navellier several pieces of false information.

20. First, F-Squared represented to Navellier that AlphaSector had been used to manage real client assets from April 2001 to September 2008, often calling it a “live” track record. In reality, no assets tracked an AlphaSector strategy until at least late 2008.

21. Second, F-Squared represented to Navellier that the track record had significantly outperformed the S&P 500 Index from April 2001 to September 2008 and gave to Navellier purported performance results and data showing this track record. In reality, this track record was substantially overstated.

22. In conducting due diligence, Navellier's CCO asked to review documents, such as brokerage statements, that would validate the AlphaSector track record. F-Squared and its CEO denied the request, claiming they could not provide the requested information because of a confidentiality agreement with the entity that had originally developed the AlphaSector strategy.

23. As a result, Navellier's due diligence efforts failed to corroborate F-Squared's claims about the April 2001 to September 2008 track record. Nor could Navellier corroborate F-Squared's claims that any investor money had even been invested using the AlphaSector strategy between April 2001 and September 2008.

24. In addition, although F-Squared provided Navellier with what F-Squared claimed were historical trading signals supposedly supporting AlphaSector's performance, Navellier never confirmed whether the signals had actually been used historically. Nor did Navellier even scrutinize this information to determine whether the signals could even have been generated on the dates in question. Nor did Navellier ever analyze whether the signals F-Squared provided would produce the results F-Squared claimed. Had Navellier checked F-Squared's claimed historical performance using the buy and sell signals provided by F-Squared, it would have discovered that the performance reported by F-Squared—which Navellier later repeated verbatim—was miscalculated and substantially overstated.

25. Navellier failed to exercise reasonable care and failed to conduct sufficient due diligence to determine whether F-Squared's buy or sell signals had actually been generated or

used in any trading decisions during the April 2001 through September 2008 period. Likewise, Navellier failed to exercise reasonable care and failed to conduct sufficient due diligence to determine whether the signals would have produced the claimed performance track record.

Navellier's Due Diligence Report Puts Navellier Management—including Mr. Navellier—on Notice of Problems

26. In or around October 2009, a group of Navellier executives, including Mr. Navellier and Navellier's President, its CCO, and its Vice President of National Accounts/Sales, reviewed the results of the due diligence process that the CCO had performed.

27. On October 5, 2009, after reviewing a number of documents F-Squared had provided and after speaking with F-Squared's CEO and other personnel, Navellier's CCO drafted an "Executive Summary," which outlined the due diligence findings relative to F-Squared and AlphaSector.

28. Adopting many of F-Squared's representations, the Executive Summary described the AlphaSector trading system as, "originally developed and used by a large wealth management group located on the east coast. They are not in the business of promoting such systems and therefore licensed it to [F-Squared]. There is a confidentiality agreement that prevents [F-Squared] from divulging who they are." Not only was there nothing to identify who the mysterious east coast wealth management group was, the Navellier team was also well aware that the data underlying the performance track record remained shrouded in secrecy. The Executive Summary highlighted that "[t]hey flat out won't show the math to us...."

29. Navellier, its CCO, and Mr. Navellier knew that the due diligence Navellier had conducted raised significant unanswered questions about the AlphaSector products and F-

Squared’s claims about those products. Indeed, the CCO noted that F-Squared’s refusal to answer these questions concerning its products would ordinarily have “knock[ed] them out of contention” (that is, that Navellier would not ordinarily do business with F-Squared or offer the AlphaSector strategies).

30. The CCO cited four factors leading to his decision to recommend the AlphaSector products, in spite of the problems flagged in the due diligence process:

- i. that another “medium-sized mutual fund family” had (according to F-Squared’s CEO) performed “significant” due diligence and had chosen to move forward with partnering with F-Squared;
- ii. that F-Squared “began reporting the holdings/trades to the NASDAQ which had used the data to calculate and publish the indices since October 2008” (though there was no explanation why holdings and trades had not been reported before that time);
- iii. that the F-Squared Board of Advisors included some individuals who were relatively well-known in the securities industry (though the CCO had not spoken to any of them); and,
- iv. the “backgrounds of the principals” of F-Squared.

Despite Its Due Diligence Results, Navellier Pushes Ahead with Marketing the AlphaSector Strategy Under Its Own Brand

31. Despite the problems revealed in the due diligence process, the Due Diligence Executive Summary laid out a “Marketing Battle Plan” for marketing the new product. The “Battle Plan” recommended marketing the new product to “firms we know well, who are leaders in the retirement and annuity channels” and “direct to our [Navellier’s] database of individual investors.”

32. Following the circulation of the Due Diligence Executive Summary (sometime between October 5, 2009 and October 19, 2009), Navellier’s senior executives, including Mr.

Navellier, Navellier's President, its CCO, and its Vice President of National Accounts/Sales, approved the AlphaSector strategies for sale. To handle the marketing of these strategies, Navellier designated a newly-created Vireo AlphaSector business unit.

