17-874

No. ____

Supreme Court, U.S.
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In the Supreme Court of the United States

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

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

The question presented is:

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

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

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

The question presented is:

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

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

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

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

RULE 29.6 STATEMENT

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

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

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

STATUTES INVOLVED

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

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

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

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

STATEMENT OF THE CASE

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

(but under the ever-present duty not to mislead), would effectively collapse the materiality requirement...." *Id.* at 240 n.18. The *Basic* decision did not "concern the timing of a disclosure," but instead, "its accuracy and completeness." *Id.* at 235. The Court made clear that "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Id.* at 240. Conversely, the Eleventh Circuit narrowed the materiality test for purposes of the Advisors Act when it refused to consider significant disclosures made available by Petitioners to prospective clients after magazine advertisements were placed in 2008 and 2011 ("Advertisements"). These disclosures included performance results required by the GIPS Advertising Guidelines ("Guidelines") that were omitted from the Advertisements, which the Eleventh Circuit excluded from the "total mix of information" by reasoning that "materiality is determined in light of the circumstances existing at the time the alleged misstatement occurred." The Eleventh Circuit limited its inquiry for materiality to information prospective investors knew when the purported false statements were made in the Advertisements and not at the time of an investment decision[1] by following an underinclusive bright line test based solely on the timing of curative disclosures. The court's holding that "later disclosures cannot negate the materiality of the earlier misrepresentations" placed no importance on the accuracy and completeness of those disclosures and prematurely closed the

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

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

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

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

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

1. BACKGROUND

ZPRIM is a registered investment advisor located in Orange City, Florida and was founded by Zavanelli, its former President and shareholder. ZPRIM initially registered with the Commission in 1994, and has been continuously registered as an investment advisor since 2006. ZPRIM established and manages several investment composites[2] for its clients that include the Small Cap Value Composite ("SCV"), the Global Equity Composite ("Global Equity") and the All-Asian Composite ("All-Asian"). App.157.

2. GLOBAL INVESTMENT PERFORMANCE STANDARDS

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

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

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

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

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

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

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

3. ZPRIM GIPS VERIFICATION AND COMPLIANCE

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

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

4. FALL 2008 ADVERTISEMENTS

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

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

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

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

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

contained the GIPS required returns together with other marketing materials.

5. 2011 ADVERTISEMENTS

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

Had these performance returns been included, they would have shown that the Global Equity Composite yielded positive returns and significantly outperformed its benchmark, the MSCI EAFE Index, during the required one, three and five year annualized periods. The All-Asian Composite also produced positive performance results from its inception of January 1, 2007, and for the annualized periods the Guidelines required[5] and outperformed its benchmark, the MSCI

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

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

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

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

The 2011 Advertisements also directed any reader to ZPRIM's website and provided a telephone number under the caption "To Learn More Call," and a footnote disclosed that the returns presented were gross of fees and that "ZPR [ZPRIM] net of fees performance and details are available on our website (www.zprim.com)." App.382-383;392-393;427-428.

6. INVESTMENT NEWSLETTERS

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

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

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

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

7. PROCEEDINGS BEFORE THE COMMISSION

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

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

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

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

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

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

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

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

Following the Opinion, Petitioners moved for reconsideration based, in part, on the then recently issued opinion in *Flannery v. SEC*, 810 F.3d 1 (1st Cir. 2015) which held when a reasonable investor conducts due diligence to make an investment decision, "the availability of actual and accurate information is relevant." *Id.* at 11 n.8. The Commission denied the Motion for Reconsideration on June 9, 2016.[7]

8. THE ELEVENTH CIRCUIT'S DECISION

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

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

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[7] App.32-57.

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

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

compliance significant without consideration of any other fact.

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

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

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

The Eleventh Circuit also ignored Zavanelli's sincere belief that the Newsletter was not an advertisement that the Guidelines applied to[9] and simply found that Petitioners violated the Advisors Act with scienter by including a claim of GIPS-compliance in the April 2009 Newsletter.

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

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

REASONS FOR GRANTING THE PETITION

The Petition should be granted for the following compelling reasons:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Eleventh Circuit's Decision that found Petitioners violated the Advisors Act with scienter[11] by including a claim of GIPS-compliance in the April 2009 Newsletter presumed the publication was an advertisement when Zavanelli's sincere opinion reflected that it was not an advertisement. Zavanelli cannot maintain his sincere opinion and at the same time act with scienter or "severe recklessness" or cause ZPRIM to act in such a manner. The Decision is in conflict with the Third Circuit's decision in *McLean v. Alexander*, 599 F.2d 1190 (3d Cir. 1979) which held that a finding of scienter could only be established against a party expressing an opinion if there was "no genuine belief that it had the information on which it could predicate that opinion." *Id.* at 1199.

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

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

CONCLUSION

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

Respectfully submitted,

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APPENDIX

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 16-15322

Agency No. 3-15263

[Filed June 30, 3017]

ZPR INVESTMENT MANAGEMENT INC., MAX E. ZAVANELLI,	)
Petitioners,	)
versus	)
SECURITIES AND EXCHANGE COMMISSION,	)
Respondent.	)

Petition for Review of a Decision of the Securities and Exchange Commission

(June 30, 2017)

Before MARTIN, JILL PRYOR, and MELLOY,* Circuit Judges.

MARTIN, Circuit Judge:

Max Zavanelli and his investment firm, ZPR Investment Management, Inc. ("ZPRIM"), are before us seeking review of a final order of the Securities and Exchange Commission ("SEC" or the "Commission").[1] The Commission found that Mr. Zavanelli and ZPRIM (the "petitioners") made material misrepresentations to prospective clients in violation of the Investment Advisers Act of 1940 (the "Advisers Act"), 15 U.S.C. § 80b-1. Based on these violations, the Commission imposed monetary and other sanctions. After careful consideration, and with the benefit of oral argument, we grant the petitioners some, but not all, of the relief they seek. We vacate the violations and monetary sanctions related to the newsletter ZPRIM published in December 2009, but we affirm all other violations and sanctions set out in the Commission's order.

I. BACKGROUND

A. THE FACTS

1. Mr. Zavanelli and ZPRIM

In 1994, Mr. Zavanelli founded ZPRIM, an investment firm registered as an "investment adviser"

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* Honorable Michael J. Melloy, United States Circuit Judge for the Eighth Circuit, sitting by designation.

[1] For clarity, we use "SEC" to refer to the party opposing this appeal and "the Commission" to refer to the administrative tribunal whose decision we are reviewing.

with the SEC. Mr. Zavanelli was ZPRIM's president and sole shareholder. As such, he "had ultimate authority over all aspects of ZPRIM's advisory business, including its advertising." ZPRIM employed Ted Bauchle as its operations manager from 1999 until early 2013. According to Mr. Bauchle, Mr. Zavanelli was ZPRIM's "boss man." Mr. Zavanelli "made all the decisions" and "was difficult to disagree" with "because he was under the impression that the company should be run his way and that he was always correct."

2. Global Investment Performance Standards

The Global Investment Performance Standards ("GIPS") are "universal, voluntary standards to be used by investment managers for quantifying and presenting investment performance that ensure fair representation, full disclosure, and apples-to-apples comparisons." GIPS has two related components, which are the performance standards and the advertising guidelines. The performance standards establish how a firm should calculate and present its investment performance. As you might have guessed, those firms that comply with the GIPS performance standards may represent themselves as being "GIPS-compliant." It is generally understood that compliance with GIPS "provides a level of credibility" to the firm's performance results and gives prospective clients "a greater level of confidence" in the firm's performance presentations.

Under GIPS, if a firm chooses to advertise that it is GIPS compliant, that firm must also comply with the

GIPS advertising guidelines.[2] The advertising guidelines require any advertisement claiming GIPS compliance to disclose specific information about the firm's investment returns. Specifically, the firm must provide: "(1) period-to-date composite performance results and (2) either one-, three-, and five-year cumulative annualized composite returns or five years of annual composite returns."

3. ZPRIM Began Claiming It Was GIPS Compliant

Mr. Zavanelli knew that GIPS compliance was "very important" for marketing to institutional clients and he wanted ZPRIM to have those "bragging rights." To that end, ZPRIM hired a GIPS verification firm, Ashland Partners & Company LLP ("Ashland"), to help bring ZPRIM into compliance. In January, February, and April 2008, ZPRIM placed advertisements in financial magazines claiming it was GIPS compliant. Together with the claim of GIPS compliance, and in keeping with GIPS advertising guidelines, the ads included period-to-date returns and at least five years of annual returns.

4. In Fall 2008, ZPRIM Published Ads Omitting Information Required Under GIPS

In the fall of 2008, ZPRIM published three more magazine ads claiming GIPS compliance. But these ads had no period-to-date performance results, nor did they include either one-, three-, and five-year annualized

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[2] The GIPS rules say: "[S]hould a GIPS-compliant FIRM choose to advertise performance results, the FIRM MUST apply . . . the GIPS Advertising Guidelines in order to include a claim of compliance with the GIPS standards."

results or five years of annual results. One effect of leaving out this GIPS-required information was that the ads hid ZPRIM's recent poor performance. Had ZPRIM shown its investment returns over the time periods required by GIPS, the ads would have revealed that the firm's performance lagged behind ZPRIM's benchmark index by as much as ten percentage points. Instead of disclosing the called-for returns with the unflattering information, ZPRIM showed its returns over a longer period of time during which ZPRIM outperformed its benchmark index.

Mr. Bauchle testified that before these ads were published, he told Mr. Zavanelli they didn't meet the GIPS requirements for showing investment return information. But Mr. Zavanelli dismissed Mr. Bauchle's concerns, saying it wasn't necessary to put the information in the ads because ZPRIM would give it to prospective clients before they invested. Mr. Zavanelli "wanted to run those ads," so ZPRIM published them even though they did not comply with the GIPS advertising guidelines. Although Ashland had reviewed and approved ZPRIM's earlier ads, ZPRIM never asked Ashland to review the fall 2008 ads.

5. ZPRIM Published Newsletters Omitting Information Required Under GIPS

Mr. Zavanelli wrote a monthly investment newsletter for ZPRIM that contained information about ZPRIM's performance results. This newsletter went to ZPRIM's clients, dozens of investment consultants, and others in the industry.

In November 2008, Ashland told ZPRIM that if "[GIPS] compliance is being claimed" in ZPRIM's

newsletters, the "GIPS Advertising Guidelines need to be followed." Ashland then explained precisely how investment returns should be listed in the newsletters in order to comply with the GIPS advertising guidelines. Nevertheless, ZPRIM sent out newsletters in April and December 2009 that claimed GIPS compliance, yet failed to include the required information.

In contrast to the April 2009 newsletter, the December 2009 newsletter contained several corrective statements. Although it is true the December 2009 newsletter said on one page that "[a]ll numbers are GIPS compliant," the next page contained a number of disclaimers. It said, for example: "The investment report you are reading is not GIPS compliant. It was never intended to be nor can it be. . . . Our report remains not GIPS compliant."

6. The SEC Notified ZPRIM of False Claim of GIPS Compliance

In January 2010, the SEC sent ZPRIM a letter. The letter noted that, while ZPRIM's December 2008 advertisement "claimed compliance" with GIPS, "the [SEC's] examination found that it did not comply with GIPS advertising guidelines." The letter told ZPRIM that "[a]s a result, ZPR[IM] may have violated Section 206 of the Advisers Act and Rule 206(4)-1, thereunder."

ZPRIM responded that it "did not intend to mislead with this ad." Beyond that, ZPRIM assured the SEC that "[w]e have changed our ads" going forward to comply with the GIPS advertising guidelines by including the "1-3-5 year annualized returns" as a "[c]orrective action[]."

In August 2010, the SEC sent ZPRIM another letter notifying the firm that the SEC was "conducting an investigation" into ZPRIM.

7. ZPRIM Represented in Two Morningstar Reports that It Was Not Under Investigation

In order to attract institutional clients, ZPRIM regularly gave information about itself to Morningstar, which is a major provider of independent investment research. Using the information it gets from investment firms, Morningstar creates a report about each firm, and investors use these reports to research potential money managers. It was Mr. Bauchle's job to submit ZPRIM's information to Morningstar.

One piece of information included in a Morningstar report is whether or not there are any "[p]ending SEC investigations" of a firm. This is important here because, even though the SEC told ZPRIM in August 2010 that it was investigating the firm, Mr. Bauchle continued to tell Morningstar there were "No" "[p]ending SEC investigations" of ZPRIM. Mr. Bauchle, on behalf of ZPRIM, made this misrepresentation to Morningstar twice: first for the period ending on September 30, 2010, and, again, for the period ending on March 31, 2011.

8. In Spring 2011, ZPRIM Published Additional Ads Omitting Information Required Under GIPS

Despite ZPRIM's assurances to the SEC that it would change its ads to comply with the GIPS advertising guidelines, ZPRIM published three more ads—in February, March, and May 2011—claiming GIPS compliance but failing to include the returns required by the GIPS advertising guidelines. Mr.

Zavanelli testified that he conceived of and approved these ads.

B. THE ADVISERS ACT

The Advisers Act sets "federal fiduciary standards for investment advisers." Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 471 n.11, 97 S. Ct. 1292, 1300 n.11 (1977). For our purposes here, we review the antifraud provisions of the Advisers Act—sections 206(1), (2), and (4).[3] In order 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. See Steadman v. SEC, 603 F.2d 1126, 1129–34 (5th Cir. 1979) (Steadman I), aff'd, 450 U.S. 91, 101 S. Ct. 999 (1981) (interpreting

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[3] Section 206 says:

> It shall be unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;
> . . .
> (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

15 U.S.C. §§ 80b-6(1), (2) & (4).

sections 206(1)–(2));[4] SEC v. Steadman, 967 F.2d 636, 643, 647 (D.C. Cir. 1992) (Steadman II) (interpreting section 206(4)). While the material-misrepresentation element is the same for all three sections, the mental-state element for section 206(1) is different than that for sections 206(2) and (4). See Steadman I, 603 F.2d at 1134; Steadman II, 967 F.2d at 647. Section 206(1) requires the SEC to show the adviser acted with scienter. Steadman I, 603 F.2d at 1134. Sections 206(2) and (4) require no showing of scienter, and a showing of negligence is sufficient. See id.; Steadman II, 967 F.2d at 643 & n.5, 647.

C. PROCEEDINGS BEFORE THE COMMISSION

In April 2013, the SEC began administrative proceedings against ZPRIM and Mr. Zavanelli. After a seven-day hearing, the Administrative Law Judge found both had violated the Advisers Act and imposed sanctions. ZPRIM and Mr. Zavanelli appealed to the Commission, which affirmed.[5]

1. Violations

The Commission found ZPRIM violated sections 206(1), (2), and (4) of the Advisers Act by making false or misleading claims (a) in the fall-2008 and spring-2011 magazine ads, and in the 2009 newsletters, that it was GIPS compliant; and (b) in the 2011 Morningstar

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[4] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. Id. at 1209.

[5] There was one finding by the Administrative Law Judge that the Commission reversed, but that issue is not before us.

report that it was not under SEC investigation. The Commission also found ZPRIM violated sections 206(2) and (4), which, again, require only a showing of negligence, for the 2010 Morningstar report.

As for Mr. Zavanelli, the Commission found him liable under sections 206(1) and (2) for all the charges involving misrepresentations of GIPS compliance. The Commission found him liable both directly and for aiding and abetting ZPRIM. It found him not liable for ZPRIM's misrepresentations in the Morningstar reports.

2. Sanctions

The Commission also affirmed the sanctions imposed on ZPRIM and Mr. Zavanelli. First, the Commission placed an "industry bar" on Mr. Zavanelli, which prohibits him from associating "with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization." Second, the Commission ordered ZPRIM and Mr. Zavanelli to cease and desist their misconduct. Third, the SEC imposed civil penalties of $570,000 against Mr. Zavanelli and $250,000 against ZPRIM. ZPRIM and Mr. Zavanelli timely petitioned this Court for review.

II. STANDARD OF REVIEW

When the Commission makes findings of fact, we must affirm them if they are "supported by substantial evidence." Orkin v. SEC, 31 F.3d 1056, 1063 (11th Cir. 1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v.

NLRB, 340 U.S. 474, 477, 71 S. Ct. 456, 459 (1951) (quotation omitted). We review de novo the Commission's legal conclusions. Orkin, 31 F.3d at 1063.

"The fashioning of an appropriate and reasonable remedy is for the Commission, not this court . . . ." Steadman I, 603 F.2d at 1140. "We may overturn the [Commission's] decision to impose a particular sanction only upon finding a gross abuse of discretion." Orkin, 31 F.3d at 1066.

III. DISCUSSION

Petitioners challenge the Commission's order on two grounds. First, they say the Commission's factual findings about both materiality and mental state are not supported by substantial evidence. More specifically, they say substantial evidence does not support the Commission's findings that: (1) the false claims of GIPS compliance in ZPRIM's advertisements were material; (2) the false claims of GIPS compliance in ZPRIM's newsletters were material; (3) the false claims of GIPS compliance in ZPRIM's ads and newsletters were made with scienter; and (4) the false claims in the Morningstar reports that ZPRIM was not under investigation were made with the required mental state. Second, petitioners argue the Commission abused its discretion in imposing sanctions. We address each argument in turn.

A. MATERIALITY OF ZPRIM'S ADVERTISEMENTS

1. The Materiality Requirement

A false or misleading statement by an investment adviser violates the antifraud provisions of the Advisers Act only if the fact misrepresented or omitted

is "material." See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 200–01, 84 S. Ct. 275, 287 (1963); Steadman I, 603 F.2d at 1129–34. An "omitted fact is material if there is a substantial likelihood that a reasonable [investor] would consider it important." Basic Inc. v. Levinson, 485 U.S. 224, 231, 108 S. Ct. 978, 983 (1988) (quotation omitted). "[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Id. at 231–32, 108 S. Ct. at 983 (quotation omitted).

2. Materiality as to ZPRIM's Advertisements

ZPRIM published ads claiming GIPS compliance but omitted the investment return information required by the GIPS advertising guidelines. ZPRIM's claim of GIPS compliance was therefore false, and petitioners do not say otherwise. Rather, they argue their omission of the GIPS-required information was not material. We conclude to the contrary. Substantial evidence showed that reasonable investors would find it important that ZPRIM's ads did not actually comply with GIPS even while they claimed compliance.

To begin, the evidence showed that the status of being "GIPS compliant" is important to investors. Mr. Zavanelli himself testified that being able to market oneself as GIPS compliant "is very important" for attracting institutional clients. Mr. Bauchle explained that institutional clients "screen[]" for GIPS compliance and will not even consider firms that are not compliant. Given the significance of GIPS compliance as a marker in the industry, reasonable investors would have

wanted to know that ZPRIM's claim of GIPS compliance was false.

Beyond the value of the label itself, the false claim of GIPS compliance was also material because it caused prospective clients to wrongly believe the performance results in ZPRIM's ads adhered to the GIPS advertising guidelines. As the Commission explained, the purpose of the advertising guidelines is to give investors the assurance that any GIPS-compliant firm will present its performance data in a way that is "complete, fair[], and comparable to those of other firms." The guidelines' requirements for presenting performance data provide "uniformity and comparability among investment managers." That meant investors looking at the ZPRIM ads could have believed they were looking at the uniform, standardized set of returns required by GIPS, when in fact ZPRIM was deviating from the standardized presentation and putting its investment performance in a more favorable light. ZPRIM presented its numbers as an "apples-to-apples comparison" with the data posted by other GIPS-compliant firms, when its numbers were not actually comparable. This discrepancy is something a "reasonable [investor] would consider [] important." Basic, 485 U.S. at 231, 108 S. Ct. at 983 (quotation omitted).

For the ads published in fall 2008, the showing of materiality was even stronger. If ZPRIM had listed its investment returns in those ads as required by GIPS, the information would have revealed that ZPRIM was significantly underperforming its benchmark. Certainly, a prospective investor would have wanted to know about those undisclosed, negative results. See

SEC v. Merch. Capital, LLC, 483 F.3d 747, 769 (11th Cir. 2007) (holding that defendants made material omissions by marketing interests in their company to investors "without disclosing the poor performance of the interests that had already been sold").

Petitioners argue that ZPRIM's failure to disclose the GIPS-required information in its ads was not a material omission because the firm provided the information later. Petitioners say ZPRIM sent a fact sheet that disclosed the performance data required by GIPS to every prospective client who responded to a ZPRIM ad. Petitioners also point to data the firm posted on its website. Because ZPRIM eventually gave prospective clients the GIPS-required information, petitioners say that information was "part of the total mix of information provided," and therefore its omission from the ads was not material. See Basic, 485 U.S. at 231–32, 108 S. Ct. at 983.

These after-advertisement disclosures do not carry the day. Materiality is "determined in light of the circumstances existing at the time the alleged misstatement occurred." Ganino v. Citizens Utils. Co., 228 F.3d 154, 165 (2d Cir. 2000) (emphasis added); see also SEC v. Morgan Keegan & Co., 678 F.3d 1233, 1253 (11th Cir. 2012) (per curiam) (holding that disclosures made "after the alleged oral misrepresentations" do not render the misrepresentations immaterial). Because our inquiry is limited to what investors knew at the time the false statements were made, ZPRIM's later disclosures cannot negate the materiality of the earlier

misrepresentations.[6] See Morgan Keegan, 678 F.3d at 1253.

Focusing the materiality inquiry on the time when the misrepresentations were made is especially important where, as here, the context of the false statements is advertising to attract new investors. A later disclosure would not have cured the misrepresentation that already occurred at the advertising stage because, again, many institutional investors "screen[ ]" for GIPS compliance. ZPRIM's false claims of GIPS compliance likely resulted in interest from investors who would not otherwise have considered or contacted ZPRIM. As the Commission explained, "[t]he adviser's false statement has succeeded because it has garnered interest, regardless of whether the adviser later provides enough information for an astute individual to detect its misstatement." The problems caused by a false ad cannot be cured by passing along corrected information to the very customers the company attracted through

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[6] It could be argued that ZPRIM's publishing of the GIPS-required information on its website was not a subsequent disclosure, since the website was available at the same time as the ads. But, even assuming that ZPRIM put the correct information on its website, that would not render immaterial the false claims of GIPS compliance in ZPRIM's ads. That is because the ads never alerted investors that they needed to look to ZPRIM's website for the GIPS-required disclosure; neither did the website alert investors that it contained the GIPS-required information omitted from ZPRIM's ads. See Morgan Keegan, 678 F.3d at 1252 (finding disclosure of accurate information on firm's website did not render immaterial earlier misrepresentations where there was "no evidence that brokers directed customers" to the information on the web page).

the misinformation in the first place. See id. at 1252 (holding that "adequate written disclosures" provided after a false statement did not render the false statement immaterial because the disclosure was "given to customers only upon a customer's request").

Petitioners also say the First Circuit's decision in Flannery v. SEC, 810 F.3d 1 (1st Cir. 2015), supports their argument. But the conduct at issue in Flannery was less egregious than the conduct we consider here. In Flannery, the Commission found that an investment firm made a material misrepresentation in a slide presentation to investors in which one slide said that a fund typically was 55% invested in a certain type of security, when the investment was actually around 100%. Id. at 5. The First Circuit reversed. Id. at 15. The court found the record supported only a "thin" showing of materiality because, among other things, (1) "the slide was clearly labeled 'Typical,'" and (2) the firm had already distributed the correct data to clients six weeks before the presentation with the inaccurate slide. Id. at 10–11.

ZPRIM did not label its return information "typical," which would have cautioned a reasonable investor he should conduct further research. See id. at 11 n.8. ZPRIM claimed it was presenting the actual, complete set of performance returns required by GIPS. By claiming GIPS compliance, ZPRIM falsely signaled to investors there was no need to look any further for the performance data GIPS requires. Also, here the GIPS-required figures were distributed only after ZPRIM made the misrepresentations—not weeks before—and then only to those prospective clients who came forward.

As the Flannery court explained, "the mere availability of accurate information" does not "negate[] an inaccurate statement." Id. And it does not do so here. This record contains substantial evidence to support the Commission's finding that ZPRIM's false claim of GIPS compliance in its ads was material.

B. MATERIALITY OF ZPRIM'S NEWSLETTER STATEMENTS

Petitioners also challenge the Commission's finding of materiality for the false claims of GIPS compliance in ZPRIM's April and December 2009 newsletters. They argue that the two newsletters did not actually claim to be compliant with GIPS. We reject this argument with respect to the April 2009 newsletter. However, the record supports petitioners' argument that the December 2009 newsletter sufficiently disclaimed GIPS compliance. The Commission's finding of materiality for that publication cannot therefore stand.

1. The April 2009 Newsletter

The April 2009 newsletter unmistakably asserted GIPS compliance. A footnote to a table listing ZPRIM's investment returns said that ZPRIM's "compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through September 30, 2008." The table listed investment returns for periods falling within this window of purported GIPS compliance, but omitted the GIPS-required information. This false claim of GIPS compliance in the newsletter was material for the same reasons the false claims of GIPS compliance in the advertisements were material. Thus for the April 2009

newsletter as well, substantial evidence supported the Commission's finding of materiality.

2. The December 2009 Newsletter

The December 2009 newsletter is different. On page three of the December 2009 newsletter, at the bottom of a list of ZPRIM's investment returns, the newsletter said: "All numbers are GIPS compliant." But on the next page, under a section titled "GIPS COMPLIANCE," the newsletter said: "The investment report you are reading is not GIPS compliant. It was never intended to be nor can it be. . . . Our report remains not GIPS compliant." Petitioners say these statements "disavowed a claim of GIPS compliance," rendering the initial false claim immaterial. We agree.

There is no question the newsletter's initial statement—"[a]ll numbers are GIPS compliant"—was not true. But our rule is that when a misrepresentation is "accompanied by meaningful cautionary statements and specific warnings . . ., that language may be sufficient to render the alleged omissions or misrepresentations immaterial as a matter of law." Saltzberg v. TM Sterling/Austin Assocs., Ltd., 45 F.3d 399, 400 (11th Cir. 1995) (per curiam); see also Merch. Capital, 483 F.3d at 767 (stating the "well-established principle that a statement or omission must be considered in context, [because] accompanying statements may render it immaterial as a matter of law" (quotation omitted)). While "general cautionary language" is not sufficient to render a misrepresentation immaterial, see Morgan Keegan, 678 F.3d at 1253, the disclaimer in the December 2009 newsletter did not use generic or vague language. It expressly and unequivocally said: "The investment

report you are reading is not GIPS compliant." This statement was then followed by two more that reiterated the point. And these statements were all below a bold, underlined header titled "GIPS COMPLIANCE," which would have alerted reasonable investors that ZPRIM was calling attention to a GIPS compliance issue that investors should be aware of. Like the cautionary statements in Saltzberg, ZPRIM's disclaimer was "no[t] boilerplate and was not buried among too many other things, but was explicit, repetitive and linked to the [statement] about which [the SEC] complain[s]." See 45 F.3d at 400. In light of the clear cautionary statements in the December 2009 newsletter, we conclude that the Commission's finding of materiality for that newsletter is not supported by substantial evidence. We therefore reverse the Commission's finding that ZPRIM and Mr. Zavanelli violated sections 206(1), (2), and (4), and sections 206(1) and (2), respectively, based on the December 2009 newsletter.

C. SCIENTER FOR ZPRIM'S ADS AND NEWSLETTERS

1. The Scienter Requirement

To prove a violation of section 206(1) of the Adviser's Act, the SEC must show the adviser acted with scienter. Steadman I, 603 F.2d at 1134. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 48, 131 S. Ct. 1309, 1323 (2011) (quotation omitted). "Scienter may be established by a showing of knowing misconduct or severe recklessness." SEC v. Monterosso, 756 F.3d 1326, 1335 (11th Cir. 2014) (per curiam) (quotation

omitted). Scienter can be established through direct or circumstantial evidence. Id. The scienter of a corporation is established by showing that the corporation's officers or directors acted with scienter. See Thompson v. RelationServe Media, Inc., 610 F.3d 628, 635 (11th Cir. 2010) ("Corporations have no state of mind of their own; rather, the scienter of their agents must be imputed to them.").

2. Scienter as to ZPRIM's Ads and Newsletters

The Commission found that Mr. Zavanelli (and thus ZPRIM) acted with scienter in publishing the false claims of GIPS compliance in ZPRIM's ads and newsletters. Petitioners challenge this finding. Because the facts underlying each set of publications differ, we discuss the issue of scienter separately for each, and conclude the scienter findings are supported by substantial evidence.

a. Scienter as to the Fall 2008 Ads

Substantial evidence supported the Commission's finding that Mr. Zavanelli (and thus ZPRIM) acted with scienter in making misrepresentations of GIPS compliance in the fall 2008 ads. In short, the evidence showed that Mr. Zavanelli knew the claims of GIPS compliance in the fall 2008 ads were false but approved them anyway. See SEC v. Carriba Air, Inc., 681 F.2d 1318, 1324 (11th Cir. 1982) (holding that scienter is established when the defendant "engaged in the dissemination of a known falsehood" (quotation omitted)).

The record supports a finding that Mr. Zavanelli knew exactly what was required of an ad that claimed GIPS compliance. He testified that he read the GIPS

requirements, including its advertising guidelines, "[n]umerous times . . . forward and backwards." He even described himself as "an expert" on GIPS. Beyond that, Mr. Zavanelli clearly knew how to present GIPS-compliant investment returns in advertisements because he was responsible for "ensuring that marketing materials [were] GIPS compliant." Indeed, from January to April 2008, ZPRIM published ads that contained the GIPS-required information.

Then in the fall of 2008, Mr. Zavanelli approved the new, non-compliant ads. Mr. Bauchle testified that before these ads were published, he told Mr. Zavanelli they didn't contain the return information required by GIPS. Yet Mr. Zavanelli ran the ads anyway. Indeed, he affirmatively directed Mr. Bauchle to leave the statement that ZPRIM is GIPS-compliant in the ad, even though he knew the investment returns in the ad did not comply with the GIPS advertising guidelines. In doing so, he "engaged in the dissemination of a known falsehood." Carriba Air, 681 F.2d at 1324 (quotation omitted).

There is also a strong inference of "intent to deceive" because the omitted GIPS-required returns resulted in covering up ZPRIM's poor investment performance. Matrixx, 563 U.S. at 48, 131 S. Ct. at 1323. There is certainly sufficient evidence to support the Commission's finding that the petitioners knowingly made false claims of GIPS compliance in the fall 2008 ads.

b. Scienter as to the Spring 2011 Ads

Substantial evidence also supported the Commission's finding of scienter for ZPRIM's false

claims of GIPS compliance in the ads published in spring 2011. After the 2008 ads were published, the SEC notified ZPRIM that its ads falsely claimed compliance with GIPS and might violate the Advisers Act. With this letter, the SEC expressly put Mr. Zavanelli on notice that he needed to change the information on ZPRIM's ads to meet the GIPS advertising guidelines. In response, ZPRIM made clear it understood what was required of it. The firm told the SEC it would take "[c]orrective action[]" by "chang[ing] our ads" to include the investment returns required by GIPS. Yet despite ZPRIM's assurances, the firm published its 2011 ads without the GIPS-required information. Mr. Zavanelli concedes this omission made the claim of GIPS compliance "untrue," and also concedes he conceived of and approved the spring 2011 round of "untrue" ads. This establishes that he acted with scienter. See Carriba Air, 681 F.2d at 1324.

c. Scienter as to the April 2009 Newsletter

It is similarly clear that Mr. Zavanelli acted with scienter in publishing the April 2009 newsletter.[7] Of course he had the same knowledge of the GIPS requirements in April 2009 as he had when he decided to publish the false claims of GIPS compliance in the fall 2008 ads. Beyond that, by this time ZPRIM had received an express warning from Ashland that if "[GIPS] compliance is being claimed" on ZPRIM's newsletters, "the GIPS Advertising Guidelines need to be followed." Despite this direct admonition from the

[7] We do not address scienter for the December 2009 newsletter because, as discussed earlier, substantial evidence did not support a finding of materiality for that newsletter.

firm's GIPS verifier, Mr. Zavanelli—who wrote "most of the newsletter"—failed to include the GIPS-required data in the April 2009 newsletter. This is sufficient to support the SEC's finding that the petitioners knowingly published the false claim of GIPS compliance in the April 2009 newsletter. See id.

D. REQUIRED MENTAL STATE FOR THE MORNINGSTAR REPORTS

The Commission found ZPRIM liable for falsely stating in two Morningstar reports that it was not under SEC investigation. ZPRIM (through Mr. Bauchle) made this false statement in the report for the period ending September 30, 2010, and, again, in the report for the period ending March 31, 2011. The Commission found ZPRIM acted with negligence for the 2010 report and scienter for the 2011 report. ZPRIM challenges both findings. We conclude that both are supported by substantial evidence.

1. Negligence as to the 2010 Morningstar Report

As set out above, violations of sections 206(2) and (4) can be established by a showing of negligence. Negligence requires a showing that the investment adviser failed to exercise "reasonable care." Capital Gains, 375 U.S. at 194, 84 S. Ct. at 284 (quotation omitted). This record supports finding that Mr. Bauchle failed to act with reasonable care when he falsely reported to Morningstar in September 2010 that ZPRIM was not under SEC investigation.

Mr. Bauchle was responsible for submitting ZPRIM's information to the Morningstar database. He acknowledged he knew the Morningstar reporting form asked whether the firm was under SEC investigation.

Thus, once the SEC sent ZPRIM a letter in August 2010 notifying it that the SEC was "conducting an investigation" into ZPRIM, Mr. Bauchle had a duty to update the Morningstar database to show the pending investigation. See Finnerty v. Stiefel Labs., Inc., 756 F.3d 1310, 1317 (11th Cir. 2014) ("[A] duty exists to update prior statements if the statements were true when made, but misleading or deceptive if left unrevised."). Mr. Bauchle did not do this. As a result, the Morningstar report for the period ending September 2010 falsely showed investors that there were "No" "[p]ending SEC investigations" of ZPRIM. A person exercising a reasonable degree of care would have updated the form once the firm received express notice from the SEC of the pending investigation. Id. Thus, the record supports the finding that ZPRIM's misrepresentation in the 2010 Morningstar report was negligent.

2. Scienter as to the 2011 Morningstar Report

The record also supports the Commission's finding that ZPRIM (through Mr. Bauchle) acted with scienter in failing to disclose the investigation in the 2011 Morningstar report. In October 2010, Mr. Bauchle gave investigative testimony as part of the SEC's proceedings in this case, and counsel for the SEC specifically informed him that he was testifying in connection with the SEC investigation into ZPRIM. This shows Mr. Bauchle had direct, personal knowledge of the SEC investigation yet failed to disclose it in the 2011 report. He thus "engaged in the dissemination of a known falsehood." Carriba Air, 681 F.2d at 1324 (quotation omitted). Also, Mr. Bauchle testified that the reason he "didn't go back and change

the [pending investigation] box" on the Morningstar form was "[b]ecause whenever we would get a new letter from the SEC, we would have a meeting and it was downplayed as [] being anything significant and so that box wasn't changed." The fact that Mr. Bauchle made a deliberate decision not to disclose the SEC investigation because the firm "downplayed" its significance supports a finding of an "intent to deceive" investors. Matrixx, 563 U.S. at 48, 131 S. Ct. at 1323. Thus, there is substantial evidence to sustain the finding of scienter regarding the 2011 Morningstar report.

E. SANCTIONS

The Commission imposed sanctions against both Mr. Zavanelli and ZPRIM. First, the Commission imposed an industry bar against Mr. Zavanelli. Second, the Commission ordered both petitioners to cease and desist their misconduct. Third, the Commission imposed civil penalties. Petitioners challenge each of these sanctions. For the reasons that follow, we affirm the Commission's sanctions except those imposed for the violations related to the December 2009 newsletter.

1. The Industry Bar Against Mr. Zavanelli

Under the Advisers Act, the Commission may impose an industry bar on an adviser if the Commission finds: (1) that the bar "is in the public interest," and (2) that the adviser "willfully violated" or "willfully aided, abetted, counseled, commanded, induced, or procured the violation" of federal securities law. 15 U.S.C. §§ 80b-3(e)(5), (6) & (f). To determine whether a bar is in the public interest, the Commission considers the following:

> [T]he egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman I, 603 F.2d at 1140 (quotation omitted). As for the willfulness prong, a violation is "willful" if the adviser "intentionally commit[ed] the act which constitutes the violation." Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quotation omitted). The adviser need not "also be aware that he is violating one of the Rules or Acts." Id. (quotation omitted).

The Commission did not commit a "gross abuse of discretion" in imposing the industry bar on Mr. Zavanelli. Orkin, 31 F.3d at 1066. In assessing the "public interest" prong, the Commission analyzed the Steadman factors and found that each factor showed the bar would be in the public interest. In particular, the Commission found Mr. Zavanelli "acted with a high degree of scienter" because "[d]espite his knowledge and familiarity with GIPS, [he] flouted the requirements of the GIPS Advertising Guidelines"; his "conduct was recurrent," continuing after "ZPRIM promised the previous year to take corrective action"; he "does not genuinely recognize the wrongfulness of his conduct"; and his "assurances against future misconduct" were not convincing because he "continues to provide investment advisory services." The Commission then made the required finding of willfulness. The Commission found the "willfulness

standard is satisfied because Zavanelli intentionally authored or approved the advertisements and investment reports containing the misrepresentations at issue." Each of these findings is supported by the record. Thus, the Commission did not grossly abuse its discretion when it imposed the industry bar. Id.

2. Cease and Desist Order

Under the Advisers Act, the Commission may issue a cease and desist order against any person it found to have violated the Act. See 15 U.S.C. § 80b-3(k)(1). Because the Commission found petitioners violated the antifraud provisions, the Commission was entitled to issue the cease and desist order against them. Id. The Commission also explained that a "cease-and-desist order will play a substantial remedial role with respect to ZPRIM considering that we have not revoked its registration as an investment adviser." In light of these findings, it was not a "gross abuse of discretion" to issue the order. Orkin, 31 F.3d at 1066.

3. Monetary Penalties

The standard for imposing monetary penalties is the same as for industry bars. See 15 U.S.C. § 80b-3(i)(1)(A). However, the factors for determining whether it would be "in the public interest," id., are different from the Steadman factors. The Advisers Act lists the following factors for making the public interest determination:

> (A) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;
>
> (B) the harm to other persons resulting

> either directly or indirectly from such act or omission;
>
> (C) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;
>
> (D) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization . . .;
>
> (E) the need to deter such person and other persons from committing such acts or omissions; and
>
> (F) such other matters as justice may require.

Id. § 80b-3(i)(3).

The Act also establishes a three-tier system of civil penalties, with each tier addressing increasingly serious misconduct and imposing progressively higher maximum penalties. Id. § 80b-3(i)(2). If the Commission applies the public interest factors listed in the Act and determines that some monetary penalty is warranted, the Commission must then decide which tier is appropriate. In this case, the Commission imposed second-tier penalties, which apply when the wrongdoing involves fraud or deceit. Id. § 80b-3(i)(2)(B). Specifically, the Commission imposed a maximum second-tier penalty on Mr. Zavanelli for each of his

eight violations, totaling $570,000, and a single below-maximum second-tier penalty of $250,000 on ZPRIM.[8]

Petitioners have not shown these penalties were a "gross abuse of discretion." Orkin, 31 F.3d at 1066. In deciding whether to impose the monetary penalties, the Commission discussed each of the public interest factors. The Commission found, among other things, that the petitioners "repeatedly violated the antifraud provisions with scienter"; the misconduct was "especially serious because it involved attempts to promote their firm through false claims"; and "[t]here is a need to deter [petitioners] from committing future" violations. These findings are supported by the record, and the Commission appropriately gave them significant weight. Also, while acknowledging that the SEC did not offer evidence to quantify the harm caused by the petitioners' misrepresentations, the Commission found the market was harmed insofar as the misrepresentations "denied investors the ability to make direct comparisons between ZPRIM's performance and that of other investment advisers." On this record, we cannot say the Commission grossly abused its discretion in its choice of monetary penalties. See id.

Although we generally affirm the Commission's imposition of monetary penalties, the amount of the penalties imposed here must be reduced by any amounts related to the December 2009 newsletter violations, which we vacate. Because the Commission's order makes clear it assessed a $75,000 penalty on Mr.

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[8] The maximum penalty for corporations is considerably higher than for "natural person[s]." 15 U.S.C. § 80b-3(i)(2)(B).

Zavanelli for the December 2009 newsletter, we vacate that portion of his monetary sanction. For ZPRIM, however, the Commission did not impose penalties for each violation, but instead a single $250,000 penalty. As a result, we vacate the ZPRIM penalty and remand for the Commission to determine the amount, if any, by which that penalty should be reduced.