33. On October 19, 2009, Navellier entered into the Model Manager Agreement, allowing Navellier to invest client assets using the AlphaSector strategies. According to the Model Manager Agreement, Navellier agreed to pay F-Squared a portion of its advisory fee as compensation for F-Squared's services as the model manager. As Navellier was one of the first investment advisers to partner with F-Squared to market AlphaSector strategies to investors, F-Squared agreed to let Navellier rebrand AlphaSector as its own. Navellier called this line of business "Vireo AlphaSector" and created a number of products based on the AlphaSector strategies including Vireo AlphaSector Premium and Vireo AlphaSector AllWeather Premium. In October 2010, Navellier renamed the AllWeather strategy "Navellier Vireo AlphaSector Allocator Premium." In April 2011, Navellier changed the name again to "Vireo AlphaSector Allocator Premium." And in April 2012, Navellier simplified the name to "Vireo Allocator" (hereinafter, collectively, "Vireo Allocator").

34. Navellier licensed AlphaSector strategies from F-Squared and, in turn, marketed AlphaSector-based strategies to its clients and to investment professionals who had relationships with Navellier's clients. Most of Navellier's Vireo AlphaSector clients were clients of financial intermediaries, and many of those clients also signed investment management agreements with Navellier.

35. Under Navellier's investment advisory agreements with its clients, Navellier agreed to act as an investment adviser to the clients. The agreements gave Navellier authority to direct the purchase and sale of securities in the clients' accounts and to supervise the investment

and reinvestment of the securities, cash, and other investments in those accounts. As investment advisers to these clients, Navellier owed each client a fiduciary duty of undivided loyalty and utmost good faith to act in the clients' best interests.

36. For advertisements it distributed or circulated, Navellier was required to make and keep true, accurate and current records or documents necessary to form the basis for or demonstrate the calculation of the performance or rate of return that it claimed the strategies had achieved.

37. In marketing its own advisory services, Navellier published charts and other data reflecting a historical performance track record of the AlphaSector strategy between 2001 and 2008, even though F-Squared had not provided Navellier with any documentary support for its claims that there was any active investment in the strategy during that time. These charts and data were used in client presentations, marketing materials and other communications provided to numerous clients, investors, and potential investors. But Navellier never made or kept records or documents sufficient to form the basis for, or demonstrate the calculation of, the claimed historical performance of AlphaSector.

38. In sum, Navellier knew or was reckless in not knowing that it lacked a reasonable basis to believe that its Vireo AlphaSector's advertising claims were accurate when it recommended the AlphaSector strategy to clients.

Navellier Repeatedly and Explicitly Misrepresented That the Vireo AlphaSector Strategies' Performance Was Based on Live Track Records and That It Was Not Back-Tested

39. From May 2010 through August 2011, Navellier advertised its Vireo AlphaSector strategy by incorporating and adapting portions of F-Squared's advertisements into its own

advertisements. These advertisements echoed F-Squared's representations, claiming that there was a track record of actual investments between 2001 and 2008, and that the AlphaSector strategy had outperformed various investment performance benchmarks during the 2001 to 2008 period. Navellier disseminated these advertisements to its clients and prospective clients, even though it lacked a reasonable basis to believe that its claims of exceptional performance between 2001 and 2008 were either a) accurate or b) based on actual live trading during that time.

40. Navellier's Vireo AlphaSector advertisements included explicit (and entirely false) representations that the historical performance of AlphaSector was "not back-tested." "Back-testing" involves the retroactive application of an investment strategy or methodology to a historical set of data. Back-tested performance attempts to indicate how a product constructed with the benefit of hindsight would have performed during a certain period in the past *if* the product had been in existence during that time. In other words, how the model would have performed during a time period before the model was actually created. Back-tested performance carries the risk of "data mining." That is, with the benefit of hindsight, the back-tester may examine multiple strategies and selectively pick one that works very well for the specific time period being tested. This process elevates the risk that reports of positive performance will simply be the result of hindsight, and may not reflect any true success in predictive modeling for future investments. By not disclosing that the Vireo AlphaSector strategies were back-tested, Navellier failed to inform its clients about the particular risks of investing in back-tested strategies.

41. For instance, Navellier's advertisements for Vireo Allocator, which were approved or disseminated on or about May 10, 2010 and August 30, 2010, each stated that the strategy had a "Live track record for the U.S. Equity sleeve" and that the strategy had been

“stress tested across two bear markets.” The August 30, 2010 advertisement explicitly stated that the strategy was “not back-tested,” as did Vireo Allocator advertisements approved or disseminated on or about October 22, 2010 and August 25, 2011. Each of the Vireo Allocator advertisements between August 2010 and August 2011 also stated that the strategy had an “inception date of April 1, 2001,” indicating (falsely) that April 2001 was when the strategy was first employed.