IV. CONCLUSION

We affirm the Commission's finding that ZPRIM violated sections 206(1), (2), and (4) of the Advisers Act by making false or misleading claims (a) that it was GIPS compliant in the fall-2008 and spring-2011 magazine ads and in the April 2009 newsletter; and (b) that it was not under SEC investigation in the 2011 Morningstar report. We also affirm the Commission's finding that ZPRIM violated sections 206(2) and (4) for the 2010 Morningstar report. We vacate the Commission's finding that ZPRIM violated sections 206(1), (2), and (4) of the Advisers Act for the December 2009 newsletter. In light of that holding, we also vacate the monetary penalty against ZPRIM and remand this case to the Commission for it to determine whether the penalty should be reduced in light of our decision, and if so by how much.

We affirm the Commission's finding that Mr. Zavanelli violated sections 206(1) and (2) of the Advisers Act by making false or misleading claims that ZPRIM was GIPS compliant in the fall-2008 and spring-2011 magazine ads and in the April 2009 newsletter. We vacate the Commission's finding that Mr. Zavanelli violated sections 206(1) and (2) for the December 2009 newsletter. We therefore also vacate

the $75,000 penalty the Commission imposed on Mr. Zavanelli for the December 2009 newsletter.

PETITION GRANTED AND REMANDED IN PART AND DENIED IN PART.

APPENDIX B

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4417

Admin. Proc. File No. 3-15263

[Filed June 9, 2016]

In the Matter of	)
	)
ZPR INVESTMENT MANAGEMENT, INC., and MAX E. ZAVANELLI	)

ORDER DENYING MOTION FOR RECONSIDERATION

On October 30, 2015, we found ZPR Investment Management, Inc. ("ZPRIM"), and its former president and owner, Max E. Zavanelli ("Zavanelli"), liable for, among other things, ZPRIM's false or misleading claims of compliance with the Global Investment Performance Standards ("GIPS") in magazine advertisements and newsletters that failed to provide returns information required by the GIPS Advertising

Guidelines.[1] Respondents seek reconsideration of our findings that the misrepresentations in these documents were material that they acted with scienter, and that Zavanelli should be barred from the securities industry.[2] They assert that the First Circuit's decision in *Flannery v. SEC*, decided after our opinion, supports these arguments.[3] We deny Respondents' motion because they revisit arguments that we already rejected in our opinion. We also explain why *Flannery* does not require a different result.

I. Background

In our October 30, 2015 opinion, we found that ZPRIM falsely or misleadingly claimed compliance with GIPS in magazine advertisements and newsletters that failed to provide the returns information required by

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[1] *ZPR Inv. Mgmt., Inc.*, Investment Advisers Act Release No. 4249 (Oct. 30, 2015), https://www.sec.gov/litigation/opinions/2015/ia-4249.pdf ("Slip Op.") at 3 (explaining that ZPRIM "violated Advisers Act Sections 206(1), (2), and (4), and Advisers Act Rule 206(4)-1(a)(5) through its false or misleading claims of GIPS compliance in the magazine articles and newsletters," that Zavanelli aided, abetted, and caused these violations, and that Zavanelli directly violated Sections 206(1) and (2) with respect to them).

[2] We also censured ZPRIM, imposed cease-and-desist orders, and ordered ZPRIM and Zavanelli to pay, respectively, $250,000 and $570,000 civil money penalties.

[3] 810 F.3d 1 (1st Cir. 2015), *vacating John P. Flannery*, Exchange Act Release No. 73840, 2014 WL 7145625 (Dec. 15, 2014) (Opinion of the Commission).

the GIPS Advertising Guidelines.[4] The GIPS are "universal, voluntary standards to be used by investment managers for quantifying and presenting investment performance that ensure fair representation, full disclosure, and apples-to-apples comparisons."[5] Under GIPS, if a firm chooses to advertise that it is GIPS-compliant and includes performance data in the advertisement, it must disclose specified returns in its advertisements.[6] The version of the GIPS in place during the relevant period required such firms to provide "(1) period-to-date composite performance results and (2) either one-, three-, and five-year cumulative annualized composite returns or five years of annual composite returns."[7]

We found that, although ZPRIM claimed compliance with GIPS in magazine advertisements and newsletters that included performance information, its claims were false or misleading because ZPRIM did not include the returns that the GIPS Advertising

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[4] Slip Op. at 15-31. We also found that ZPRIM made misrepresentations in two Morningstar reports because it falsely claimed that an independent GIPS verifier had verified its results "to the present," after that verifier had resigned, and because ZPRIM had denied the existence of a Commission investigation of which it had been notified. *Id.* at 31-35.

[5] *Id.* at 4 (citation omitted).

[6] *Id.*

[7] *Id.* at 6.

Guidelines required to be disclosed in those advertisements:[8]

1. In late 2008 advertisements, ZPRIM disclosed only five, ten, and 20-year cumulative and ten-year annualized returns, which all exceeded its benchmark, rather than the year-to-date and one, three, and five-year annualized returns (or five years of annual returns) required by the Guidelines.[9] The returns ZPRIM disclosed ranged from 14.21% (10-year annualized) to 1187.05% (20-year compounded).[10] If ZPRIM had followed the Guidelines, it would have shown negative period-to-date returns (from -17.02% to -18.42%) that underperformed its benchmark.[11]

2. In 2011 advertisements, ZPRIM touted "28 Years of Portfolio Management by MAX ZAVANELLI" and proclaimed that it was "THE #1 MANAGER" or "TRIPLE #1" "FOR THE 3rd TIME." But ZPRIM disclosed only returns over periods that showed ZPR beating all other "TOP 10 MANAGERS," and

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[8] *Id.* at 15-18, 25-29.

[9] *Id.* at 6-7, 15.

[10] *Id.* at 7.

[11] *Id.* at 6-7.

failed to include other data required by the Guidelines.[12]

3. In 2009 newsletters distributed to clients and prospective clients, ZPRIM also cherry picked favorable data, or included data intended to support a point regarding the performance of its composites, without including the information required by the Guidelines.[13]

ZPRIM never disclosed that it had failed to follow the GIPS Advertising Guidelines and that its claims of compliance with them were false.[14]

Applying the well-established materiality standard,[15] we found that Respondents' undisclosed failure to comply with the GIPS Advertising Guidelines was material for two reasons.[16] First, compliance with

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[12] *Id.* at 12-13, 15-16.

[13] *Id.* at 9, 27, 28.

[14] *Id.* at 17-18.

[15] "An omitted fact is material 'if there is a substantial likelihood that a reasonable [investor] would consider it important' in making an investment decision." Slip Op. at 18 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988)). "[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231-32 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U. S. 438, 449 (1976)).

[16] Slip Op. at 18-19; *see also id.* at 21 (additional discussion with respect to 2011 advertisements); *id.* at 29-30 (discussion of materiality with respect to 2009 newsletters).

the Guidelines performs an important independent role: it "ensures that, where a firm claims compliance and discloses financial results, those results are complete, fairly presented, and comparable to those of other firms."[17] By including a claim of GIPS compliance in an advertisement, a firm represents that the results it discloses are consistent with the Advertising Guidelines and benefits from this claim. Indeed, Zavanelli agreed that it was "very important" for marketing to institutional clients to claim GIPS compliance, and he testified that he wanted to be "measured on a GIPS basis" so that ZPRIM could have "bragging rights" based on its performance.[18] Yet, in its violative advertisements, ZPRIM claimed these bragging rights without complying with the Advertising Guidelines. We found this material because "[i]n deciding whether to entrust their money to ZPRIM, potential clients would have considered it significant that ZPRIM had not complied with the Advertising Guidelines (as it had represented) and had not disclosed a track record of performance comparable to a firm that had done so."[19]

Second, we found that "ZPRIM's false claim of compliance with GIPS in its 2008 magazine advertisements is also material because if ZPRIM had complied with the Advertising Guidelines, it would have disclosed that its SCV composite was losing money and significantly underperforming its

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[17] *Id.* at 18-19 & nn. 59 & 60.

[18] *Id.* at 5.

[19] *Id.* at 19.

benchmark, the Russell 2000."[20] "A reasonable investor would have considered the omitted performance information significant to its investment decision."[21]

We also considered Respondents' argument that ZPRIM's false or misleading claims of GIPS compliance were immaterial because ZPRIM purportedly disclosed the returns information that it omitted from its advertisements by other means, *i.e.,* its website and information sent to potential clients who inquired about its services. We rejected this argument for three reasons.

First, by claiming GIPS compliance in its advertisements, ZPRIM represented that they included all the performance information required by GIPS. We concluded that "[i]nvestors should not be required to search for additional information that a firm represents it has already provided through its claims of GIPS compliance."[22]

Second, we rejected an underlying assumption of Respondents' argument: that by providing or making available by other means the returns data it omitted from its advertisements ZPRIM introduced "corrective disclosures" into the total mix of information that cured

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[20] *Id.*

[21] *Id.*

[22] *Id.*; *see also id.* at 18 n.59 (citing authority in which we declined to consider other information in the total mix).

its false or misleading claims of GIPS compliance.[23] Instead, we found that ZPRIM "did not correct" those claims because it never publicly acknowledged that they "were false, distributed corrected advertisements addressing [them], or even directed recipients of its advertisement to the information required by the Guidelines that it omitted from the advertisements."[24] Providing the data omitted from the advertisements through other means could not cure ZPRIM's false or misleading claims of GIPS compliance because it did not speak to that compliance.

Third, we explained that "[e]ven if we were inclined to consider information outside the advertisements and found that the exact information omitted from the advertisements was available online or otherwise, we do not believe that ZPRIM adequately drew attention to it here."[25]

On November 16, 2015, Respondents moved for reconsideration of our opinion;[26] they filed a

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[23] Although we reached this conclusion in a portion of our opinion that explained why ZPRIM's advertisements were false, our analysis is also relevant to ZPRIM's materiality argument.

[24] *Id.* at 17-18. We also explained that although ZPRIM specifically corrected another element of its December 2008 advertisement, it never sought to fix the misrepresentation regarding GIPS compliance. *Id.* at 18 n.54.

[25] *Id.* at 20.

[26] *See ZPR Inv. Mgmt., Inc.*, Advisers Act Release No. 4260, 2015 WL 6777087, at *1 (Nov. 6, 2015) (extending deadline for filing reconsideration motion until November 16, 2015).

supplemental brief arguing that *Flannery* supported reconsideration on January 6, 2016.[27]

II. Analysis

Reconsideration is an "extraordinary" remedy[28] "designed to correct manifest errors of law or fact or permit the presentation of newly discovered evidence."[29] A party "may not use a motion for reconsideration to reiterate arguments previously made or to cite authority previously available."[30]

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[27] *Flannery* was decided after Respondents filed their reconsideration motion. The Commission granted their request to submit supplemental briefing with respect to it and ordered the Division of Enforcement to file a responsive brief. *See ZPR Inv. Mgmt., Inc.*, Advisers Act Release No. 4294, 2015 WL 9256653, at *1 (Dec. 18, 2015).

[28] *Johnny Clifton*, Exchange Act Release No. 70639, 2013 WL 5553865, at *1 (Oct. 9, 2013).

[29] *Daniel Imperato*, Exchange Act Release No. 74886, 2015 WL 2088435, at *1 (May 6, 2015) (quoting *Steven Allman, Esq.*, Exchange Act Release No. 63665, 2011 WL 52087, at *1 (Jan. 6, 2011)). We will accept only such additional evidence that "the movant could not have known about or adduced before entry of the order subject to the motion for reconsideration." *Eric J. Brown*, Exchange Act Release No. 66752, 2012 WL 1143573, at *1 (Apr. 5, 2012) (quoting *Perpetual Sec., Inc.*, Exchange Act Release No. 56962, 2007 WL 4372765, at *1 (Dec. 13, 2007)).

[30] *Imperato*, 2015 WL 2088435, at *1 (quoting *Allman*, 2011 WL 52087, at *1).

Reconsideration motions are thus granted only in exceptional cases.[31]

Respondents fail to meet this standard because they raise three principal arguments that we already addressed and rejected in our opinion. They argue that (1) their misrepresentations regarding GIPS compliance were not material given that the total mix of information available to investors purportedly contained the information they omitted from their advertisements; (2) the evidence did not support our findings that they acted with scienter; and (3) imposing an industry bar against Zavanelli was not in the public interest. We addressed each of these arguments at length in our opinion and found them to be without merit.[32]

The First Circuit decided *Flannery* after we issued our opinion in this case. Respondents contend that *Flannery* reinforces the arguments that they made based on the disclosure of information outside their advertisements. According to Respondents, *Flannery* strengthens their argument that ZPRIM's false claims of GIPS compliance were not material because, by providing additional data to potential investors and on its website, ZPRIM otherwise provided or made available the returns data that the GIPS Advertising Guidelines required it to include in its advertisements.

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[31] *Brown*, 2012 WL 1143573, at *1 (citing *Feeley & Willcox Asset Management Corp.*, Exchange Act Release No. 48607, 2003 WL 22316308, at *1 (Oct. 9, 2003)).

[32] *See, e.g.*, Slip Op. at 18-21, 29-30, 32-33 (materiality); *id.* at 22-26, 30-31, 34-35 (scienter); *id.* at 37-43 (industry bar on Zavanelli).

Because *Flannery* had not been decided when we issued our opinion, we write to clarify that it provides no basis for reconsideration.

A. *Flannery* has no bearing on liability under the Advisers Act.

In *Flannery*, the Commission found that a respondent had made a material misrepresentation with scienter in a slide presentation that asserted that a fund typically was 55% invested in asset-backed securities ("ABS"), although its actual exposure to ABS at the time was around 100% of its portfolio and had exceeded 55% for several quarters.[33] The First Circuit, however, concluded that the record supported only a "thin" showing of materiality with respect to this "typical portfolio slide" based on a number of considerations, including that information about the "actual percent[age] of sector investment" for the fund that showed it was 100% invested in ABS had been made available to clients six weeks before the presentation was made.[34] The Court concluded that this "marginal" materiality showing,[35] when considered

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[33] *Flannery*, 2014 WL 7145625, at *19-24.

[34] 810 F.3d at 11. The Court also found that additional facts weighed against a finding of materiality: the specific purpose of the meeting at which the slide was presented, that the slide at issue was but one of 20 slides in the presentation, that it was not mentioned in a contemporaneous report prepared by a consultant who attended the meeting, and certain expert testimony. *Id.*

[35] *Id.* at 4, 9-10.

in light of other evidence in the record,[36] could not support a showing of recklessness sufficient to establish scienter, and it vacated our order finding the respondent liable and imposing sanctions.[37]

Respondents argue that finding the information they omitted from their advertisements to be material despite the availability of that information from other sources is "contrary to *Flannery*." But *Flannery* emphasized that it "d[id] not suggest that the mere availability of accurate information negates an inaccurate statement"; rather, the Court limited its holding to the narrow circumstances of the case.[38] *Flannery* has no hearing on our conclusion that

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[36] The Court recited that the respondent testified that "in his experience investors did not focus on sector breakdown when making their investment decisions and that [fund] investors did not focus on how much of [its] investment was in ABS versus [mortgage-backed securities]," he "did not recall ever discussing the Typical Portfolio Slide or being asked a question about the actual sector breakdown when presenting the slide," and "[h]e did not update the Typical Portfolio Slide's sector breakdowns because he did not think the typical sector breakdowns were important to investors." 810 F.3d at 11-12. The Court also observed that "[t]o the extent that an investor would want to know the actual sector breakdowns, [the respondent] would bring notes with 'the accurate information' so that he could answer any questions that arose." *Id.* at 12.

[37] *Id.* at 4, 12, 14. The Court also vacated our findings of liability and sanctions issued against the other respondent in the case.

[38] *Id.* at 11 n.8. Even under these narrow circumstances, the Court referred to the availability of the information as relevant, not dispositive. *Id.* As explained below in Section II.8, *Flannery* is distinguishable based on its facts.

Respondents' misrepresentations were material for a fundamental reason: unlike in *Flannery*, Respondents in this case made material misrepresentations in advertisements disseminated to the general public, and the Advisers Act and rules thereunder prohibit such misrepresentations in advertisements to clients or prospective clients.

Advisers Act Section 206(1) prohibits investment advisers from "directly or indirectly . . . employ[ing] any device, scheme, or artifice to defraud any client or prospective client."[39] Section 206(2) includes a "broad proscription against 'any . . . practice . . . which operates . . . as a fraud or deceit upon any client or prospective client.'"[40] And Section 206(4) simply prohibits "any act, practice, or course of business which is fraudulent, deceptive, or manipulative,"[41] and in conjunction with Rule 206(4)-1(a)(5), bars registered investment advisers from publishing, circulating, or distributing "any advertisement . . . [w]hich contains any untrue statement of a material fact, or which is otherwise false or misleading."[42]

We have recognized previously that Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5) together "prohibit investment advisers from misstating material facts or omitting facts necessary to make a prior statement

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[39] 15 U.S.C. § 80b-6(1).

[40] *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191 (1963) (citing Advisers Act Section 206(2), 15 U.S.C. § 80b-6(2)).

[41] 15 U.S.C. § 80b-6(4).

[42] 17 C.F.R. § 275.206(4)-1(a)(5).

non-misleading in promotional literature and other communications to clients or prospective clients."[43] Indeed, we adopted Rule 206(4)-1(a)(5) to "foreclose(e) the use of advertisements which have a tendency to mislead or deceive clients or prospective clients."[44] That is exactly the type of advertisement that Respondents employed here.

Respondents' false claims of GIPS compliance are squarely within the prohibitions of Section 206 and Rule 206(4)-1(a)(5).[45] By claiming GIPS compliance, Respondents misrepresented to prospective clients that ZPRIM complied with the GIPS Advertising Guidelines. As we stated in our opinion, in "deciding whether to entrust their money to ZPRIM, potential clients would have considered it significant that ZPRIM had not complied with the Advertising Guidelines (as

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[43] *Anthony Fields*, Advisers Act Release No. 4028, 2015 WL 728005, at *14 (Feb. 20, 2015); *see also Marketlines v. SEC*, 384 F.2d 264, 266 (2d Cir. 1967) (affirming Commission order finding that respondent "violated the antifraud provisions of Section 206 of the [Advisers] Act by publishing misleading advertisements"); *Stanford Inv. Mgmt, Inc.*, Advisers Act Release No. 228, 43 SEC 864, 1968 WL 86065, at *2 (Aug. 30, 1968) (explaining that "[w]e have previously taken action with respect to improper advertising practices of a number of investment advisers" and "again emphasiz[ing] the importance of adherence to the required standards under the securities acts with respect to advertising").

[44] *Advertisements by Investment Advisers*, Advisers Act Release No. 121 (Nov. 1, 1961), 26 Fed. Reg. 10,548, 10,549 (Nov. 9, 1961).

[45] Although Rule 206(4)-1(a)(5) applies to registered investment advisers only, we found that Zavanelli aided, abetted, and caused ZPRIM's violations of the rule with respect to the magazine advertisements and newsletters. Slip Op. at 36-37.

it had represented) and had not disclosed a track record of performance comparable to a firm that had done so."[46] Zavanelli conceded that GIPS compliance was "very important" for marketing to institutional clients, and he wanted ZPRIM to be "measured on a GIPS basis" so that it could claim "bragging rights" based on its performance.[47] Nonetheless, ZPRIM never publicly acknowledged that its claims of GIPS compliance in its advertisements were false or otherwise corrected them.[48] Because Respondents employed materially misleading misrepresentations about a core fact–compliance with GIPS–in their advertisements, they employed a device or artifice to defraud prospective clients and engaged in a practice that operated as a fraud on prospective clients. Respondents also engaged in a fraudulent act by publishing, circulating, and distributing advertisements containing material misstatements.

1. The information Respondents may have provided in subsequent disclosures does not render the misstatements in the advertisements immaterial.

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[46] *Cf. Riggs Inv. Mgmt. Corp. v. Columbia Partners, LLC*, 966 F. Supp. 1250, 1262, 1268 (D.D.C. 1997) (recognizing that "[c]ompliance with AIMR," the predecessor of GIPS, "has importance for a firm's reputation," and concluding that "to advertise oneself as meeting such an important industry standard while knowingly being out of compliance is false advertising").

[47] *See supra* note 18 and accompanying text.

[48] *See supra* notes 23 and 24 and accompanying text.

Respondents argue that their misrepresentations were immaterial because they provided the information they omitted from their advertisements "in subsequent disclosures" that they sent to prospective clients who read those advertisements and contacted ZPRIM. Subsequent disclosures cannot render a misstatement in an advertisement immaterial to prospective clients. Prospective clients who do not respond to the advertisement or otherwise seek more information are left with only the false advertisement. Providing additional information only to prospective clients who respond to a false advertisement cannot render the initial misrepresentation in the advertisement itself immaterial. And we have never held that, for purposes of Section 206,[49] only the persons who respond to a misleading advertisement are prospective clients.[50]

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[49] Advisers Act Sections 206(1) and (2) prohibit certain conduct by investment advisers with respect to "any client or prospective client." *See* 15 U.S.C. § 80b-6(1) (prohibiting "employ[ing] any device, scheme, or artifice to defraud any client or prospective client"); 15 U.S.C. § 80b-6(2) (prohibiting "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client"); *cf.* 15 U.S.C. § 80b-6(4) (prohibiting "any act, practice, or course of business which is fraudulent, deceptive, or manipulative" without requiring nexus to "any client or prospective client"); 17 C.F.R. § 275.206(4)-1(a)(5) (prohibiting investment advisers from "publish[ing], circulat[ing], or distribut[ing]" certain advertisements without reference to clients or prospective clients).

[50] *See Fields*, 2015 WL 728005, at *15 (finding that "[v]ia AFA's Form ADV and AFA's and Platinum's websites, Fields disseminated false and material information to prospective clients"); *Sol Jay Rifkin*, Advisers Act Release No. 417, 1974 WL 162954, at *1 (June 6, 1974) (settled case) (finding that material misrepresentations in newspaper and periodical advertisements

We also believe that the subsequent disclosures provided to prospective clients who responded to the advertisement did not render the misstatements therein immaterial as to those prospective clients. When a prospective client decides whether to respond to an advertisement, he cannot consider information he does not have, and that an adviser provides only after contact. When a prospective client responds to a materially false advertisement, it is reasonable to believe that the prospective client has been influenced by the misrepresentation in the advertisement. The adviser's false statement has succeeded because it has garnered interest, regardless of whether the adviser later provides enough information for an astute individual to detect its misstatement.

Accordingly, we think it appropriate to look to the content of the advertisement in determining materiality and to exclude subsequent communications delivered only to those individuals who respond. Respondents attempted to attract or retain clients through false advertising; they cannot avoid liability on the basis that they later provided only to the very customers who they attracted through their misstatements the information that they failed to disclose in their advertisements. We therefore reject

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violated Sections 206(1), (2), and (4) and Rule 206(4)-1 by deceiving prospective clients); *see also SEC v. Bolla*, 401 F. Supp. 2d 43, 68 (D. D.C. 2005) (noting that "Section 206(1) and (2) both cover 'any client or prospective client'" and rejecting attempt to "improperly limit[]" set of actions to those involving certain clients "when all WIN clients or potential clients are the relevant subset"), *aff'd sub nom. in relevant part, SEC v. Washington Inv. Network*, 475 F.3d 392 (D.C. Cir. 2007) (remanding for modification of injunctive relief).

Respondents' argument that the misrepresentations in the advertisements were immaterial, even accepting their premise that, "each and every prospective client of ZPRIM was given full and fair disclosure of all required performance results of the firm before they decided to select ZPRIM as their adviser."[51]

Respondents' argument also fails for an additional reason: their assertion that all relevant information was provided "immediately" to clients who responded has scant support in the record. Our opinion recognized that prospective clients did not receive a GIPS-compliant presentation until they received contracts to retain ZPRIM and that it "would have been important to potential investors to receive the information at issue to be able to compare performance numbers before they reached this advanced stage."[52] Respondents assert that ZPRIM sent out a package containing the missing performance returns to prospective clients who contacted its marketing agent for more information, well before sending them a contract with the formal GIPS-compliant presentation we referenced in our opinion. The record does not substantiate these assertions.

Respondents rely on a single email dated August 12, 2008, that ZPRIM sent an individual who contacted its marketing agent. The email predates the advertisements at issue, and the person who sent it did

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[51] Respondents do not explain, or cite to anything in the record to demonstrate, how they can be sure that no prospective clients decided to select ZPRIM on the basis of its false advertisements.

[52] Slip Op. at 20.

not testify at the hearing. ZPRIM's marketing agent testified that he believed ZPRIM sent out various materials but he did not describe them with specificity, and he initially testified that he did not know what ZPRIM sent prospective clients. And for his part, Zavanelli testified that ZPRIM sent out "many different packages" and agreed that "the materials that were sent changed over time" and that he did not know what materials were actually sent to potential clients because he was not copied on each mailing. ZPRIM also changed its advertisements over time to remove information required by the GIPS Advertising Guidelines. We cannot infer from one email that ZPRIM consistently provided all information that it omitted from its advertisements.

Respondents believe that so long as a prospective client eventually gets all relevant information before making an ultimate investment decision there can be no material misrepresentation and no violation. While this might defeat reliance or harm in a private securities fraud action, it is not a bar to liability in a Commission enforcement proceeding under the Advisers Act.[53] Liability under Advisers Act Section 206 does not require that the fraudulent conduct occur in connection with the offer, purchase, or sale of securities.[54] To the contrary, Section 206 includes

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[53] *See generally* Slip Op. at 21 & n.69 ("[T]he Division is not required to establish investor reliance or loss to prevail on its claims.").

[54] *SEC v. Lauer*, No. 03-80612-CIV, 2008 WL 4372896, at *24 (S.D. Fla. Sept. 24, 2008), *aff'd*, 478 F. App'x 550 (11th Cir. 2012); *see also* Applicability of the Investment Advisers Act, Advisers Act

within its scope misrepresentations that are not specific to a client investment decision.[55]

2. The information Respondents may have provided on their website does not render the misstatements in their advertisements immaterial.

Respondents also argue that their misrepresentations were immaterial because the advertisements "disclosed the firm's website which . . . contained all of the information required by the" Advertising Guidelines. In our opinion, we noted that "ZPRIM did not mention that its website contained financial information that it had omitted from its magazine advertisements."[56] And, as discussed below, the mere availability of accurate information is insufficient to render false information that an

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Release No. 1092, 1987 WL 112702, at *9 (Oct. 8, 1987) (staff interpretive release stating that the Section 206 provisions "do not refer to dealings in securities but are stated in terms of the effector potential effect of prohibited conduct on the client").

[55] *See, e.g.*, *SEC v. C.R. Richmond & Co.*, 565 F.2d 1101, 1106 (9th Cir. 1977) (investment adviser violated Section 206 by making misrepresentations in a book and newsletter concerning its investment strategy and the results of a model portfolio); *see also* Applicability of the Investment Advisers Act, 1987 WL 112702, at *9 (staff interpretive release stating that "the Commission has applied Sections 206(1) and (2) in circumstances in which the fraudulent conduct arose out of the investment advisory relationship between an investment adviser and its clients, even though the conduct does not involve a securities transaction").

[56] Slip Op. at 20.

investment adviser provides to clients or potential clients immaterial.

"Investment advisers are fiduciaries whose actions must be governed by the highest standards of conduct."[57] Respondents present a materiality argument that is inimical to their fiduciary obligations. They assert that an investment adviser may solicit clients on the basis of false or misleading representations so long as the adviser makes available information sufficient for a prospective client to detect the adviser's misrepresentation elsewhere. We disagree.

On this point, the opinion in *SEC v. Bolla* is instructive.[58] That case involved an investment adviser firm (WIN) with two principals (Bolla and Radano). After Bolla was barred from association with any investment adviser, Radano and WIN failed to disclose the bar to clients or made misleading statements regarding Bolla's status. Radano argued that these statements and omissions were not material because

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[57] *Valicenti Advisory Servs., Inc.*, Advisers Act Release No. 1774, 1998 WL 798699, at *6 (Nov. 18, 1998), *petition denied*, 198 F.3d 62 (2d Cir. 1999) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. at 191-92; *Rosenfeld v. Black*, 445 F.2d 1337, 1342-44 (2d Cir. 1971)). Investment advisers are charged with the affirmative duty of "utmost good faith, and full and fair disclosure of all material facts" and the obligation "to employ reasonable care to avoid misleading" their clients through half-truths or incompletely volunteered information. *SEC v. Capital Gains*, 375 U.S. at 191, 194; *accord Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *7 & n.44 (Sept. 26, 2007), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008).

[58] 401 F. Supp. 2d 43.

when he spoke with one client, she was already aware of the bar. The court rejected this argument because the standards applicable to investment advisers require more than just the availability of the truth through other means:

> Given the fiduciary duties owed by an investment adviser to his clients and the necessary foundation of truth and ethical action underlying the relationship, to take up Defendants' suggestion and allow an investment adviser to freely lie or omit information to his clients–as long as they know that he cannot be trusted–is to court the absurd and undermine the basis of Section 206.[59]

Unlike in *Bolla*, Respondents do not assert that the readers of their advertisements were already aware that ZPRIM's claims of GIPS compliance were false or misleading when they read them. Rather, Respondents argue that their advertisements disclosed the firm's website and the website contained the omitted information represented to be in their advertisements. The same rationale that caused the court to reject the materiality argument in *Bolla* supports rejecting Respondents' argument here: the fiduciary duty owed by an investment adviser does not countenance the adviser making a misrepresentation in an advertisement to attract clients even where the prospective client might be able to discern that the

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[59] *Id.* at 69; *see also Washington Inv. Network*, 475 F.3d at 404 (agreeing "that WIN's evasiveness in these conversations constituted fraudulent behavior in violation of Section 206").

statement was false through information available elsewhere.

Moreover, Respondents' argument is weaker than the argument the court rejected in *Bolla*. In *Bolla*, the defendants relied on a client's actual knowledge of a bar, but here Respondents point to disclosures on its website that merely could have alerted potential clients to the truth. As we said in our opinion, "ZPRIM did not sufficiently bring to investors' attention the information it contends cures its misrepresentations."[60] Rather, "ZPRIM generically referenced its website in its advertisements but did not specify what information was available on the website or otherwise direct investors to it for specific information."[61] "Put another way, the law does not put the onus on investors to seek out disclosures; it puts the obligation to provide

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[60] Slip. Op. at 20 & n.68; *see also SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1254 (11th Cir. 2012) (finding that website disclosures to which defendant did not specifically direct customers did not alter total mix of information so as to render contrary oral misrepresentations immaterial); *SEC v. Washington Inv. Network*, 475 F.3d at 405 (rejecting defendants' argument that public availability of undisclosed bar order rendered statements immaterial because "[t]he existence of the bar order may have been public information, but it was not information that was so widely disseminated that an average small investor could be expected to be aware of it").

[61] Slip Op. at 20 n.66. Respondents' advertisements referenced its top level web page, zprim.com. The webpages that Respondents contend provided the omitted information are from other web addresses under that top level page. In addition, those webpages were not printed on dates around the times of the misrepresentations at issue.

disclosures on people who solicit and manage investors' money."[62]

B. *Flannery* is distinguishable on its facts.

In addition to having no hearing on liability under the Advisers Act, *Flannery* is distinguishable on its facts. We reject Respondents' assertion that they are in "the exact situation addressed by *Flannery*." *Flannery* addressed a slide that disclosed "typical" holdings. The court concluded that "when a slide is labeled "typical" and where a reasonable investor would not rely on one slide but instead would conduct due diligence when making an investment decision, the availability of actual and accurate information is relevant."[63] Here, ZPRIM's misrepresentations in its advertisements concerned the *actual* performance returns. By claiming compliance with GIPS, ZPRIM represented that it had provided in its advertisements all the actual performance information required by the Guidelines, although it had not. Investors "should not be required to search for additional information that a firm represents it has *already provided* through its claims of GIPS compliance."[64]

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[62] *SEC v. Nutmeg Grp., LLC*, No. 09–cv–1775, __ F. Supp. 3d __, __, 2016 WL 690930, at *16 (N.D. Ill. Feb. 18, 2016).

[63] *Flannery*, 810 F.3d at 11 n.8; *see also id.* at 10 n.3 (emphasizing that the slide at issue "was clearly labeled 'Typical Portfolio Characteristics–Limited Duration Bond Strategy' and did not purport to show the actual exposures to each sector at any given time"); *id.* at 10 (emphasizing that "the slide was clearly labeled 'Typical'").

[64] Slip Op. at 19 (emphasis added).

We also reject Respondents' assertion that *Flannery* supports finding their misrepresentations to be immaterial in light of "the absence of any existing or prospective ZPRIM clients called by the Division to testify" about materiality. Although the *Flannery* court found that the absence of investor testimony supported its conclusions regarding the materiality (or lack thereof) of the representations, *Flannery* did not establish a requirement that investor testimony must be used to establish materiality.[65] Rather, it concluded that the evidence as a whole indicated that there were either no material misrepresentations or that the evidence of materiality was thin. Here, testimony established that "ZPRIM decided to become GIPS-compliant so it could compete for institutional clients," that "many institutional investors will not consider investment advisers unless they provide GIPS-compliant returns," and that Zavanelli himself agreed that GIPS compliance was "very important" for marketing to institutional clients.[66] Indeed, before ZPRIM finalized its late 2008 advertisements, Zavanelli "specifically instructed" that the advertisements "retain the footnote claiming GIPS compliance."[67] Investors did not need to testify as to the misrepresentations' materiality in light of this other evidence.

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[65] *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38, 43-45 (2011) (emphasizing that materiality is weighed from the perspective of the "reasonable investor").

[66] Slip Op. at 5, 18-19.

[67] *Id.* at 23.

Finally, we reject Respondents' assertion that "the *Flannery* court would also find that there was a lack of substantial evidence that" they acted recklessly. *Flannery* held that the "thin materiality showing" could not support finding reckless conduct. In contrast, the evidence of materiality in this case is substantial: "By failing to provide the returns required by the Guidelines, Respondents denied potential clients information necessary to make informed investment decisions, while representing that ZPRIM offered the benefits of GIPS compliance."[68] And the evidence in this case also demonstrated that Respondents acted not simply recklessly but also "intentionally" and "knowingly" in falsely claiming compliance with GIPS.[69] *Flannery* provides no basis for us to reconsider either the findings that Respondents' misrepresentations were material or that they acted with scienter.

Accordingly, IT IS ORDERED that ZPR Investment Management, Inc., and Max E. Zavanelli's motion for reconsideration is denied.

By the Commission.

Brent J. Fields
Secretary

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[68] Slip Op. at 29.

[69] *Id.* at 23, 25.

APPENDIX C

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Release No. 4249

Admin. Proc. File No. 3-15263

[Filed October 30, 2015]

In the Matter of	)
	)
ZPR INVESTMENT	)
MANAGEMENT, INC.,	)
and MAX E. ZAVANELLI	)
	)

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Fraud

Negligent misrepresentations

Registered investment adviser and its owner and principal made misrepresentations in advertisements regarding, among other things, compliance with Global Investment Performance Standards. *Held*, it is in the public interest to impose an industry bar on principal, censure

investment adviser, order respondents to cease and desist from further violations, and assess a $250,000 civil money penalty on investment adviser and a $570,000 civil money penalty on principal.

APPEARANCES

Philip J. Snyderburn and *K. Michael Swann* of Snyderburn, Rishoi & Swann, LLP, for ZPR Investment Management, Inc., and Max E. Zavanelli.

Amie Riggle Berlin for the Division of Enforcement.

Appeal filed: June 30, 2014
Last brief received: October 6, 2014
Oral argument held: October 26, 2015

I.

Respondents ZPR Investment Management, Inc., a registered investment adviser ("ZPRIM"), and Max E. Zavanelli ("Zavanelli"), ZPRIM's former president and owner, appeal from an administrative law judge's initial decision.[1] The law judge found that ZPRIM violated Sections 206(1), (2), and (4) of the Investment Advisers Act of 1940,[2] and Advisers Act Rule 206(4)-1(a)(5),[3] by misrepresenting compliance with the Global Investment Performance Standards ("GIPS") in magazine advertisements and investment report newsletters, and that Zavanelli aided, abetted, and

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[1] *ZPR Inv. Mgmt., Inc.*, Initial Decision Release No. 602, 2014 WL 2191006 (May 27, 2014).

[2] 15 U.S.C. § 80b-6(1), (2), and (4).

[3] 17 C.F.R. § 275.206(4)-1(a)(5).

caused each of ZPRIM's violations based on these misrepresentations and was primarily liable for violating Sections 206(1) and (2). The law judge also found that ZPRIM violated Sections 206(2) and (4) and Rule 206(4)-1(a)(5) by negligently claiming in a Morningstar report for the period ended September 30, 2010 that (a) an independent third party had verified ZPRIM's compliance with GIPS "to the present," and (b) ZPRIM was not under Commission investigation. In addition, the law judge found that ZPRIM violated Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5) by repeating its false claim that it was not under Commission investigation in a Morningstar report for the period ended March 31, 2011. The initial decision found that Zavanelli had caused each of ZPRIM's Morningstar violations but had not aided and abetted them. As sanctions, the law judge permanently barred Zavanelli from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization; censured ZPRIM; issued cease-and-desist orders with respect to each Respondent; and imposed civil money penalties of $250,000 against ZPRIM and $660,000 against Zavanelli. For the reasons explained below, we sustain the law judge's findings with the exception of the finding that Zavanelli caused ZPRIM's misrepresentations in the Morningstar reports, and we reduce the civil money penalties assessed against him accordingly. We base our findings on an independent

review of the record, except with respect to those findings not challenged on appeal.[4]

II.

This case concerns the Division of Enforcement's claims that ZPR Investment Management, Inc., (a) falsely claimed that it complied with the Global Investment Performance Standards in 2008 and 2011 magazine advertisements and 2009 investment newsletters that failed to provide the returns required by the GIPS Advertising Guidelines; (b) falsely claimed in a Morningstar report for the period ended September 30, 2010 that ZPRIM's GIPS compliance had been verified "to the present," although its GIPS verification firm had resigned months earlier; and (c) falsely stated in the same Morningstar report – and a subsequent report for the period ended March 31, 2011 – that it was not under Commission investigation, although it had been notified in writing to the contrary. The Division also seeks io hold Zavanelli responsible for the magazine advertisements and newsletters and for aiding and abetting and/or causing each of his firm's violations.

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[4] The Division did not appeal the law judge's findings that (a) ZPRIM did not act with scienter with respect to the 2010 Morningstar report and thus did not violate Section 206(1) in connection with it, and (b) Zavanelli did not aid and abet ZPRIM's Morningstar violations or himself commit them. We also note that Rule of Practice 451(d), 17 C.F.R. § 201.451(d), permits a member of the Commission who was not present at oral argument to participate in the decision of the proceeding if that member has reviewed the oral argument transcript prior to such participation. Commissioner Aguilar has made the requisite review.

We find ZPRIM and Zavanelli liable for the misrepresentations at issue as follows. ZPRIM violated Advisers Act Sections 206(1), (2), and (4), and Advisers Act Rule 206(4)-1(a)(5) through its false or misleading claims of GIPS compliance in the magazine articles and newsletters, and its false claim that it was not under Commission investigation in its Morningstar report for the period ended March 31, 2011. ZPRIM also violated Sections 206(2) and (4) and Rule 206(4)-1(a)(5) through its false claims of GIPS compliance and lack of any Commission investigation in the Morningstar report for the period ended September 30, 2010. We find that Zavanelli violated Sections 206(1) and (2) with respect to the magazine articles and newsletters, and that he aided, abetted, and caused all of ZPRIM's violations other than those relating to the Morningstar reports.

For this conduct, we bar Zavanelli from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization; censure ZPRIM; impose cease-and-desist orders; and order ZPRIM to pay a civil money penalty of $250,000 and Zavanelli to pay a civil money penalty of $570,000.

III.

A. Zavanelli owned and controlled ZPR Investment Management, Inc., during the relevant period.

ZPR Investment Management, Inc., is an investment adviser registered with the Commission and located in Orange City, Florida. It was formed in 1994 as a successor to Zavanelli Portfolio Research.

ZPRIM was first registered with the Commission in 1994 and has been registered continuously as an investment adviser since 2006.

During the relevant period, Zavanelli was ZPRIM's president and sole shareholder. Zavanelli's former spouse, Ruth Ann Fay, served as ZPRIM's corporate secretary and was its chief compliance officer from April 2006 to April 2009, when Zavanelli assumed the position. ZPRIM also employed Ted Bauchle as its operations manager from 1999 until early 2013, when Zavanelli terminated him following a dispute regarding the content of Bauchle's investigative testimony in this matter. Zavanelli considered Bauchle to be an officer of ZPRIM. ZPRIM also contracted with ZPR Client Management, a separate entity wholly owned by David Sappir, to provide marketing and client communication services.