42. Navellier’s advertisements for Vireo AlphaSector Premium Portfolio approved or disseminated on or about August 30, 2010; August 11, 2011; and August 25, 2011, all claimed that the strategy had a “live track record, stress tested across two bear markets” and that the strategy was “not back-tested.” Like the Allocator advertisements, each of these advertisements also claimed that the strategy had an “inception date of April 1, 2001.”

43. In no advertisement did Navellier state that the Vireo AlphaSector performance was, in fact, back tested.

44. Navellier’s AlphaSector advertisements for this period also substantially overstated the performance of the back-tested track record during the 2001–2008 period, based on Navellier’s uncritical reiteration of the false information provided by F-Squared. In each of Navellier’s advertisements, the reported performance was substantially inflated for the period before September 2008. F-Squared had given Navellier performance numbers that were not only false (in that they did not reflect actual trading activity) but were also mis-computed. Even as a back-test, the F-Squared figures were grossly overstated due to an error in the method of computation. For the period April 2001 to September 2008, if the F-Squared AlphaSector strategy had been accurately computed it would have shown an approximate gain of 38% (versus

28% for the S&P 500 Index). Instead, due to the error in computation, F-Squared reported a gain of up to 135%.

45. The Vireo AlphaSector advertisements included a chart that showed the historical performance of the AlphaSector between 2001 and 2008 as compared to the Dow Jones Moderate Global Index, the S&P 500 Index, and/or a blended index used by Navellier. The chart cited performance of the “Manager” or “Index” for that time period, giving the impression that the graph reflected actual performance, even though F-Squared did not exist until 2006. The chart itself purported to show the cumulative performance of the AlphaSector strategies, including the time period 2001 to 2008, and claimed that it had significantly outperformed at least one of the indices listed above during that period. Navellier included these performance claims in Vireo Allocator advertisements approved or disseminated on or about May 10, 2010; August 30, 2010; October 22, 2010; April 14, 2011; August 25, 2011; and January 26, 2102; and in Vireo Premium advertisements approved or disseminated on or about August 30, 2010; August 11, 2011; August 25, 2011; October 19, 2011; November 21, 2011; and February 17, 2012.

46. Navellier’s Vireo AlphaSector advertisements were distributed to investment firms, including at least one entity in Massachusetts, in order to attract new clients.

47. Navellier’s advice to clients and prospective clients to invest in the AlphaSector strategies also included these claims about the performance track record.

Navellier Learned Conclusively that the AlphaSector Track Record was a Sham—Based on Retrospective Back-Testing—Yet Failed to Disclose This Information to Its Clients

48. In March 2011, as part of Navellier’s efforts to have its Vireo AlphaSector strategies offered for sale on large investment platforms, Navellier’s CCO arranged for F-Squared’s CEO to speak by telephone with an analyst for a third-party investment adviser. The analyst had been reviewing Vireo AlphaSector strategies in connection with the third-party investment adviser’s consideration of whether to offer the strategy on its own marketing platform.

49. During the March 2011 call, which included the analyst, F-Squared’s CEO, and Navellier’s CCO, the analyst asked F-Squared’s CEO about the performance track record of the AlphaSector Premium Index (upon which the Vireo AlphaSector strategy was based). In response, the F-Squared CEO admitted that the Index was not based on actual trades beginning in April 2001, that investor assets had not “tracked” the strategy during that time, and that there was no composite to verify the performance.

50. This admission from F-Squared’s CEO confirmed for Navellier that the AlphaSector “track record” between April 2001 and September 2008 was, in fact, back-tested and not based on the “live” trading of actual assets.

Even Though Navellier and Mr. Navellier Recognized the Fraud in the Performance Claims Navellier Had Disseminated to its Clients, Navellier Representatives Continued to Repeat Those False Claims

51. On March 16, 2011, Mr. Navellier emailed Navellier’s President and its CCO describing an “ambush” he experienced while attending an event hosted by a third-party investment adviser. According to an invitation for the event, Mr. Navellier was scheduled to

speak to representatives of the investment adviser about Vireo and the current market outlook. In his email, Mr. Navellier noted that he had told “folks that the Vireo composite has been GIPS verified and that [Navellier’s CCO] went through all the trades, since that was what I was told.” He stated that if Navellier “used the index argument, we are dead.” Mr. Navellier wrote that, “if we have been using an index to sell Vireo, we have to get ready to blame FX2....” In follow-up emails that day, Navellier’s CCO told the Head of Sales that “‘We are dead’ is not what we want [Mr. Navellier] to be thinking about.”

52. On May 22, 2011, Mr. Navellier emailed Navellier’s President, its CCO, and its Head of Sales. Mr. Navellier stated, “[u]nless somebody shows me the confirms, F2 is merely a model and I am protecting the firm from potential fraud, so we must not talk about F2 as being base[d] on real \$ since 2001.”