Zavanelli had ultimate authority over all aspects of ZPRIM's advisory business, including its advertising. As Ted Bauchle testified, Zavanelli was ZPRIM's "boss man" who "made all the decisions." Bauchle explained that it "was difficult to disagree" with Zavanelli "because he was under the impression that the company should be run his way and that he was always correct."

In October 2011, Zavanelli's son, Mark Zavanelli, joined ZPRIM as president and chief compliance officer. Through a series of transactions, Mark Zavanelli now owns 100% of ZPRIM. According to Max Zavanelli, Mark Zavanelli currently makes all final, non-investment decisions for ZPRIM. But Max Zavanelli continues to make investment decisions for ZPRIM and receives daily reports from ZPRIM on performance and

valuation. He also retains significant input into various other ZPRIM decisions, including GIPS compliance.

B. The Global Investment Performance Standards are voluntary standards for quantifying and presenting investment performance.

The Global Investment Performance Standards are "universal, voluntary standards to be used by investment managers for quantifying and presenting investment performance that ensure fair representation, full disclosure, and apples-to-apples comparisons."[5] GIPS has two principal components: the Performance Standards and the Advertising Guidelines. Among other things, the Performance Standards specify how a firm constructs composites, calculates their performance, and presents that performance in formal GIPS-compliant presentations. As defined in GIPS, a composite is an "aggregation of one or more PORTFOLIOS into a single group that represents a particular investment objective or strategy."[6] The accounts in a composite are separately maintained but follow the same strategy.

Under GIPS, if a firm chooses to advertise that it is GIPS-compliant, it must comply with the GIPS Advertising Guidelines in addition to the Performance

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[5] *See* What Are the GIPS Standards?, http://www.gipsstandards.org/about/documents/factsheet.pdf.

[6] 2005 GIPS at 6, http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2005.n5.4002. All references to GIPS refer to the 2005 version, which is applicable to the statements at issue in this case.

Standards.[7] The Guidelines require the disclosure of certain basic information regarding the firm in all advertisements claiming GIPS compliance.[8] In addition, where a firm discloses performance data in an advertisement claiming GIPS compliance, the Guidelines require the firm to disclose specific forms of returns. If a firm does not advertise GIPS compliance, the Guidelines do not apply.

GIPS compliance "provides a level of credibility to the performance results of investment management firms" that choose to comply with GIPS.[9] "Prospective clients have a greater level of confidence in the integrity of performance presentations as well as the general practices of a compliant firm."[10]

Firms can obtain additional benefits by choosing to have their claims of GIPS compliance verified.

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[7] 2005 GIPS at 33; *see also* 2005 GIPS at iii (explaining that GIPS "includes guidelines for claiming compliance with the GIPS standards in advertisements").

[8] All advertisements claiming GIPS compliance must include (1) a "description of the FIRM"; (2) an explanation of how "an interested party can obtain a presentation that complies with the REQUIREMENTS of GIPS standards and/or a list and description of all FIRM COMPOSITES"; and (3) the specific "GIPS Advertising Guidelines compliance statement: [Insert name of firm] claims compliance with the Global Investment Performance Standards (GIPS®)."

[9] GIPS Standards FactSheet at 1; *see also id.* (stating that claims of GIPS compliance "assure prospective clients that the historical 'track record' they report is both complete and fairly presented").

[10] GIPS Standards FactSheet at 1.

"Verification is the review of an investment management FIRM'S performance measurement processes and procedures by an independent third-party 'verifier.'"[11] Third-party verification provides "marketing advantages" and "brings credibility" to a firm's GIPS compliance claims.[12]

C. In 2006, ZPRIM retained Ashland Partners & Company LLP so that it could become GIPS-compliant and attract investors.

In early 2006, ZPRIM retained Ashland Partners & Company LLP to help ZPRIM create GIPS policies and procedures and to verify on a quarterly basis that ZPRIM complied with GIPS.[13] Nikola Feliz, a senior manager at Ashland Partners at the time of the hearing, testified that to receive serious consideration from institutional investors, a firm must comply with GIPS.[14] Feliz, who had responsibility for ZPRIM's

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[11] 2005 GIPS at 21. Verification considers (a) "[w]hether the FIRM has complied with all the COMPOSITE construction REQUIREMENTS of the GIPS standards on a FIRM-wide basis" and (b) "[w]hether the FIRM'S processes and procedures are designed to calculate and present performance results in compliance with the GIPS standards." 2005 GIPS at 21.

[12] 2005 GIPS at 21.

[13] A consultant that advised institutional investors with respect to the selection of investment managers previously had recommended to ZPRIM that it comply with GIPS and have that compliance verified.

[14] *See also* GIPS Standards FactSheet at 1 ("Compliance enables the GIPS-compliant firm to participate in competitive bids against other compliant firms throughout the world.").

account at times during the relevant period, also explained that verification of a firm's claim of GIPS compliance has become "almost mandatory" for firms seeking institutional clients.

According to Ted Bauchle, who was ZPRIM's primary contact with Ashland, ZPRIM decided to become GIPS-compliant so it could compete for institutional clients. Although Zavanelli disputed this, he agreed that being GIPS-compliant is "very important" for marketing to institutional clients, and he testified that he wanted to be "measured on a GIPS basis" so that ZPRIM could have "bragging rights" based on its performance, which he thought "very easily" could have been "the best." Following Ashland's initial verification, ZPRIM began to represent to potential clients that it was GIPS-compliant.

D. By 2008, ZPRIM had begun to claim GIPS compliance in its advertisements.

By January 2008, ZPRIM had begun to claim compliance with GIPS in advertisements reporting financial performance. When a firm discloses returns information in an advertisement claiming GIPS compliance, the GIPS Advertising Guidelines require it to provide (1) period-to-date composite performance results and (2) either one-, three-, and five-year cumulative annualized composite returns or five years of annual composite returns.[15]

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[15] 2005 GIPS at 34. Annual returns show the performance of a composite only during a particular year. Annualized returns express returns over a period other than a year on an annual basis.

ZPRIM placed advertisements that claimed GIPS compliance in the January, February, and April 2008 issues of Smart Money Magazine and the January 2008 issue of Kiplinger. The advertisements included period-to-date returns and over five years of annual returns for ZPRIM's Small Cap Value ("SCV") composite, the Russell 2000 index (SCV's benchmark), and the S&P 500 index.[16]

Zavanelli created the format for those advertisements, which he prepared by consulting a template Ashland provided. Zavanelli also consulted the GIPS Advertising Guidelines, which provide sample advertisements disclosing financial results.[17] Zavanelli designed the advertisements to be GIPS-compliant and had final approval for everything that went in them.[18]

E. In late 2008, ZPRIM dramatically changed the format of its advertisements to remove information required by the GIPS Advertising Guidelines.

ZPRIM published additional advertisements in Smart Money magazine in October, November, and

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[16] Although the Division elicited testimony at the hearing tending to show that these advertisements did not comply with the GIPS Advertising Guidelines in some respects, the advertisements were not the basis of any claim asserted in the OIP.

[17] 2005 GIPS at 36-37.

[18] Zavanelli also testified that ZPRIM ran advertisements in 2007 that claimed GIPS compliance and followed the same format as the January 2008 advertisement.

December 2008, which again claimed GIPS compliance. But the advertisements omitted (1) period-to-date performance, and (2) either five years of annual results or one-, three-, and five-year annualized results, as required by the GIPS Advertising Guidelines. ZPRIM's period-to-date results were negative and lagged the Russell 2000 Index, its benchmark.

Had ZPRIM followed the Guidelines and disclosed performance against its benchmark, it would have disclosed the following period-to-date results:

Advertisement date	**End of period used in advertisement**	**ZPRIM SCV Return**	**Russell 2000 Index Return**
October 2008	June 30, 2008	-17.02%	-9.38%
November 2008	August 31, 2008	-12.70%	-2.63%
December 2008	September 30, 2008[19]	-18.42%	-10.39%

Rather than publicize these unfavorable returns, ZPRIM disclosed compounded and annualized ten-year returns in the October and November advertisements and compounded five-, ten-, and twenty-year returns for its SCV composite in its December 2008 advertisement. ZPRIM's advertisements showed that, over these time periods, ZPRIM was beating the

[19] The December 2008 advertisement erroneously identified August 31, 2008 as the end of the period but disclosed returns calculated through September 30, 2008.

Russell 2000 and S&P 500 indices in all disclosed measures:

Advertisement date Return period	**ZPRIM SCV Returns**	**Russell 2000 Index Returns**	**S&P 500 Index Returns**
October 2008			
10 year	277.60%	71.21%	32.87%
Annualized	14.21%	5.52%	2.88%
November 2008			
10 year	415.14%	148.39%	57.93%
Annualized	17.81%	9.53%	4.68%
December 2008			
20 year	1187.05%	509.76%	565.18%
10 year	357.82%	111.99%	35.20%
5 year	75.45%	47.92%	28.65%

Bauchle testified that ZPRIM revised its advertising format to omit unfavorable results. Before the late-2008 advertisements ran, Bauchle told Zavanelli that they did not comply with the GIPS Advertising Guidelines. In particular, Bauchle told Zavanelli that because the advertisements had been changed to use annualized results (rather than at least five years of annual results), they needed to include one-, three-, and five-year annualized returns. Zavanelli maintained that it was not necessary to include these results because ZPRIM would provide them to prospective clients before they invested. Although Ashland had reviewed and commented on ZPRIM's January 2008 advertisement, ZPRIM did not send the new

advertisement format to Ashland for review. Because Zavanelli wanted to run the advertisements, ZPRIM published them even though they did not comply with the Guidelines.

Bauchle also told Ruth Ann Fay, ZPRIM's chief compliance officer, that the late-2008 advertisements were not GIPS-compliant. Although Fay disputes Bauchle's testimony, her testimony is not convincing because, on September 2, 2008, Bauchle sent her an email raising the GIPS Advertising Guidelines requirement regarding one-, three-, and five-year annualized performance and attaching the 2005 GIPS.

For his part, Zavanelli testified that ZPRIM's late-2008 advertisements "dramatically changed the format" of its advertisements. Zavanelli attributed the failure of the late-2008 advertisements to comply with GIPS to his inattention, his busy work and travel schedule, and the mistakes of others.[20] But Zavanelli also testified that he "made the approval" of the late-2008 advertisements at issue – albeit "without thinking" – and he separately agreed that they were submitted to him.[21] Zavanelli also admitted that he

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[20] Zavanelli testified that "I lost sort of direct control. I was busy. I wasn't paying attention. I forgot this format was wrong." He also testified that he "was out of the country," "was busy," and "had lots of people advising on the ad."

[21] Zavanelli answered the following question in the affirmative: "And you began using the new format that we see on pages 5 through 7 of DX-21 as the first advertisements running after you had – were submitted to you after you had known about March 2008 and ZPR's worst performance compared to its benchmarks, correct?"

directed that the footnote claiming GIPS compliance be retained during a telephone conference on which the late-2008 advertising format was discussed.

F. In late 2008, Ashland Partners advised ZPRIM that it needed to attach a GIPS-compliant presentation to its monthly investment report newsletters or follow the GIPS Advertising Guidelines.

Zavanelli wrote a monthly investment report newsletter for ZPRIM that, among other things, contained information regarding the performance of ZPRIM's composites, including the Small Cap Value, Global, and All Asian composites. ZPRIM distributed this newsletter to its clients, as well as to a group that Zavanelli testified consisted of "maybe 30 to 40 investment consultants, professionals, a lot of professors, economists, a lot of people that are never going to invest with me, some famous money managers," as well as friends and family. ZPRIM also posted its newsletters on its website but later removed them.

On multiple occasions beginning in late 2008, Ashland advised ZPRIM that, if it claimed GIPS compliance and reported composite performance in its newsletter, it needed to follow the Advertising Guidelines or attach a GIPS-compliant presentation to the newsletter.[22] A GIPS-compliant presentation is a

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[22] In a November 24, 2008 email, Ashland told ZPRIM that it needed to follow one of these options and summarized the requirements of the Guidelines. In an undated letter sent sometime after June 2009, Ashland also told ZPRIM that its

formal performance presentation that contains financial returns information specified in the GIPS Performance Standards.[23] It contains more detailed financial information than that required by the Advertising Guidelines but does not necessarily contain all the returns information in the form those guidelines require for advertisements.[24]

G. ZPRIM claimed GIPS compliance in 2009 newsletters without following the GIPS Advertising Guidelines or attaching a GIPS-compliant presentation.

In 2009, ZPRIM twice distributed monthly newsletters that claimed compliance with GIPS but did not follow the GIPS Advertising Guidelines or attach a GIPS-compliant presentation. First, as part of a discussion of the Small Cap Value composite returns in ZPRIM's April 2009 newsletter, Zavanelli stated that Ashland Partners had verified ZPRIM's GIPS compliance. But Zavanelli did not provide period-to-date results for the SCV composite or five years of annual data or each of one-, three-, and five-year annualized results.

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newsletter was subject to the Guidelines because it showed performance.

[23] Under GIPS, firms must "make every reasonable effort to provide a compliant presentation to all prospective clients" but "[a]s long as a prospective client has received a compliant presentation within the previous 12 months, the FIRM has met this REQUIREMENT." 2005 GIPS at 8, Section II.0.A.11.

[24] Ashland provided ZPRIM with a checklist or summary of the GIPS Advertising Guidelines requirements.

Second, in a discussion of the performance of ZPRIM's International Equity Global and SCV composites in its December 2009 newsletter, Zavanelli claimed that "[a]ll numbers are GIPS compliant." Zavanelli boasted that the International Equity Global composite was "now# 1 on the top 10 managers list of Morningstar for the World Stock Composite," and number six for the previous five years. He also wrote that the SCV composite "again made the top 10 list for 5 years." Zavanelli included in the newsletter one-year and five-year annualized returns for the International Equity Global composite and (only) five-year annualized returns for SCV, each compared to the other managers in the top ten.

But that discussion failed to include period-to-date results and either five years of annual data or each of one-, three-, and five-year annualized results.[25] Zavanelli asserted later in the same newsletter that "[t]he investment report you are reading is not GIPS compliant" and "was never intended to be nor can it be." Zavanelli explained that, because the newsletter was prepared shortly after the close of the prior month, it contained some estimated numbers that were not prepared consistent with GIPS. But that explanation did not apply to the numbers that Zavanelli specifically claimed *were* GIPS-compliant, which were not estimates and were not prepared immediately prior to finalizing the newsletter.

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[25] Specifically, the newsletter did not disclose the three-year annualized returns for either composite, and it also did not disclose one-year returns for the SCV composite.

Zavanelli also indirectly addressed Ashland's advice that, if ZPRIM did not follow the GIPS Advertising Guidelines, it should distribute its GIPS-compliant presentation with the newsletter. Sometime before December 2009, Bauchle had distributed a copy of ZPRIM's GIPS-compliant presentation to newsletter recipients. When Zavanelli learned that Bauchle had done so, he became upset because the presentation disclosed the firm's assets under management, which Zavanelli believed were not particularly large for a registered investment adviser.[26] Zavanelli thereafter ordered Bauchle not to distribute the GIPS-compliant presentation with the newsletter.

Zavanelli dismissed Ashland's concerns, writing in ZPRIM's December 2009 newsletter that "[i]n a panic after a call from the GIPS verifiers, [his] staff sent out disclosure statements to all who read the investment report without [his] knowledge." Zavanelli asserted that these "disclosure reports by themselves are highly misleading," "normally go only to clients," and "d[id] not reflect [ZPRIM's] true situation."[27]

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[26] *See* 2005 GIPS at 14, Section II.5.A. (generally requiring GIPS-compliant presentation to disclose the "number of PORTFOLIOS and amount of assets in the COMPOSITE, and either the percentage of the TOTAL FIRM ASSETS represented by the COMPOSITE or the amount of TOTAL FIRM ASSETS at the end of each annual period").

[27] In underlined text, Zavanelli asserted that "[t]hese GIPS tables are misleading since they don't go back prior [to] 2001 and begin at the bottom of the cycle for [ZPRIM's] investment management."

H. Ashland resigned following attempts to secure ZPRIM's compliance with GIPS.

Ashland subsequently had several calls with ZPRIM regarding the need for ZPRIM's newsletters to follow the GIPS Advertising Guidelines, and in April 2010, Ashland sent Bauchle a letter providing options for GIPS compliance. When Ashland later reviewed a subsequent newsletter, it found that ZPRIM had not followed either of the options identified in Ashland's April letter.[28]

On July 9, 2010, Ashland resigned effective immediately. In its resignation letter, Ashland explained that it was unable to reach a comfort level sufficient to continue to attest to ZPRIM's claim of GIPS compliance and that its final verification report covered only the period from December 31, 2000 through December 31, 2009.[29]

I. ZPRIM promised corrective action after an examination identified ZPRIM's false claims of GIPS compliance in its December 2008 Smart Money advertisement.

In February 2009, Commission staff performed an on-site examination of ZPRIM. On January 28, 2010, staff sent a letter to Ruth Ann Fay stating the

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[28] The newsletter that Ashland reviewed is not in the record and was not the basis for any charge.

[29] ZPRIM later retained another verifier, which issued a verification report in early 2011 that covered 2010.

examination's conclusions.[30] Among other things, the letter stated that, although ZPRIM had claimed compliance with GIPS in its December 2008 Smart Money advertisement, it had not provided the period-to-date and other results required by the Advertising Guidelines. Zavanelli testified that he read the deficiency letter in detail at the time.

On February 26, 2010, Fay responded to the staff letter on behalf of ZPRIM, asserting that

> ZPR did not intend to mislead with this ad. ZPR was unaware at the time we needed to show annualized returns as well as compounded. We thought that including more years was better than less. It shows that we have survived some bad markets even though we are small.

ZPRIM also stated that it had changed its advertisements to show the "1-3-5 year annualized returns" as a corrective action. ZPRIM generally followed this format in advertisements it placed between December 2009 and April 2010.

J. ZPRIM made three additional false statements in Morningstar reports for the periods ended September 30, 2010 and March 31, 2011.

ZPRIM made three additional false statements in Morningstar reports for the periods ended September 30, 2010 and March 31, 2011.[31] For many years, ZPRIM

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[30] The examination team had shared concerns with ZPRIM in a 2009 exit interview.

[31] According to its website, "Morningstar, Inc. is a leading provider of independent investment research" and offers "an extensive line

had submitted returns and other information to Morningstar for inclusion in a database of investment advisers. The information contained in the database was reflected in formal periodic reports, which ZPRIM, at times distributed to investors through ZPR Client Management and circulated internally. These reports were also available to subscribers to Morningstar's institutional research product, Morningstar Direct. Bauchle, who was responsible for submitting information to Morningstar, testified that ZPRIM hoped to get institutional customers based on its submissions.

First, in its Morningstar report for the period ended September 30, 2010, ZPRIM falsely stated that its GIPS compliance had been verified "for the period December 31, 2000 to the present by Ashland Partners & Company LLP." In fact, Ashland had resigned as ZPRIM's verifier in July 2010 and its final verification report did not cover any period after December 31, 2009. Bauchle testified that he generally did not update the GIPS compliance statement in the Morningstar reports when he input new performance data each quarter. He explained that the website he used to input information to Morningstar had two sections: one included financial information, which he updated quarterly; the other included information that Bauchle updated less frequently, including the statement regarding GIPS verification. Bauchle drafted ZPRIM's GIPS verification disclosure to state that

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of products and services for individual investors, financial advisors, asset managers, and retirement plan providers and sponsors." http://corporate.morningstar.com/US/documents/MarketingFactSheets/AboutMorningstarFactsheet.pdf.

ZPRIM had been verified "to the present" so that he would not need to update the disclosure each quarter.[32]

Second, in its Morningstar report for the period ended September 30, 2010, ZPRIM also falsely stated that there was no "Pending SEC Investigation" of ZPRIM. But by August 16, 2010, Commission staff had notified ZPRIM in writing that the Miami Regional Office was conducting an investigation of ZPRIM. Bauchle acknowledged that he knew that the Morningstar database asked whether the firm was under investigation. But according to Bauchle, ZPRIM did not believe that the investigation was a "real investigation" until the order instituting proceedings[33] was issued in April 2013.[34]

Third, in its Morningstar report for the period ended March 31, 2011, ZPRIM repeated its false claim that it was not under Commission investigation even though Division counsel had specifically informed Bauchle during his October 14, 2010 investigative

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[32] In practice, Ashland could not verify ZPRIM's GIPS compliance "to the present." Its verification process trailed the completion of each quarter.