53. Despite Mr. Navellier’s recognition that Navellier lacked any basis to believe that F-Squared’s strategy had actually been used to invest money as far back as 2001, Navellier and Mr. Navellier took no actions to further investigate the matter or to inform Navellier’s clients that Navellier’s prior representations about the strategy were false. To the contrary, Mr. Navellier told his senior staff, “I am not stopping Vireo sales” and instead, on May 22, 2011, directed that all “tough questions” should be directed to Navellier’s CCO.

54. Although, by no later than May 2011, Mr. Navellier recognized Navellier was selling a potential fraud, Navellier continued to advertise Vireo AlphaSector Premium Portfolio as having a “live track record.” An August 11, 2011 advertisement falsely represented that the strategy was “not back-tested” and that it had an “inception date of April 1, 2001.” The advertisement contained the misleading and overstated performance graph and lacked the kind of disclosures that would have been necessary to make it not misleading.

55. By August 2011 (and while Navellier was disseminating a Vireo Premium advertisement representing that the strategy had a “live track record;” was “not back-tested;” and had an “inception date of April 1, 2001”), Mr. Navellier had become convinced that the AlphaSector track record was fraudulent and hatched his plan to wash his hands of the matter by selling, or spinning off, Navellier’s Vireo business unit. Mr. Navellier’s conclusion was based, in part, on information he learned from speaking with F-Squared’s CEO. At about that time, Mr. Navellier told Navellier’s President, CCO, and head of sales about his conclusion that the track record was fraudulent; about his plan to sell the Vireo line of business; and about his concerns that Navellier’s statements about the AlphaSector performance track record could bring regulatory (including Commission) scrutiny and potential liability for fraud.

56. After that, Navellier stopped claiming in its own ads that the AlphaSector performance was “not back-tested.” But at no point did Navellier notify Navellier clients who had invested in the Vireo AlphaSector strategies that the company’s previous representations about the AlphaSector strategies were false or inaccurate.

57. On January 26, 2012, Navellier began using an advertisement for its Vireo Allocator that contained the misleading performance graph showing returns back to 2001. In this advertisement, Navellier included a disclaimer that “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” and that “hypothetical back-tested performance has many inherent limitations.”

58. Navellier did not remove claims about the 2001 to 2008 performance from its AlphaSector advertisements until June 2012.

Navellier Sales Staff Repeat and Amplify Navellier's Written False Representations When Marketing Vireo AlphaSector

59. Both before and after Mr. Navellier recognized the fraud in the statements about the performance track record, Navellier's sales people continued to market Vireo AlphaSector as not back-tested. Navellier's sales people consistently marketed Vireo AlphaSector's April 2001 to September 2008 track record as based on actual client investments during the time period May 2010 to August 2013.

60. From May 2010 to August 2013, Navellier sales staff, including its Director of Marketing, told clients and potential clients that AlphaSector's historical performance was produced by an actively-traded strategy that had been traded with real investor assets in real time. Navellier's Director of Marketing also told clients and potential clients that a "family office" had been following the strategy since 2000 or 2001. These claims were false.

61. In 2011, when another Navellier sales representative received questions from third-party advisers or clients to whom he was marketing Vireo AlphaSector concerning the historical basis for the AlphaSector products' track record, he informed them that the Vireo AlphaSector strategy had a ten-year track record. This too was false.

62. Navellier sales people routinely represented that a private wealth advisor had employed the AlphaSector strategy to invest real assets in the same securities and over the same period in the index—essentially, that the index was a proxy for the track record of accounts that followed AlphaSector.

63. Although Navellier's disclosures for its own Vireo AlphaSector advertisements eventually dropped claims that the strategies were not back-tested, Navellier sales staff continued to market Navellier's Vireo AlphaSector products to clients and prospective clients using

marketing materials produced by F-Squared. Navellier's sales staff routinely gave prospective clients presentations and other information from F-Squared's website and supplied them with links to F-Squared's website. These F-Squared materials falsely represented that the AlphaSector strategy was "not backtested," and included the overstated historical performance.

64. In addition to Navellier's and F-Squared's marketing materials, Navellier's sales staff also used Morningstar "tear sheets" containing the purported performance for the 2001 to 2008 period to show prospective clients the purported performance of the Vireo AlphaSector strategies. F-Squared had generated Morningstar tear sheets for each of the AlphaSector strategies that it offered using Morningstar's software. But, although the tear sheets bore the Morningstar logo, the sheets merely used the performance data supplied by F-Squared; not data verified by some third party (such as Morningstar). Additionally, the tear sheet stated that the strategies had an inception date of 2001. Thus, when Navellier sales personnel used tear sheets to show the pre-2009 performance of Vireo Premium or Vireo Allocator, they were again disseminating false performance track record information.

65. On several occasions between September 15, 2012 and May 20, 2013, Navellier sales staff forwarded to intermediaries outdated Vireo AlphaSector marketing materials that included the false historical performance back to 2001, the false representation that the index inception date was April 1, 2001, and the false representation that the index was "not back-tested." Typically, the Navellier sales staff supplied a 2011 version of the Vireo Allocator Premium marketing presentation, along with a link to an audio "webinar" from the same period.

Navellier and Mr. Navellier Confirm that Navellier's Prior Representations about AlphaSector Products Were False, But They Still Don't Tell Most of Their Clients

66. By no later than August 2011, Mr. Navellier knew that Navellier had made misrepresentations about the AlphaSector strategies, and he knew that Navellier had adopted and repeated F-Squared's misrepresentations.

67. On September 13, 2012, while visiting an intermediary firm, Mr. Navellier fielded questions about Vireo AlphaSector from a wholesaler from the intermediary firm. The wholesaler showed Mr. Navellier certain sales materials and a power point presentation created by F-Squared, which apparently had been given to the wholesaler by a Navellier sales representative in support of Vireo AlphaSector sales efforts. Mr. Navellier was concerned that the use of the performance track record and "simulated ... performance numbers" would potentially lead to lawsuits and SEC investigations. As a result of the discussion between Mr. Navellier and the wholesaler, the wholesaler decided that it would be "exiting our business with Vireo."

68. In an apparent response to this meeting, Mr. Navellier directed Navellier's President to send a September 14, 2012 email to all Navellier employees directing them to discontinue use of non-Vireo AlphaSector sales material. The email, on which Mr. Navellier was copied, recognized that "unapproved marketing materials may have been or is (sic) currently being used by Navellier Sales personnel to promote the Vireo Investment Strategies."

69. Even after the September 14, 2012 email, no one at Navellier attempted to correct the misrepresentations Navellier had previously made to current or prospective clients. Moreover, despite the directive, various Navellier employees continued to forward F-Squared sales materials to intermediary firms and prospective clients. These materials falsely stated that

the AlphaSector strategy was “not backtested,” and included the overstated historical performance.

Rather Than Disclose His Company’s Misrepresentations to its Clients, Mr. Navellier Sells the Vireo Business, Putting His Clients Directly Into the Hands of F-Squared

70. In August 2013, Mr. Navellier executed on the plan he laid out two years earlier, and sold the Vireo AlphaSector business to F-Squared for \$14 million dollars.

71. At the time of sale, Vireo AlphaSector had approximately six-thousand accounts valued at approximately \$1.4 billion.

72. At no time before or after this sale did Mr. Navellier correct the firm’s prior misrepresentations to its clients. Nor did he direct anyone else at Navellier to correct the misrepresentations. Nor did Navellier or Mr. Navellier disclose any conflict of interest or potential conflict of interest in the sale—namely that a goal of the sale (and the delivery of those clients to F-Squared, who had originated the fraudulent misrepresentations) was for Navellier to avoid potential liability for its role in marketing a fraudulent track record for Vireo AlphaSector.

FIRST CLAIM

**Fraudulent Conduct by an Investment Adviser
Violation of Section 206(1) of the Advisers Act
(Navellier, Mr. Navellier)**

73. The Commission repeats and incorporates by reference the allegations in paragraphs 1 through 72 above as if set forth fully herein.

74. At all relevant times, Navellier and Mr. Navellier were “investment advisers” within the meaning of Section 202(a)(11) of the Advisers Act [15 U.S.C. §80b-2(a)(11)]. Mr.

Navellier was an “investment adviser” by virtue of his ownership, management and control of Navellier. Both Navellier and Mr. Navellier received compensation in the form of money from clients as compensation for investment advice, and both were in the business of providing investment advice concerning securities, for compensation.

75. As set forth above, Navellier and Mr. Navellier made materially false and misleading statements and omissions to their investment advisory clients and engaged in a scheme to defraud those clients by concealing material information regarding the performance track record of the investment strategies they offered.

76. Navellier and Mr. Navellier, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, acting intentionally, knowingly or recklessly have employed or are employing devices, schemes, or artifices to defraud a client or prospective client.

77. As a result, Navellier and Mr. Navellier have violated and, unless enjoined, will continue to violate Section 206(1) of the Advisers Act [15 U.S.C. §80b-6(1)].

SECOND CLAIM

Fraudulent Conduct by an Investment Adviser Violation of Section 206(2) of the Advisers Act (Navellier, Mr. Navellier)

78. The Commission repeats and incorporates by reference the allegations in paragraphs 1 through 77 above as if set forth fully herein.