[33] An order instituting proceedings or OIP "means an order issued by the Commission commencing a proceeding or an order issued by the Commission to hold a hearing." Rule of Practice 101(a)(7), 17 C.F.R. § 201.101(a)(7).

[34] ZPRIM referred to the investigation as an "inquiry" in minutes of a Board of Directors meeting held within weeks of formal notice of the investigation, and Mark Zavanelli, who joined ZPRIM in late 2011, testified that ZPRIM referred to the investigation as an inquiry when it spoke of it internally.

testimony that he was testifying in connection with a Commission investigation.

K. In early 2011, Zavanelli conceived of and approved additional magazine advertisements that claimed GIPS compliance but omitted required performance results.

In February, March, and May 2011, ZPRIM placed three additional advertisements in Smart Money and Barron's, each of which claimed compliance with the GIPS Advertising Guidelines. Zavanelli conceived of and approved the advertisements. He testified that because ZPRIM was "finishing first as the top manager" in Pensions & Investments magazine, he "wanted to reprint what [it] printed." ZPRIM entered into a contract with Pensions & Investments to reprint these favorable comparisons in ZPRIM's advertisements.

ZPRIM's 2011 advertisements showed its Global Equity composite as the best performing Global Equity composite among the "Top 10 Managers" identified in prior issues of Pensions & Investments, based on gross returns over one-year and five-year annualized returns. The advertisements also showed ZPRIM's All Asian composite as the best performing International Equity Composite based on one-year gross returns. Other than the results showing ZPRIM composites as the number one performing composite over the specified periods, the advertisements did not disclose any returns data. These advertisements did not comply with the GIPS Advertising Guidelines because ZPRIM failed to disclose three-year annualized returns or five years of annual returns for the Global Equity composite. ZPRIM

also failed to disclose for the All Asian composite all performance information required by the Guidelines.[35]

At the hearing, Zavanelli conceded that he knew the requirements of GIPS in 2010. He initially contended that it would have been impossible for ZPRIM to have complied with the Guidelines for various reasons. But Zavanelli later conceded that he added the claim of GIPS compliance to the advertisements and that ZPRIM could have published them without it.

L. The law judge made findings against ZPRIM and Zavanelli and sanctioned them.

Following a seven-day hearing and post-hearing briefing, the law judge issued an initial decision finding ZPRIM and Zavanelli liable for the multiple statutory and regulatory violations summarized above. The law judge based his initial decision on the evidence in the record and denied the Division's request for an adverse inference against ZPRIM in connection with its failure to produce subpoenaed documents during the investigation.[36] The law judge imposed an industry bar

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[35] Because the All Asian composite had existed for less than five years, the GIPS Advertising Guidelines required that different data be disclosed in place of one-, three-, and five-year returns or five years of annual returns.

[36] The Division argued below that Respondents had operated a private email system (which ZPRIM called a portal) to shield communications from review by Commission staff. The Division's attention was drawn to the portal at a meeting with Bauchle shortly before the hearing. Bauchle testified that Respondents had not searched or produced documents from the portal before the hearing. On appeal, the Division has not renewed its request for an

against Zavanelli, censured ZPRIM, imposed cease-and-desist orders against them, and required each to pay civil money penalties. This appeal followed.[37]

IV.

A. ZPRIM violated the Advisers Act.

Advisers Act Sections 206(1), (2), and (4) respectively prohibit any investment adviser,

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adverse inference, and the OIP does not charge Respondents with books and records violations.

[37] We deny Respondents' motion to supplement the record to introduce a number of documents that were not in existence at the conclusion of the hearing. As explained below, these documents are not material within the meaning of Rule of Practice 452, 17 C.F.R. § 201.452, and accordingly, were we to admit them, they would not change our conclusions herein. First, Respondents request that we admit Morningstar reports that did not exist at the time of the hearing as evidence of their disclosure of the Commission action against ZPRIM. But evidence of collective steps taken after the law judge issued his initial decision is not persuasive. And the fact that ZPRIM retains a four-star Morningstar rating does not affect our determination of liability or sanctions. Second, Respondents argue that a GIPS verification report issued for the period ended December 31, 2013 is material because it shows that the firm is GIPS-compliant. But ZPRIM is not charged with violations arising after the OIP and, in any event, GIPS verification reports do not establish that a firm complies with the GIPS Advertising Guidelines. Finally, Respondents seek to introduce documents showing Zavanelli's resignation as an officer or director of ZPRIM. Zavanelli resigned well after the events at issue here, and, in any event, we evaluate his continuing role in ZPRIM regardless of his formal title.

through jurisdictional means,[38] from directly or indirectly (1) employing "any device, scheme, or artifice to defraud any client or prospective client";[39] (2) engaging in "any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client";[40] or (4) engaging in "any act, practice, or course of business which is fraudulent, deceptive, or manipulative."[41] Scienter must be proven to establish a Section 206(1) violation, but negligence is sufficient for purposes of Sections 206(2) and (4).[42] Material misrepresentations made with the requisite

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[38] 15 U.S.C. § 80b-6 (prohibiting specified acts by "investment adviser[s]" undertaken "by use of the mails or any means or instrumentality of interstate commerce").

[39] 15 U.S.C. § 80b-6(1).

[40] 15 U.S.C. § 80b-6(2).

[41] 15 U.S.C. § 80b-6(4).

[42] *David Henry Disraeli,* Advisers Act Release No. 2686, 2007 WL 4481515, at* 8(Dec. 21, 2007), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009) (citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963) (holding that scienter is not required under Section 206(2)); *SEC v. Steadman*, 967 F.2d 636, 643 n.5, 647 (D.C. Cir. 1992) (observing that "a violation of [Section] 206(2) of the Investment Advisers Act may rest on a finding of simple negligence" and holding that "scienter is not required under [S]ection 206(4)"); *Steadman v. SEC*, 603 F.2d 1126, 1134 (5th Cir. 1979) (holding that although "the Supreme Court has ruled that scienter is not required under section 206(2)," scienter is required under Section 206(1)), *aff'd on other grounds*, 450 U.S. 91 (1981)).

scienter or negligence generally violate Sections 206(1), (2), and (4).[43]

We find that ZPRIM violated Advisers Act Sections 206(1), (2), and (4) through the charged magazine advertisements, newsletters, and Morningstar report for the period ended March 31, 2011.[44] With respect to ZPRIM's Morningstar report for the period ended September 30, 2010, we find ZPRIM liable under Sections 206(2) and (4). Because the Division did not appeal the law judge's determination that ZPRIM acted only negligently with respect to that report, we do not address whether ZPRIM violated Section 206(1), which requires scienter. We explain separately below the basis for our findings with respect to (1) ZPRIM's 2008 and 2011 magazine advertisements, (2) Respondents' 2009 newsletters, and (3) ZPRIM's 2010 and 2011 Morningstar reports.[45]

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[43] *See Warwick Capital Mgmt., Inc.*, Advisers Act Release No. 2694, 2008 WL 149127, at *8-9 (Jan. 16, 2008). Although Section 206(4) expressly authorizes the Commission to define "such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative" through rule-making, violation of one of its associated rules is not a precondition to finding a Section 206(4) violation. *See id.*, at *1 n.3, *9 (finding a violation of Section 206(4) without an associated rule violation).

[44] It is undisputed, and we find, that ZPRIM is, and was at the time of the events at issue, an investment adviser and that its acts in question were undertaken through interstate commerce. The magazine advertisements at issue were disseminated through nationally circulated magazines. ZPRIM's newsletters and Morningstar reports were available through the Internet.

[45] We separately find in Section IV.B. below that ZPRIM violated Advisers Act Rule 206(4)-1(a)(5) for each of the charged

1. Acting with scienter, ZPRIM made material misrepresentations in 2008 and 2011 magazine advertisements regarding its compliance with the GIPS Advertising Guidelines.

We find that ZPRIM violated Advisers Act Sections 206(1), (2), and (4) through the 2008 and 2011 magazine advertisements at issue. As explained below, in those advertisements, ZPRIM falsely claimed compliance with the GIPS Advertising Guidelines; those misrepresentations were material; and ZPRIM made them with scienter.

a. ZPRIM falsely claimed compliance with the GIPS Advertising Guidelines in each of the charged 2008 and 2011 magazine advertisements.

ZPRIM falsely claimed compliance with GIPS in its October, November, and December 2008 Smart Money advertisements, in which it failed to disclose as required by the GIPS Advertising Guidelines: (1) period-to-date composite performance, and (2) either one-, three-, and five-year cumulative annualized returns, or five years of annual returns. Instead, ZPRIM provided only compounded and annualized ten-year returns (October and November 2008 advertisements), or compounded five-, ten-, and twenty-year returns (December 2008 advertisements).

ZPRIM also falsely claimed GIPS compliance in its February and May 2011 Smart Money advertisements

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misrepresentations. In Section IV.C. we discuss Zavanelli's liability.

and its March 21, 2011 Barron's advertisement in which it failed to include financial information required by the 2005 GIPS Advertising Guidelines with respect to the composites discussed in those advertisements.[46] Although the Guidelines required ZPRIM to disclose either one-, three-, and five-year cumulative annualized returns, or five years of annual returns, ZPRIM provided only one- and five-year annualized returns for its Global Equity composite in the 2011 advertisements. In addition, ZPRIM supplied only one-year returns for its All Asian composite in the same advertisements.[47] Thus, in each of the 2008 and 2011 magazine advertisements, ZPRIM falsely claimed compliance with the GIPS Advertising Guidelines because it failed to provide all required information.

Respondents contend that their magazine advertisements were not false or misleading for three reasons, each of which we reject. First, Respondents assert that their GIPS claims were true because ZPRIM complied with the GIPS Performance

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[46] GIPS was amended in 2010, but the 2005 GIPS apply to ZPRIM's 2011 advertisements because they did not contain performance for periods beginning on or after January 1, 2011. *See* 2010 GIPS at 4 (stating that "[t]he effective date for the 2010 edition of the GIPS standards is 1 January 2011," but explaining that "[c]ompliant presentations that include performance for periods that begin on or after 1 January 2011 must be prepared in accordance with the 2010 edition of the GIPS standards").

[47] Because the All Asian composite existed for less than five years at the time of the advertisements, the Guidelines required somewhat different disclosure than what was required for the Global Equity composite. Nonetheless, there is no dispute that ZPRIM failed to provide it.

Standards and independent third parties verified ZPRIM's compliance. But the OIP alleged that ZPRIM failed to comply with the GIPS Advertising Guidelines, not the GIPS Performance Standards. That a firm complies with the Performance Standards, or that a third party has verified that compliance, does not establish that the firm's advertisements comply with the Guidelines.[48] ZPRIM represented that it complied with the Guidelines by including the exact wording of the "GIPS Advertising Guidelines compliance statement" in its magazine advertisements.[49] As explained above, those representations were false.

Second, Respondents assert that because the financial information ZPRIM did include in its magazine advertisements was accurate, those advertisements were true and not misleading. But ZPRIM's false claims of compliance with the GIPS Advertising Guidelines are not rendered true simply

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[48] *See* 2005 GIPS at 33, Appendix C, Section A (providing that the Advertising Guidelines "only apply to FIRMS that already satisfy all the REQUIREMENTS of the Standards on a FIRM-wide basis and claim compliance with the Standards").

[49] *See* 2005 GIPS at 34, Appendix C, Section B.3. ("All advertisements that include a claim of compliance with the GIPS Advertising Guidelines MUST include . . . [t]he GIPS Advertising Guidelines compliance statement: [Insert name of FIRM] claims compliance with the Global Investment Performance Standards (GIPS®)."). ZPRIM's use of the GIPS Advertising Guidelines compliance statement belies its assertion that "if a firm claims in an advertisement that it is GIPS compliant, the representation only relates to the GIPS standards and not the GIPS Advertising Guidelines." The GIPS Performance Standards provide for a separate form of compliance statement applicable to performance presentations.

because other statements in its advertisements were accurate.[50]

Finally, Respondents contend that ZPRIM's magazine advertisements complied with the GIPS Advertising Guidelines because ZPRIM "corrected" them by making the omitted financial information available on its website and in its GIPS-compliant presentation. We are not persuaded.

Respondents marshal three pieces of evidence to support their argument. First, they point to the testimony of Nikola Feliz of Ashland Partners. But Feliz highlighted that the GIPS Advertising Guidelines "specifically say that the disclosures [they mandate] need to be included within the ad."[51] She also agreed that it would be irrelevant to a claim of GIPS compliance if the omitted information required by the Guidelines was available through a website or otherwise. And although she did testify that a firm might be able to correct an advertisement, Feliz did not conclude that ZPRIM actually had corrected its magazine advertisements.

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[50] *See John J. Kenny*, Exchange Act Release No. 47847, 56 SEC 448, 2003 WL 21078085, at *7 (May 14, 2003) ("Although the letters contain some truthful statements, the letters are misleading because of the omitted information."), *aff'd*, 87 F. App'x 608 (8th Cir. 2004).

[51] *See also* 2005 GIPS at 34 (stating that advertisement claiming compliance "MUST include" specified information and stating that required financial information "MUST be *taken/derived* from a presentation that adheres to the REQUIREMENTS of the GIPS standards" (emphasis added)).

Second, Respondents rely on the GIPS Guidance Statement on Error Correction, which directed firms to establish error correction policies and procedures by January 1, 2010. The Guidance Statement acknowledges that even firms that maintain the "tightest of controls" may be "faced with situations in which errors are discovered that must be specifically addressed." But by its own terms, the Guidance Statement "does not address errors discovered in advertisements prepared following the GIPS Advertising Guidelines."[52] And even if the Guidance Statement did apply to ZPRIM's advertisements, Respondents do not contend that they complied with the requirements it articulates for the correction of material errors in performance presentations: material errors "must be corrected and disclosed in a corrected presentation" and "[e]very reasonable effort must be made to provide the corrected presentation to all prospective clients and other parties that received the erroneous presentation." Respondents never circulated revised advertisements.

Third, Respondents rely on a response to an email that ZPRIM's current GIPS verification firm sent to the GIPS Helpdesk in September 2013. The verifier asked if a firm could correct an advertisement that claimed GIPS compliance but omitted returns information required by the GIPS Advertising Guidelines by distributing a GIPS-compliant presentation containing the omitted information. The Helpdesk cautioned that firms "must remember that the fundamental principles

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[52] The GIPS Guidance Statement on Error Correction (effective January 1, 2010), http://www.gipsstandards.org/standards/Documents/Develop/GS_Error_Correction_Final.pdf.

of the GIPS standards are fair representation and full disclosure," and that the "objectives of the GIPS standards include presenting investment performance in a fair, comparable format that provides full disclosure." The Helpdesk highlighted that information contained in a GIPS-compliant performance presentation might cover different periods than an advertisement and that a presentation might not include period-to-date information required to be disclosed in an advertisement. In addition to these considerations, the Helpdesk urged that a "firm should also consider whether it is necessary to run a corrected advertisement."[53] In short, the GIPS Helpdesk did not endorse Respondents' argument.

Considering the evidence, we reject Respondents' argument. ZPRIM never publicly acknowledged (before this proceeding) that its claims of GIPS compliance were false, distributed corrected advertisements addressing its false claims of GIPS compliance, or even directed recipients of its advertisement to the information required by the Guidelines that it omitted from the advertisements.[54] Instead, ZPRIM argues that actions it was already taking before the advertisements' publication, i.e., making available certain information on its website and distributing its

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[53] The Helpdesk also referred ZPRIM's GIPS verifier to the OIP in this proceeding.

[54] Due to a typographical error, ZPRIM's December 2008 advertisement mistakenly identified the provided results as through August 31, 2008, rather than September 30, 2008. Bauchle testified that ZPRIM sent a correction of this narrow issue to individuals who inquired about becoming ZPRIM clients.

GIPS-compliant presentation to investors and certain potential clients, cured its misrepresentations. In short, ZPRIM did not correct its false claims of compliance with the GIPS Advertising Guidelines.[55]

b. ZPRIM's misrepresentations in its magazine advertisements were material.

An omitted fact is material "if there is a substantial likelihood that a reasonable [investor] would consider it important" in making an investment decision.[56] "[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[57] ZPRIM's misrepresentations regarding GIPS compliance in its magazine advertisements were material for two reasons.

First, as Bauchle and Feliz testified, many institutional investors will not consider investment advisers unless they provide GIPS-compliant returns.[58]

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[55] *Cf. Seaboard Inv. Advisers*, Investment Advisers Act Release No. 1918, 54 SEC 1111, 2001 WL 23178, at *4 n.21 (Jan. 10, 2001) (rejecting claim that "correction letter" cured misrepresentation where letter failed to acknowledge error).

[56] *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

[57] *Basic*, 485 U.S. at 231-32 (quoting *TSC*, 426 U.S. at 449).

[58] *See also* 2005 GIPS at 5, Section I.G.22. ("Compliance with the GIPS standards will provide FIRMS with a 'right of access' to be considered alongside all investment managers, thereby allowing all FIRMS to be evaluated on equal terms."); 2005 GIPS at 5, Section

Compliance with the GIPS Advertising Guidelines ensures that, where a firm claims compliance and discloses financial results, those results are complete, fairly presented,[59] and comparable to those of other firms.[60] Yet, ZPRIM disclosed only those results that it determined presented its composites in the most positive light. In deciding whether to entrust their money to ZPRIM, potential clients would have considered it significant that ZPRIM had not complied with the Advertising Guidelines (as it had represented) and had not disclosed a track record of performance comparable to a firm that had done so.

I.G.19. ("GIPS compliance provides FIRMS with a 'passport' and creates a level playing field where all FIRMS can compete on equal footing.").

[59] 2005 GIPS at I, Section I.A.3. (preamble) ("Requiring investment management firms to adhere to performance presentation standards will help assure investors that the performance information is both complete and fairly presented."); *see also* 2005 GIPS at 2, Section I.D.10.b. (reciting that one of "several key characteristics" of GIPS is that "[t]he GIPS standards are ethical standards for investment performance presentation to ensure *fair representation and full disclosure* of a FIRM'S performance.") (emphasis added).

[60] *See* 2005 GIPS at 1, Section 1.C.6. (explaining that one GIPS objective is "[t]o obtain worldwide acceptance of a standard for the calculation and presentation of investment performance in a fair, comparable format that provides full disclosure"); 2005 GIPS at 33, Appendix C – GIPS Advertising Guidelines, Section A. (explaining that GIPS provides "greater uniformity and comparability among investment managers . . . to facilitate a dialogue between FIRMS and their prospective clients about the critical issues of how the FIRM achieved historical performance results and determines future investment strategies").

Second, ZPRIM's false claim of compliance with GIPS in its 2008 magazine advertisements is also material because if ZPRIM had complied with the Advertising Guidelines, it would have disclosed that its SCV composite was losing money and significantly underperforming its benchmark, the Russell 2000. Instead, ZPRIM presented only favorable long-term performance in these advertisements. A reasonable investor would have considered the omitted performance information significant to its investment decision.

We are not persuaded by Respondents' arguments that their false claims of GIPS compliance in their magazine advertisements were not material:

Availability of omitted information through other means: Respondents contend that their misrepresentations were not material because ZPRIM posted the omitted information on its website or sent it to clients or prospective clients in its GIPS-compliant presentation.[61] But that argument cannot be squared with a fundamental purpose of the Guidelines: requiring the disclosure, in advertisements representing GIPS compliance and disclosing financial performance data, of information intended to assure comparability of performance numbers among financial

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[61] Under GIPS, firms must "make every reasonable effort to provide a compliant presentation to all prospective clients" but "[a]s long as a prospective client has received a compliant presentation within the previous 12 months, the FIRM has met this REQUIREMENT." 2005 GIPS at 8, Section II.0.A.11.

advisers.[62] Investors should not be required to search for additional information that a firm represents it has already provided through its claims of GIPS compliance.[63]

Even if we were inclined to consider information outside the advertisements and found that the exact information omitted from the advertisements was available online or otherwise, we do not believe that ZPRIM adequately drew attention to it here. As one court has explained, "[t]he way information is disclosed can be as important as its content."[64] In that case, the Eleventh Circuit found that the defendant's "weak, or non-existent, distribution of written disclosures," did

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[62] *See* 2005 GIPS at 33 ("The guidelines are mandatory for FIRMS that include a claim of compliance with the GIPS Advertising Guidelines in their advertisements.").