79. At all relevant times, Navellier and Mr. Navellier were “investment advisers” within the meaning of Section 202(a)(11) of the Advisers Act [15 U.S.C. §80b-2(a)(11)]. Mr. Navellier was an “investment adviser” by virtue of his ownership, management and control of

Navellier. Both Navellier and Mr. Navellier received compensation in the form of money from clients as compensation for investment advice, and both were in the business of providing investment advice concerning securities, for compensation.

80. As set forth above, Navellier and Mr. Navellier made materially false and misleading statements and omissions to their investment advisory clients and engaged in a scheme to defraud those clients by concealing material information regarding the performance track record of the investment strategies they offered.

81. Navellier and Mr. Navellier, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, acting intentionally, knowingly, recklessly, or negligently have engaged or are engaging in transactions, practices, or courses of business which operate as a fraud or deceit upon a client or prospective client.

82. As a result, Navellier and Mr. Navellier have violated and, unless enjoined, will continue to violate Section 206(2) of the Advisers Act [15 U.S.C. §80b-6(2)].

THIRD CLAIM

In the Alternative, Aiding and Abetting Navellier's Violations of Sections 206(1) and 206(2) of the Advisers Act (Mr. Navellier)

83. The Commission repeats and incorporates by reference the allegations in paragraphs 1 through 82 above as if set forth fully herein.

84. At all relevant times, Navellier was an "investment adviser" within the meaning of Section 202(a)(11) of the Advisers Act [15 U.S.C. §80b-2(a)(11)] .

85. By engaging in the conduct set forth above, Navellier, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, acting intentionally,

knowingly, recklessly, or negligently: (a) has employed or is employing devices, schemes, or artifices to defraud; or (b) has engaged or is engaging in transactions, practices, or courses of business which operate as a fraud or deceit upon a client or prospective client, in violation of Sections 206(1) and 206 (2) of the Advisers Act [15 U.S.C. §80b-6(1) & (2)].

86. By engaging in the conduct set forth above, and with respect to Mr. Navellier, in the alternative to the First and Second Claims, Mr. Navellier knowingly or recklessly provided substantial assistance to Navellier in its violations of Sections 206(1) and 206(2) of the Advisers Act [15 U.S.C. §80b-6(1) & (2)].

87. As a result, Mr. Navellier aided and abetted, and unless enjoined, will continue to aid and abet Navellier's violations of Sections 206(1) and 206(2) of the Advisers Act [15 U.S.C. §80b-6(1) & (2)], and is liable under those sections pursuant to Section 209(f) of the Advisers Act [15 U.S.C. §80b-9(f)].

FOURTH CLAIM

Fraudulent, Deceptive or Manipulative Conduct by an Investment Adviser: Publishing, Circulating, or Distributing Advertisements Containing Untrue Material Facts Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) Thereunder (Navellier)

88. The Commission repeats and incorporates by reference the allegations in paragraphs 1 through 87 above as if set forth fully herein.

89. Section 206(4) of the Advisers Act prohibits any investment adviser from engaging in "any act, practice, or course of business which is fraudulent, deceptive, or manipulative," and authorizes the Commission to prescribe rules designed to prevent such conduct.

90. Rule 206(4)-1(a)(5) thereunder (the “Advertising Rule”) prohibits a registered investment adviser from publishing, circulating, or distributing advertisements containing untrue statements of material facts, or that are otherwise false or misleading.

91. At all relevant times, Navellier was a registered investment adviser.

92. As set forth above, Navellier disseminated to its clients numerous advertisements containing (a) a fabricated track record for its Vireo AlphaSector products and/or (b) F-Squared-produced presentations and websites which contained false representations concerning the AlphaSector track record and its history.

93. As a result, Navellier violated, and unless enjoined, will continue to violate Section 206(4) of the Advisers Act [15 U.S.C. § 80b-4] and Rule 206(4)-1(a)(5) [17 C.F.R. § 275.206(4)-1(a)(5)].

PRAYER FOR RELIEF

WHEREFORE, the Commission requests that this Court:

A. Enter permanent injunctions, including an injunction restraining Defendants and each of their agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, including facsimile transmission or overnight delivery service, from directly or indirectly engaging in the conduct described above, or in conduct of similar purport and effect, in violation of Sections 206(1), (2), and (4) of the Advisers Act [15 U.S.C. §80b-6(1), (2), & (4)], and Rule 206(4)-1(a)(5) [17 C.F.R. § 275.206(4)-1(a)(5)].

B. Require Defendants to disgorge their ill-gotten gains and losses avoided, plus pre-judgment interest, with said monies to be distributed in accordance with a plan of distribution to

be ordered by the Court;

C. Require Defendants to pay an appropriate civil monetary penalty pursuant to Section 209(e) of the Advisers Act [15 U.S.C. §80b-9(e)];

D. Retain jurisdiction over this action to implement and carry out the terms of all orders and decrees that may be entered; and,

E. Award such other and further relief as the Court deems just and proper.

Respectfully submitted,

SECURITIES AND EXCHANGE COMMISSION
By its attorneys,

/s/ Marc Jones

Marc J. Jones (Mass. Bar No. 645910)

Senior Trial Counsel

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SECURITIES AND EXCHANGE COMMISSION

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DATED: August 31, 2017

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
SECURITIES AND EXCHANGE COMMISSIONDEFENDANTS
NAVELLIER & ASSOCIATES, INC. and LOUIS NAVELLIER

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Washoe County NV
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number)
Marc J. Jones, SEC, 33 Arch Street, 24th Floor
Boston, MA 02110
(617) 573-8947 (Jones direct)

Attorneys (If Known)
Peter Unger, Esq. and Joseph Mauro, Esq.
Arent Fox LLP
1717 K Street, Washington, DC 20006-5344

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☒ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | ☐ 1 | ☐ 1 | Incorporated or Principal Place of Business In This State | ☐ 4 | ☐ 4 |
| Citizen of Another State | ☐ 2 | ☐ 2 | Incorporated and Principal Place of Business In Another State | ☐ 5 | ☐ 5 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 | Foreign Nation | ☐ 6 | ☐ 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability ☐ 196 Franchise	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury ☐ 362 Personal Injury - Medical Malpractice	PERSONAL INJURY ☐ 365 Personal Injury - Product Liability ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability ☐ 368 Asbestos Personal Injury Product Liability LABOR ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 690 Other ☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 835 Patent - Abbreviated New Drug Application ☐ 840 Trademark SOCIAL SECURITY ☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g))	☐ 375 False Claims Act ☐ 376 Qui Tam (31 USC 3729(a)) ☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 480 Consumer Credit ☐ 490 Cable/Sat TV ☒ 850 Securities/Commodities/Exchange ☐ 890 Other Statutory Actions ☐ 891 Agricultural Acts ☐ 893 Environmental Matters ☐ 895 Freedom of Information Act ☐ 896 Arbitration ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision ☐ 950 Constitutionality of State Statutes
REAL PROPERTY ☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	CIVIL RIGHTS ☐ 440 Other Civil Rights ☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/Accommodations ☐ 445 Amer. w/Disabilities - Employment ☐ 446 Amer. w/Disabilities - Other ☐ 448 Education	PRISONER PETITIONS Habeas Corpus: ☐ 463 Alien Detainee ☐ 510 Motions to Vacate Sentence ☐ 530 General ☐ 535 Death Penalty Other: ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition ☐ 560 Civil Detainee - Conditions of Confinement	FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609	

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from Another District (specify)
☐ 6 Multidistrict Litigation - Transfer
☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

15 U.S.C. §80b-2(a)(11); 15 U.S.C. §80b-6(1); 15 U.S.C. §80b-6(2); 15 U.S.C. § 80b-4; 17 C.F.R. § 275.206(4)-1(a)5

Brief description of cause:

Securities Fraud

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE August 30, 2017 SIGNATURE OF ATTORNEY OF RECORD 

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS1. Title of case (name of first party on each side only) SECURITIES AND EXCHANGE COMMISSION v. NAVELLIER & ASSOCIATES, INC.

2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).

☐

I. 410, 441, 470, 535, 830*, 835*, 891, 893, 895, R.23, REGARDLESS OF NATURE OF SUIT.

☒

II. 110, 130, 140, 160, 190, 196, 230, 240, 290, 320, 362, 370, 371, 380, 430, 440, 442, 443, 445, 446, 448, 710, 720, 740, 790, 820*, 840*, 850, 870, 871.

☐

III. 120, 150, 151, 152, 153, 195, 210, 220, 245, 310, 315, 330, 340, 345, 350, 355, 360, 365, 367, 368, 375, 376, 385, 400, 422, 423, 450, 460, 462, 463, 465, 480, 490, 510, 530, 540, 550, 555, 625, 690, 751, 791, 861-865, 890, 896, 899, 950.

*Also complete AO 120 or AO 121. for patent, trademark or copyright cases.

3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.

4. Has a prior action between the same parties and based on the same claim ever been filed in this court?

YES

☐

NO

☒

5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)

YES

☐

NO

☒

If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?

YES

☐

NO

☐

6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?

YES

☐

NO

☒7. Do all of the parties in this action, excluding governmental agencies of the United States and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).

YES

☐

NO

☐A. If yes, in which division do all of the non-governmental parties reside?

Eastern Division

☐

Central Division

☐

Western Division

☐

B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?

Eastern Division

☐

Central Division

☐

Western Division

☐

8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)

YES

☐

NO

☐

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Marc J. Jones, Esq.ADDRESS SEC, 33 Arch Street, 24th Floor Boston, MA 02110TELEPHONE NO. (617) 573-8947 (Jones direct)

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

	)	
	)	
SECURITIES AND EXCHANGE	)	
COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 17-cv-11633
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 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

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).