[63] *Cf. Dolphin & Bradbury, Inc.*, Exchange Act Release No. 54143, 2006 WL 1976000, at *9 (July 13, 2006) (declining to include information disclosed in local media accounts in total mix of information), *petition denied*, 512 F.3d 634, 641 (D.C. Cir. 2008); *Donner Corp. Int'l*, Exchange Act Release No. 55313, 2007 WL 516282, at *10 (Feb. 20, 2007) (rejecting "Applicants' argument that the research reports did not need to disclose the omitted facts because they believed a reasonable investor would read the company's public filings and obtain the information from those filings and because some reports provided a hyperlink to the Commission's website where those filings were available"); *Richmark Capital Corp.*, Exchange Act Release No. 48758, 57 SEC 1, 2003 WL 22570712, at *7 (Nov. 7, 2003) (finding that letter to stockholders, press release, and brief mentions of relevant contract in "media reports were not part of the 'total mix' of information reasonably available" to respondent's customers).

[64] *SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1250 (11th Cir. 2012).

not render contrary oral misrepresentations immaterial as a matter of law.[65]

Like the defendant in *Morgan Keegan*, ZPRIM failed to direct investors' attention to the written disclosures it now contends rendered its false claims of GIPS compliance immaterial. ZPRIM did not mention that its website contained financial information that it had omitted from its magazine advertisements.[66] Those advertisements also did not explain that ZPRIM's GIPS-compliant presentation was available on request.[67] A though ZPRIM did send prospective investors its GIPS-compliant presentation, it did not do so until investors received contracts to retain ZPRIM. It would have been important to potential investors to receive the information at issue to be able to compare performance numbers before they reached this

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[65] *Id.* at 1252.

[66] ZPRIM generically referenced its website in its advertisements but did not specify what information was available on the website or otherwise direct investors to it for specific information.

[67] The GIPS Advertising Guidelines provide that a firm claiming compliance in an advertisement must specify "[h]ow an interested party can obtain a presentation that complies with the REQUIREMENTS of GIPS standards *and / or* a list and description of all FIRM COMPOSITES." 2005 GIPS at 34, Appendix C, Section B.2. (emphasis added). The sample GIPS-compliant advertisements attached to the Guidelines explain how to obtain both. Respondents disclosed how to obtain a list and description of composites only and contend that this is all that is required by the Guidelines. Regardless of the validity of Respondents' position – an issue we need not and do not reach – we find it significant that ZPRIM did not disclose that the presentation it now contends cures its misrepresentations was available on request.

advanced stage with ZPRIM. We find that ZPRIM did not sufficiently bring to investors' attention the information it contends cures its misrepresentations.[68]

Lack of harm from 2008 magazine advertisements: We also reject Respondents' argument that ZPRIM's false claims of GIPS compliance in its 2008 advertisements were immaterial because "no investor retained the firm in the fall of 2008 after the advertisements were published." Even accepting Respondents' factual predicate, on which the record is unclear, their argument fails because the Division is not required to establish investor reliance or loss to prevail on its claims.[69] Moreover, the issue of

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[68] *Cf. Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 167 (2d Cir. 2000) (explaining in the context of the "truth on the market" defense in a private securities action that "the corrective information must be conveyed to the public 'with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by' the alleged misstatements" (quoting *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989))).

[69] *Charles K. Seavey*, Advisers Act Release No. 2119, 56 SEC 357, 2003 WL 1561440, at * 5 n.20 (Mar. 27, 2003) (holding that the Division "need not show reliance by investors to find a violation of Sections 206(1) and (2)," and that "proof of injury by the fraudulent practice" is not "a necessary element of the violation" (citations omitted)); *see also Morgan Keegan & Co.*, 678 F.3d at 1244 ("'Justifiable reliance . . . is not an element of an SEC enforcement action because Congress designated the SEC as the primary enforcer of the securities laws, and a private plaintiffs 'reliance' does not bear on the determination of whether the securities laws were violated, only whether that private plaintiff may recover damages."); *Graham v. SEC*, 222 F.3d 994, 1001 n.15 (D.C. Cir. 2000) ("[U]nlike a plaintiff in a private damages action, the SEC need not prove actual harm.").

materiality is "an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor."[70] Thus, "the reaction of individual investors is not determinative of materiality, since the standard is objective, not subjective."[71] ZPRIM's failure to disclose the information required by the GIPS Advertising Guidelines would have been material to a reasonable investor, particularly given that the omitted information would have disclosed the poor performance of the SCV composite over 2008.

2011 magazine advertisements omitted positive information: Finally, Respondents argue that ZPRIM's false claims of GIPS compliance in its 2011 advertisements were immaterial because the omitted information would have shown that ZPRIM's composites were exceeding their benchmarks. But Respondents miss the point. The GIPS Advertising Guidelines require disclosure of specified financial results to facilitate full disclosure and comparability of

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[70] *Disraeli*, 2007 WL 4481515, at *6 & n.29 (citing *Richmark Capital Corp.*, 2003 WL 22570712, at *5 (citing *TSC Indus.*, 426 U.S. at 445)); *accord S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at *6 (Dec. 5, 2014).

[71] *Disraeli*, 2007 WL 4481515, at *6 & n.30; *cf. Amgen v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191, 568 U.S. --- (2013) (explaining that because "materiality is judged according to an objective standard, the materiality of [defendant's] alleged misrepresentations and omissions is a question common to all members of the class" in private securities class action and that in "no event will the individual circumstances of particular class members bear on the inquiry").

performance information disclosed in advertisements.[72] Prospective clients can then evaluate this information, rather than rely on firms to determine its importance. Because Respondents chose to disclose only the three measures published in Pensions & Investments in which ZPRIM had finished first and omitted results required by the Guidelines, their omissions were material.

c. ZPRIM, through Zavanelli, acted with scienter with respect to the charged magazine advertisements.

Scienter is "a mental state embracing intent to deceive, manipulate, or defraud,"[73] and "includes recklessness, defined as conduct that is 'an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the [respondent] or is so obvious that the [respondent] must have been aware of it.'"[74] Scienter may be proven by "inference from circumstantial evidence," which "can be more than sufficient" to establish the requisite state of mind.[75] "The scienter of a corporation's officers and directors establishes the scienter of the corporation for purposes

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[72] *See supra* notes 59 and 60 and accompanying text.

[73] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

[74] S.W. *Hatfield, CPA*, 2014 WL 6850921, at *7 (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)).

[75] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983).

of the antifraud provisions."[76] As explained below, ZPRIM acted with scienter with respect to the 2008 and 2011 magazine advertisements.

2008 magazine advertisements: We find that ZPRIM, through Zavanelli, made the misrepresentations in the 2008 magazine advertisements with scienter. Bauchle testified that, although he informed Zavanelli that the 2008 magazine advertisements did not comply with the GIPS Advertising Guidelines, Zavanelli determined to go ahead with them anyway. Bauchle also testified that ZPRIM changed the format of the advertisements to conceal its poor performance in 2008, including that it was underperforming its benchmark. These facts establish Zavanelli's scienter.

Even aside from Bauchle's testimony, the record includes compelling evidence that Zavanelli acted with scienter. Zavanelli testified that he was responsible for ZPRIM's advertising and, ultimately, its GIPS compliance.[77] He also claimed a certain level of expertise with GIPS, testifying that he had "been

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[76] *See Disraeli*, 2007 WL 4481515, at *5 n.25 (internal quotation marks and citation omitted); *accord SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1096 n.16 (2d Cir. 1992).

[77] In his investigative testimony, which the law judge admitted in its entirety, Zavanelli testified as follows: "Q. Who is responsible at ZPR for ensuring that marketing materials are GIPS-compliant. A. I am. Q. Anyone else? A. No. Ted is not responsible . . . ." But at the hearing, Zavanelli inconsistently testified as follows: "I didn't make GIPS decisions. Ashland is our expert. They're making GIPS decisions for us with Ted." But Zavanelli also admitted that with respect to GIPS, he was the "final guy" and that the "buck stops with [him]."

involved [with GIPS] and kn[e]w [it] from the beginning," in its previous iteration as AIMR. Zavanelli also testified that he first read the GIPS Advertising Guidelines in 2006 and read GIPS "[n]umerous times . . . forward and backward," and he agreed that he was "very familiar" with GIPS in 2008 through 2011.[78] Indeed, in his investigative testimony, Zavanelli represented that he was "more than familiar" with GIPS and the "closest thing to an expert" on it present.

In late 2008, ZPRIM dramatically changed the format of its advertisements in a way that excluded the recent poor performance of ZPRIM's SCV composite. Although the new format of the financial results disclosure looked nothing like that used in ZPRIM's prior advertisements or the sample advertisements provided with the GIPS Advertising Guidelines, ZPRIM did not consult with Ashland about it. Because he participated in a telephone conference that discussed the changes to the advertisements, Zavanelli knew the advertisements would diverge from the format specified in the Guidelines. But he specifically instructed the other participants to retain the footnote claiming GIPS compliance. In sum, Zavanelli (and thus ZPRIM) knowingly approved ZPRIM's false claims of GIPS compliance in its late-2008 magazine advertisements.

Respondents make several arguments against a scienter finding; we reject each of them.

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[78] Zavanelli acknowledged that he read the 2005 GIPS when it came out in 2005 and before ZPRIM started advertising in 2008. Zavanelli also read the 2010 GIPS shortly after it was released.

Availability of omitted information: Respondents contend that they did not intend to mislead because ZPRIM disclosed the returns information that it omitted from its advertisements on its website and in its GIPS-compliant presentation. We disagree. Respondents claimed GIPS compliance despite knowing that they had not provided the information required by the GIPS Advertising Guidelines. Their claims of GIPS compliance therefore were knowingly false. That investors might otherwise have discovered the information Respondents omitted from the advertisements does not negate their scienter.

Accuracy of disclosed financial returns: Respondents argue that they were at most negligent with respect to the magazine advertisements because all the financial results disclosed in them were true. But the question is whether Respondents acted with scienter with respect to their claim of GIPS compliance, not whether they made additional misrepresentations.

Motivation for revising advertisement format: Respondents contend, based on Zavanelli's testimony, that ZPRIM changed its 2008 magazine advertisements' format to ensure that they would fit the publication space ZPRIM purchased, not to conceal its poor performance. Respondents ask us to reject Bauchle's contrary testimony, but we find no reason to credit Zavanelli's testimony over Bauchle's on this point. Although the law judge discounted Bauchle's testimony on some points, he found that Bauchle was a "generally believable" witness and explained that "[h]is demeanor on the stand was straightforward and matter-of-fact, and he answered questions with nowhere near the evasiveness and discursiveness of

Max Zavanelli."[79] We accordingly credit Bauchle's testimony over Zavanelli's here.

We also do not find Zavanelli's account credible. He contends that the decision to revise the format of the late-2008 magazine advertisements was a last-minute decision on the day that the advertisements needed to be submitted for publication. But in 2008, advertising was a matter of critical importance to ZPRIM. It was experiencing some of its worst performance and ultimately realized income of less than $7,000 in 2008. Given Zavanelli's level of involvement in ZPRIM's operations and the importance of the advertisements, we find it highly unlikely that he would have left the final decision on their format to the eleventh hour and entrusted it to others. We also find, contrary to Zavanelli's assertion, that ZPRIM could have revised its advertisements to comply with GIPS and still fit the available magazine advertising space that it had purchased.

Zavanelli's claim of "no involvement" in 2008 advertisement creation: Respondents argue that they did not act with scienter because Zavanelli had "no involvement" in creating the late-2008 advertisements. Relying on Zavanelli's testimony, Respondents assert that others designed the advertisements, Zavanelli told

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[79] *See Robert M. Fuller*, Exchange Act Release No. 48406, 56 SEC 976, 2003 WL 22016309, at *7 (Aug. 25, 2003) ("We give considerable weight to the credibility determination of a law judge since it is based on hearing the witnesses' testimony and observing their demeanor." (internal quotation marks and citation omitted)), *petition denied*, 95 F. App'x 361 (D.C. Cir. 2004); *see also Martin R. Kaiden*, Exchange Act Release No. 41629, 54 SEC 194, 1999 WL 507860, at *6 (July 20, 1999) (same).

Bauchle to use the prior format for the late-2008 advertisements but he failed to do so, and Zavanelli never saw the final advertisements until the 2009 examination of ZPRIM.

Even were we to credit each of these factual claims, the record still would disprove Zavanelli's claim of "no involvement" in the advertisements' creation. When David Sappir of ZPR Client Management initially prepared several mockups of advertisements in June 2008, he specifically asked that they be shared with Zavanelli. Zavanelli admits that he discussed the format of the advertisements on a telephone conference and that he approved them. Based on Zavanelli's account of the call, it is clear that he understood that the late-2008 advertisements would not contain the information required by the Guidelines. But Zavanelli instructed that the footnote claiming GIPS compliance be retained. Whether he saw the final advertisements or not,[80] Zavanelli knew that they would not comply with GIPS.[81]

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[80] Given Zavanelli's level of involvement with and control over ZPRIM's business and the importance of the advertisements, we do not find credible his testimony that he never saw the late-2008 advertisements until after the 2009 examination.

[81] Respondents also rely on Zavanelli's physical presence outside the United States as support for his lack of involvement with the new advertisement format. But this does not diminish his responsibility for the advertisements. As Bauchle testified, Zavanelli often worked from outside the United States and still remained in charge of the details of ZPRIM's operations as ZPRIM's "boss man."

Challenge to credibility of specific Bauchle testimony: Respondents challenge the credibility of Bauchle's testimony that he told Zavanelli that the late-2008 advertisements did not comply with the GIPS Advertising Guidelines before they were published. Respondents contend that Bauchle could not have done so because, in January 2008, he raised a GIPS issue with Zavanelli that was not actually a problem under the Guidelines. Bauchle testified that he told Zavanelli that the January 2008 advertisement was not GIPS-compliant because it did not contain one-, three-, and five-year annualized returns. Zavanelli responded that annualized returns were not necessary because the advertisement contained more than five years of annual returns, which the Guidelines authorized as an alternative.

Respondents' argument is puzzling. Bauchle may have been overzealous in identifying GIPS compliance issues in early 2008. But this does not mean he subsequently kept quiet about non-compliant advertisements. In any event, Bauchle's concern regarding one-, three-, and five-year annualized returns did apply to the late-2008 advertisements because they omitted both the relevant annualized returns and five years of annual returns. And based on his experience and knowledge of the GIPS Advertising Guidelines, Zavanelli knew that the late-2008 advertisements did not comply with the Guidelines. He did not need Bauchle to tell him so.

Respondents also assert that Bauchle could not have objected to the late-2008 advertisements because he did not raise any GIPS issues when he reviewed a non-compliant draft advertisement in July 2008. But

although Bauchle initially did not object to that draft advertisement, the record shows that he did raise the GIPS requirement of one-, three-, and five-year annualized results in a September 2008 email regarding advertising on ZPRIM's website. Thus, Bauchle raised issues with ZPRIM's compliance with the Guidelines both before and after he viewed the non-compliant draft advertisement.

Claim that other compliant advertisements establish lack of scienter: Respondents assert that they could not have acted with scienter because advertisements that they published both before and after the late-2008 advertisements contained the financial results required by the Guidelines. But those advertisements support our finding of scienter because they show that Respondents knew how to comply with the Guidelines when they chose to do so.

Claim that Respondents did not intentionally stop sending advertisements to Ashland for review: Respondents assert that they did not intentionally stop sending advertisements to Ashland for review before running the late-2008 advertisements. Even if this is so, it is undisputed that ZPRIM chose not to consult with its GIPS expert before, as Zavanelli testified, it "dramatically changed the format" of its advertisements. And ZPRIM had sent a January 2008 advertisement to Ashland for review earlier in the year. Zavanelli's approval of the revised advertisement format, although ZPRIM had not consulted Ashland about the change, supports our finding of scienter.

2011 magazine advertisements: We also find that ZPRIM, acting through Zavanelli, made the misrepresentations in the 2011 magazine

advertisements with scienter. Zavanelli admitted that he conceived of the format of these advertisements, added the claim of GIPS compliance, and ultimately approved them. He was familiar with the GIPS Advertising Guidelines. And nearly a year earlier, ZPRIM had promised Commission staff that it had taken corrective action to address its false claim of GIPS compliance in the December 2008 advertisements. Based on the facts set forth above, we conclude that Zavanelli intentionally claimed that the 2011 advertisements complied with the Guidelines even though he knew that they did not.

Respondents raise two additional arguments against a finding of scienter with respect to the 2011 magazine advertisements, neither of which we find persuasive. First, Respondents contend that the financial returns they omitted would have shown that ZPRIM had outperformed its benchmarks. But Respondents miss the point. Their misrepresentations of GIPS compliance were false, and they knew them to be so. Rather than provide the information that their claims of GIPS compliance required, they chose to present only the information that presented the firm in the best light, i.e., returns that presented ZPRIM as a number one manager. And even if Respondents' misrepresentations had been unintentional, their conduct would still be reckless because, among other things, the requirements of the GIPS Advertising Guidelines were clear, Respondents had received prior warnings about compliance with the Guidelines from Ashland and Commission staff, and Respondents were not in any way reasonably mistaken as to the Guidelines' requirements.

Second, Respondents contend that "when the total mix of information being disclosed by ZPRIM is considered," a finding of scienter is inappropriate because "no potential harm or danger was created by the 2011 advertisements." Even accepting this assertion for the sake of argument, the Division is not required to establish economic harm to prevail on its claims.[82] Zavanelli's argument also fails because it confuses the concept of materiality, in which it is necessary to consider the total mix of information, with scienter.

2. Acting with scienter, Respondents made material misstatements in their April and December 2009 newsletters regarding GIPS compliance.

We also conclude that Respondents misleadingly claimed GIPS compliance in ZPRIM's April and December 2009 newsletters; these misrepresentations were material; and Respondents made them with scienter.

a. Respondents misleadingly claimed GIPS compliance in ZPRIM's April and December 2009 newsletters.

Respondents misleadingly claimed GIPS compliance in ZPRIM's April and December 2009 newsletters, which Zavanelli authored. As explained below, although those newsletters were advertisements under the GIPS Advertising Guidelines that claimed GIPS compliance, Respondents failed to include the returns mandated by the Guidelines.

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[82] *See supra* note 69 and accompanying text.

Under the plain language of the GIPS Advertising Guidelines, ZPRIM's newsletters are advertisements. The Guidelines define advertisement to include "any materials that are distributed to or designed for use in newspapers, magazines, FIRM brochures, letters, media, or any other written or electronic material addressed to more than one prospective client," as well as "[a]ny written material (other than one-on-one presentations and individual client reporting) distributed to maintain existing clients or solicit new clients."[83] ZPRIM posted its newsletters on its website and distributed them to persons other than clients, including industry participants who might be in a position to recommend ZPRIM to potential clients. Moreover, as Zavanelli agreed, the newsletters "helped [him] maintain [recipients] as clients."

Respondents claimed GIPS compliance in the newsletters. In the April 2009 newsletter, Respondents stated in a footnote linked to disclosure of performance results for the SCV composite that ZPRIM's "compliance with the Global Investment Performance Standards (GIPS®) ha[d] been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through September 30, 2008." In the December 2009 newsletter, Respondents stated that "[a]ll numbers are GIPS compliant" in a section disclosing the performance of ZPRIM's International Equity Global and SCV composites. A reasonable investor[84]

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[83] 2005 GIPS at 33, Appendix C (Definition of Advertisement).

[84] *Cf. Omnicare, Inc. v. Laborers Dist. Council Const. Indust. Pension Fund*, 135 S. Ct. 1318, 1321, 575 U.S. --- (2015) ("[W]hether a statement is 'misleading' depends on the perspective

would have believed that, as advertisements disclosing performance information, the newsletters complied with the Advertising Guidelines.[85]

But the newsletters did not comply with the Guidelines because Respondents omitted financial results required by them. In the April 2009 newsletter, Respondents failed to include: (1) period-to-date results and (2) either one-, three-, and five-year cumulative annualized composite returns or five years of annual composite returns. In the December 2009 newsletter, Respondents failed to disclose period-to-date results for its International Equity Global and Fundamental Small Cap Value composites, as well as other required returns.[86] In the December 2009 newsletter, Respondents instead presented various results showing ZPRIM's composites as the best performing or a top ten performing composite over selected periods. Because Respondents did not comply with the GIPS Advertising Guidelines, their claims of GIPS compliance in the

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of a reasonable investor: The inquiry (like the one into materiality) is objective.").