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).

recidivist behavior when making a determination whether to refer matters to enforcement staff for possible further actions.” Id. at 8-9.

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 re-branded 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, 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

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.

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 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

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.

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 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 Advisers 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, 2011⁵ 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. 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

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

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

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

NAVELLIER & ASSOCIATES, INC. and
LOUIS NAVELLIER,
Defendants.

Case No. 17-cv-11633-DJC

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 (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 (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 (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 (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 (D.C. Cir. 1989)); *SEC v. Yang*, 2020 WL 4530630, at *2 (9th Cir. Aug. 6, 2020) (applying this standard after *Liu*); *SEC v. Mizrahi*, 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 (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 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 (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 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 material 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 (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 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.
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.

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

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**

By its Attorneys,

/s/ Marc J. Jones

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Jennifer A. Cardello (Mass. Bar No. 657253)

William J. Donahue (Mass. Bar No. 631229)

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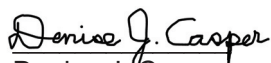
CERTIFICATE OF SERVICE

I certify that on January 19, 2021, a copy of the foregoing was electronically filed through the ECF system and will be sent electronically to all persons identified in the Notice of Electronic Filing and that paper copies will be sent to those indicated as non-registered participants.

Dated: January 19, 2021

/s/ Marc J. Jones

Adopted by the Court.
Sept. 21, 2021


Denise J. Casper
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

NAVELLIER & ASSOCIATES, INC. and
LOUIS NAVELLIER,
Defendants.

Case No. 17-cv-11633-DJC

~~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.

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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.

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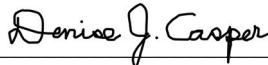
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IV.

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



Hon. Denise J. Casper
United States District Court Judge

Dated: _____

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

NAVELLIER & ASSOCIATES, INC. and
LOUIS NAVELLIER,
Defendants.

Case No. 17-cv-11633-DJC

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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 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

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.

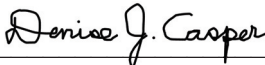
Defendants shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendants relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned 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



Hon. Denise J. Casper
United States District Court Judge

Dated: _____

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.

JUDGMENT

Entered: July 16, 2024

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's judgments are affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc: Steven Joel Brooks, Samuel Kornhauser, Jennifer A. Cardello, Robert Bradley Baker, Donald Campbell Lockhart, William J. Donahue, Paul Gerard Alvarez, Marc Jonathan Jones, Rachel McKenzie, Emily True Parise, Martin F. Healey

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.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Denise J. Casper, U.S. District Judge]

Before

Kayatta, Lipez, and Gelpí,
Circuit Judges.

Samuel Kornhauser for appellants.

Paul G. Álvarez, Senior Appellate Counsel, with whom Megan Barbero, General Counsel, and Daniel Staroselsky, Assistant General Counsel, Securities and Exchange Commission, Washington, D.C., were on brief, for appellee.

July 16, 2024

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 Act¹ "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 (1963). In drafting the Advisers Act, Congress recognized that "the national public interest and the interest of investors are

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

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; Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 471 n.11 (1977).

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

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

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 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).

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 "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

³ An ETF "is a pooled investment security that can be bought and sold like an individual stock. ETFs can be structured to track

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 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

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).

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."

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

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

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 GIPS⁵ 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

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

⁵ "GIPS" are the Global Investment Performance Standards.

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.

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

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).

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

On June 22, 2020, the Supreme Court decided Liu v. SEC, 591 U.S. 71 (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. The Court also instructed district courts to "deduct legitimate expenses before ordering disgorgement." Id. at 91-92.

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 alter or amend its amended final judgment. On September 13, 2022, the district court denied both motions.

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

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. 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). 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).

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 concern over

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

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.

genuine issue of material fact. See Triangle Trading Co. v. Robroy Indus., 200 F.3d 1, 2 (1st Cir. 1999) ("Conclusory allegations, improbable inferences, and unsupported speculation, are insufficient to establish a genuine dispute of fact.") (internal quotation marks and alteration omitted).

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, 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

¹¹ The Supreme Court rejected a similar argument in Capital Gains, which interpreted the reach of section 206. 375 U.S. at 200. 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.

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 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 (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)). 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 (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 (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 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,

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).

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).

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 (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

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).

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).

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. 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

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. 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

measure 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 (alteration omitted) (first alteration in original). Disgorgement is thus "tethered to a wrongdoer's net unlawful profits." Id. at 80 (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.

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. Here, notwithstanding the fact that 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.

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

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 (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. "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. "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 (quoting Providence Rubber Co. v. Goodyear, 76 U.S. 788, 804 (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). 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. 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

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

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; 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.

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

D. Supersedeas Bond¹⁸

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. 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

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.

[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**.