[85] *See* 2005 GIPS at 33 ("[S]hould a GIPS-compliant FIRM choose to advertise performance results, the FIRM MUST apply . . . the GIPS Advertising Guidelines in order to include a claim of compliance with the GIPS standards."); 2005 GIPS at iii (explaining that GIPS "includes guidelines for claiming compliance with the GIPS standards in advertisements").

[86] Respondents failed to disclose either three-year returns or five years of annual returns for the International Equity Global composite, either of which would have satisfied the Guidelines. Respondents also failed to disclose either three- and five-year returns or five years of annual returns for the SCV composite.

April and December 2009 newsletters were misleading.[87] We reject Respondents' contrary arguments for the reasons discussed below.

April 2009 newsletter: Respondents assert that ZPRIM did not make a claim of GIPS-compliance in the April 2009 newsletter "in the context of being required to follow the GIPS Advertising Guidelines." Respondents contend that the "article" in the April 2009 newsletter that claimed GIPS compliance did not "promote ZPRIM or solicit any new clients." Rather, it "was simply designed to illustrate a point that was totally unrelated to marketing or advertising," i.e., that the elimination of the uptick rule affected the performance of ZPRIM's SCV composite.[88]

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[87] ZPRIM's claim in its April 2009 newsletter that its compliance with GIPS had been verified "from December 31, 2000 through September 30, 2008" may have been literally true because Ashland did verify ZPRIM's GIPS compliance over that period. But a literally accurate statement may still be misleading. *McMahan & Co. v. Wherehouse Entm't, Inc.*, 900 F.2d 576, 579 (2d Cir. 1990) ("Some statements, although literally accurate, can become, through their context and manner of presentation, devices which mislead investors."); *see also IFG Network Sec., Inc.*, Exchange Act Release No. 54127, 2006 WL 1976001, at *10 (July 11, 2006) (finding that although disclosed information was "literally true," it was misleading). We find that ZPRIM's April 2009 claim of GIPS compliance is such a statement because it conveyed that ZPRIM complied with GIPS, although ZPRIM had not complied with the Advertising Guidelines.

[88] The uptick rule was a limitation on certain forms of short-selling that was eliminated in July 2007. Regulation SHO and Rule 10a-1, Exchange Act Release No. 55970 (June 28, 2007), 72 Fed. Reg. 36348 (July 3, 2007). Following notice and comment, we adopted Rule 201, the alternative uptick rule, in February 2010. *See*

Contrary to Respondents' argument, the GIPS Advertising Guidelines consider a document as a whole to determine if it is an advertisement.[89] As explained above, the newsletter was an advertisement under the Guidelines because, at a minimum, it was used to maintain clients.[90] Moreover, Respondents also used the "article" at issue to maintain clients by attempting to explain SCV's past performance and attribute it to an external factor (the uptick rule), thereby portraying ZPRIM in the best possible light.

December 2009 newsletter: Respondents argue that the December 2009 newsletter did not claim GIPS compliance because, in a section entitled "GIPS Compliance," they stated that the newsletter "remain[ed] not GIPS compliant." Respondents assert that because the GIPS Advertising Guidelines apply only when a firm claims compliance, they did not apply to the December 2009 newsletter.

We do not agree that Respondents' disclaimer of GIPS compliance with respect to the newsletter as a whole negated their earlier specific claim of GIPS

Amendments to Regulation SHO, Exchange Act Release No. 61595 (Feb. 26, 2010), 75 Fed. Reg. 11232 (Mar. 10, 2010).

[89] *See* 2005 GIPS at 33, Appendix C (providing Definition of Advertisement which discusses status of "newspapers, magazines, FIRM brochures, letters, media, or any other written or electronic material addressed to more than one prospective client").

[90] *See supra* note 83 and accompanying text.

compliance.[91] At best, Respondents' statements, taken together, convey that ZPRIM was claiming to be partially compliant with GIPS. But because GIPS prohibits claims of partial compliance,[92] Respondents' statements were misleading.[93]

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[91] *Cf. Philip L. Spartis*, Exchange Act Release No. 64489, 2011 WL 1825026, at *10 n.42 (May 13, 2011) (finding that boilerplate disclaimers were ineffective where they did not adequately address the misleading aspects of the document); *Kenneth R. Ward*, Exchange Act Release No. 47535, 56 SEC 236, 2003 WL 1447865, at *10 n.42 (Mar. 19, 2003) (concluding that "'boilerplate' disclaimers in no way overrode Ward's unqualified recommendations regarding specific securities"), *aff'd*, 75 F. App'x 320 (5th Cir. 2003); *Brian Prendergast*, Exchange Act Release No. 44632, 55 SEC 289, 2001 WL 872693, at *6 n.15 (Aug. 1, 2001) (finding that "generic disclaimer" "failed to cure specific misleading aspects" of document at issue).

[92] *See* 2005 GIPS at 8, Section II.0.A.8. ("If the FIRM does not meet all the REQUIREMENTS of the GIPS standards, the FIRM cannot represent that it is 'in compliance with the Global Investment Performance Standards except for . . .'"); 2005 GIPS at 8, Section II.0.A.9. ("Statements referring to the calculation methodology used in a COMPOSITE presentation as being 'in accordance [or compliance] with the Global Investment Performance Standards' are prohibited.").

[93] In addition, Feliz testified that "claiming all numbers are GIPS compliant," as Respondents did in the December 2009 newsletter, "is not a valid statement because firms are GIPS compliant, not numbers." Feliz also explained that "[t]ypically, Ashland's stance is that referencing GIPS in other ways [i.e., without a claim of compliance] is misleading because it's – it's speaking to somebody's compliance without meeting all the requirements of the standards."

b. Respondents' misrepresentations in ZPRIM's newsletters were material.

Respondents' claims of GIPS compliance in ZPRIM's April and December 2009 newsletters were also materially misleading. By failing to provide the returns required by the Guidelines, Respondents denied potential clients information necessary to make informed investment decisions, while representing that ZPRIM offered the benefits of GIPS compliance, including comparability of results.[94]

Respondents make three contrary arguments, each of which we find unconvincing. First, Respondents repeat their argument that their misstatements were immaterial because the information they failed to disclose was available through other sources. We reject this argument for the reasons stated above.[95]

Second, Respondents assert that their claims of GIPS compliance in the April 2009 newsletter were immaterial because they made them in connection with a discussion of the uptick rule, and the omitted information would not have changed investors' minds about that rule. But materiality focuses on the significance of omitted information to an investment decision, not a regulation.[96] Investors would have considered the performance results that Respondents

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[94] *See supra* section IV.A.1.b.

[95] *See supra* section IV.A.1.b. (availability of omitted information through other means).

[96] *See supra* note 56 and accompanying text.

failed to disclose important to their decision whether to invest their money with ZPRIM.[97]

Third, Respondents argue that their general disclaimer of GIPS compliance in their December 2009 newsletter renders their earlier specific claim of GIPS compliance in the same newsletter immaterial. But as explained above,[98] when read together, these statements are still materially misleading.[99]

c. ZPRIM, through Zavanelli, acted with scienter with respect to the April and December 2009 newsletters.

We also find that ZPRIM, through Zavanelli, acted with scienter with respect to ZPRIM's April and December 2009 newsletters. At a minimum, Zavanelli was reckless in falsely claiming GIPS compliance in the newsletters. He was familiar with the GIPS Advertising Guidelines and devised the format of ZPRIM's initial advertisements. By November 2008, Ashland had informed ZPRIM that, because its newsletter claimed GIPS compliance and showed performance results, ZPRIM needed to attach a GIPS-compliant presentation or follow the GIPS Advertising

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[97] *See supra* note 94 and accompanying text.

[98] *See supra* notes 92 and 93 and accompanying text.

[99] *Cf. Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097-98 (1991) ("The point of a proxy statement, after all, should be to inform, not to challenge the reader's critical wits. Only when the inconsistency would exhaust the misleading conclusion's capacity to influence the reasonable shareholder would a § 14(a) action fail on the element of materiality.").

Guidelines. But when Bauchle followed this advice on one occasion, Zavanelli instructed him not to so do again. And Zavanelli also did not follow the Guidelines with respect to either 2009 newsletter at issue. Under the circumstances, Respondents' false claims of GIPS compliance were reckless if not intentional.

Respondents raise several arguments against a finding of scienter, each of which we reject. First, Respondents contend that Zavanelli believed in good faith that the newsletters were not advertisements and thus reasonably understood that the GIPS Advertising Guidelines did not apply. Even assuming that Zavanelli sincerely held this view, his conduct was still reckless because that view was so objectively unreasonable under the circumstances that Zavanelli must have been aware of the risk of misleading investors.[100] As explained above, the Guidelines, with which Zavanelli concedes he was familiar, define advertisements to include–any written material (other than communications with a single person) "distributed to maintain existing clients or solicit new clients."[101] Zavanelli testified that he did not believe the newsletter was an advertisement because it was not used to solicit new clients. But ZPRIM posted the newsletter on its website and distributed it to persons other than clients, including industry participants who might be in a position to recommend ZPRIM to potential clients. And even assuming that the

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[100] *See Sundstrand Corp.*, 553 F.2d at 1045; *accord SEC v. Platforms Wireless Intern. Corp.*, 617 F.3d 1072, 1093 (9th Cir. 2010).

[101] 2005 GIPS at 33 (emphasis added).

newsletter did not solicit new clients, Zavanelli conceded that it helped ZPRIM maintain its existing clients.[102]

Second, Respondents contend that they did not act with scienter because they otherwise disclosed the information they omitted from the newsletters. But as explained above, the availability of the omitted information through other means does not establish that Respondents' claim of GIPS compliance was not knowingly or recklessly false.[103] And to the extent that Respondents contend that they deliberately excluded information required by the Guidelines from the newsletters based on its availability through alternative means, they confirm that they intentionally failed to follow the Guidelines, while simultaneously claiming GIPS compliance.[104]

Third, Respondents assert that Zavanelli did not learn that Ashland had sent ZPRIM a 2010 letter identifying GIPS-compliance options for its newsletter until after Ashland terminated its relationship with ZPRIM in July 2010. But Ashland's 2010 letter is not

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[102] Zavanelli testified that he sent the investment reports to current clients "[t]o keep them informed of our performance, why we were winning, why we were losing, what w[ere] our future expectations." He also agreed that part of the reason for the investment reports was to make sure that clients understood that they should stay with ZPR because it was following a long-term strategy.

[103] *See supra* section IV.A.1.b. (availability of omitted information through other means).

[104] *Id.*

relevant to Respondents' scienter with respect to the 2009 newsletters.[105] Ashland told ZPRIM in writing in 2008 and 2009 that it needed to either attach a GIPS-compliant presentation to the newsletter or follow the GIPS Advertising Guidelines. Zavanelli was aware of this advice. Indeed, he dismissed it as alarmism in the December 2009 newsletter in which he expressed regret over Bauchle's prior distribution of the GIPS-compliant presentation and stated that he would not follow the Guidelines with respect to the newsletter.

3. ZPRIM violated Advisers Act Sections 206(2) and (4) with respect to its Morningstar report for the period ended September 30, 2010 and violated Sections 206(1), (2), and (4) with respect to the Morningstar report for the period ended March 31, 2011.

As explained below, ZPRIM made additional false statements in its Morningstar reports for the periods ended September 30, 2010 and March 31, 2011; these statements were material; ZPRIM negligently made the false statements in the Morningstar report for the period ended September 30, 2010; and ZPRIM made the false statement in the Morningstar report for the period ended March 31, 2011 with scienter. Accordingly, we conclude that ZPRIM violated Advisers

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[105] In any event, it strains credulity to accept that Zavanelli had no knowledge of the 2010 letter until after Ashland terminated its relationship with ZPRIM. Respondents offer no reason why Bauchle (the letter's recipient) would not have forwarded the letter to Zavanelli given Zavanelli's personal engagement with Ashland regarding the newsletters' GIPS compliance.

Act Sections 206(2) and (4) with respect to the 2010 Morningstar report and violated Sections 206(1), (2), and (4) with respect to the 2011 Morningstar report.

a. ZPRIM made three false statements in the Morningstar reports.

ZPRIM made three false statements in its Morningstar reports for the periods ended September 30, 2010 and March 31, 2011. First, in its September 30, 2010 Morningstar report, ZPRIM stated that Ashland had verified its "GIPS compliance for the period December 31, 2000 to the present." This statement was false because Ashland had resigned as ZPRIM's verification firm in July 2010 and its final report attesting to ZPRIM's GIPS compliance did not cover any period after December 31, 2009.[106] Second, in that same report ZPRIM asserted that it was not under a "Pending SEC investigation." This statement was also false because, as the Division of Enforcement had informed ZPRIM no later than August 16, 2010, Commission staff was "conducting an investigation" of ZPRIM. Third, ZPRIM repeated this false statement in the March 31, 2011 Morningstar report.

b. ZPRIM's Morningstar report misrepresentations were material.

GIPS verification claim: ZPRIM's false claim of GIPS verification in its Morningstar report for the period ended September 30, 2010 was material. It would have significantly altered the total mix of

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[106] *See* 2005 GIPS at 21, Section III.A.4. ("Without . . . a report from the verifier, the FIRM cannot state that its claim of compliance with the GIPS standards has been verified.").

information for an investor to have learned that Ashland had not verified ZPRIM's GIPS compliance through "the present," i.e., approximately September 30, 2010, as ZPRIM had represented. Although optional, verification bas become a de facto requirement for an adviser to be considered by institutional investors and also provides "marketing advantages."[107] ZPRIM's misstatement was material because it allowed ZPRIM to obtain these benefits without verification,[108] and it concealed that Ashland had resigned because it could not obtain sufficient comfort to continue to attest to the firm's claim of GIPS compliance.[109]

Respondents argue that their false claim of GIPS verification in 2010 was immaterial because another verifier, Alpha Performance Verification Services, issued a GIPS verification report for ZPRIM in 2011 covering 2010. But Alpha did not issue its verification report until February 4, 2011. A reasonable investor

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[107] 2005 GIPS at 21; *see also* 2005 GIPS at 21, Section III.A.2. ("Third-party verification brings credibility to the claim of [GIPS] compliance and supports the overall guiding principles of full disclosure and fair representation of investment performance.")

[108] *Cf. S.W. Hatfield, CPA*, 2014 WL 6850921, at *6 (finding that misrepresentation that audit report had been signed by a CPA was material because, among other things, "[a]n audit report signed by a CPA is important to investors because it provides an independent evaluation of the issuer's financial position by a qualified professional on whose expertise investors can rely").

[109] *Cf.* Form 8-K, Instruction to Item 4.01 (specifying that "[t]he resignation or dismissal of an independent accountant, or its refusal to stand for re-appointment, is a reportable event"), *available at* https://www.sec.gov/about/forms/form8-k.pdf.

would have considered it significant that no verification report existed when ZPRIM falsely claimed that it had been verified "to the present," i.e., around September 30, 2010. Moreover, ZPRIM specifically represented that its GIPS compliance had been verified "by Ashland Partners & Company LLP." But Ashland never reached a "necessary level of comfort" to allow it to do so for 2010. Alpha's belated verification report does not cure ZPRIM's failure to disclose Ashland's resignation.

Commission investigation: ZPRIM's false statements in its Morningstar reports for the periods ended September 30, 2010 and March 31, 2011 that it was not under investigation by the Commission were also material. A reasonable investor would have found it significant to its decision whether to entrust money to ZPRIM for management that ZPRIM was under investigation by Commission staff.[110]

Respondents argue that these misrepresentations were not material because Morningstar did not require ZPRIM to disclose the existence of a Commission investigation unless and until the Commission filed particular charges against it. Respondents base their argument on language in the relevant Morningstar data entry form asking whether there was a "Pending

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[110] *See SEC v. Merkin*, No. 11-23585-CIV, 2012 WL 5245561, at *7 (S.D. Fla. Oct. 3, 2012) ("Clearly, there is a substantial likelihood that a reasonable investor would consider the fact that the SEC was investigating StratoComm for violation of securities laws and the details of the investigation important in deciding whether to buy or sell StratoComm stock."); *cf. In re Geniva Sec. Litig.*, 932 F. Supp. 2d 352, 387 (E.D.N.Y. 2013) (citing cases in which substantial stock price drop followed company's announcement of Commission investigation).

SEC Investigation Charge." According to Respondents, no charge existed until the Commission issued the OIP.

Respondents' argument fails because ZPRIM's reports unambiguously stated that there were "No" "Pending SEC Investigations." The reports do not refer to "Investigation Charge[s]." A reasonable investor would have understood that there was no ongoing investigation of ZPRIM.

c. ZPRIM, through Bauchle, acted negligently with respect to its Morningstar report for the period ended September 30, 2010.

We find that ZPRIM, through Bauchle, acted at least negligently with respect to the Morningstar report for the period ended September 30, 2010. Because the Division did not appeal the law judge's dismissal of its scienter-based claims with respect to this report, the question of whether Bauchle acted with scienter is not before us.[111] Negligence requires a showing that the defendant failed to exercise reasonable care.[112] Because investment advisers and their associated persons are fiduciaries, they are charged with the affirmative duty of "utmost good faith, and full and fair disclosure of all material facts" and the obligation "to employ reasonable care to avoid

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[111] *See supra* note 4.

[112] *Ira Weiss*, Exchange Act Release No. 52875, 58 SEC 977, 2005 WL 3273381, at *12 (Dec. 2, 2005) (citing *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 453-54 (3d Cir. 1997)), *petition denied*, *Weiss v. SEC*, 468 F.3d 849 (D.C. Cir. 2006).

misleading" their clients through half-truths or incompletely volunteered information.[113]

We find that ZPRIM breached its duty of reasonable care with respect to the Morningstar report for the period ended September 30, 2010. Although Ashland notified ZPRIM of its resignation as of June 9, 2010, neither Bauchle nor anyone else at ZPRIM corrected ZPRIM's statement that Ashland had verified ZPRIM's GIPS compliance "to the present." Bauchle testified that he originally included this language in the database so he would not have to update ZPRIM's disclosure each quarter to change the end date of the verification period. ZPRIM acted negligently by relying on this practice after Ashland had resigned.[114]

In addition, ZPRIM was informed of the existence of the Commission investigation no later than August 16, 2010, but neither Bauchle nor anyone else at ZPRIM disclosed it in connection with the September 30, 2010 Morningstar report. By failing to update the Morningstar database, ZPRIM (through Bauchle) was, at a minimum, negligent.

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[113] *SEC v. Capital Gains Research Bureau*, 375 U.S. at 191, 194; *see, e.g.*, *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633) at *7 & n.44 (Sept. 26, 2007), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008).

[114] Moreover, ZPRIM's use of "to the present" language was also negligent because, as Bauchle knew, Ashland typically did not issue its quarterly verification reports until sometime after the quarter had closed. Thus, even before Ashland resigned as ZPRIM's verifier it was not accurate for ZPRIM to claim that it had been verified "to the present."

d. ZPRIM, through Bauchle, acted with scienter with respect to the Morningstar report for the period ended March 31, 2011.

We also find that ZPRIM, through Bauchle, acted with scienter with respect to ZPRIM's Morningstar report for the period ended March 31, 2011, in which ZPRIM falsely stated that there were "No" "Pending SEC Investigations." At the time of the report, Bauchle knew that ZPRIM was under investigation. ZPRIM had been informed of the investigation no later than August 16, 2010, and retained counsel in connection with the investigation by August 30, 2010. Bauchle gave investigative testimony on October 14, 2010, and Division counsel specifically informed him that he was testifying in connection with a Commission investigation. He nonetheless intentionally failed to disclose it in ZPRIM's Morningstar report for the period ended March 31, 2011.

Respondents rely on Bauchle's testimony that, although ZPRIM knew of the investigation, it "didn't feel that it was a real investigation" until the OIP was issued. As explained above, ZPRIM had been notified in writing that it was under investigation, and Bauchle specifically had been informed of the same during his investigative testimony. These statements were unequivocal and left no room for confusion; any contrary view is so objectively unreasonable that Bauchle must have known that claiming that ZPRIM was not the subject of a pending investigation would be misleading.

Respondents also rely on the text of Morningstar's online input form. They assert that the form requires

firms to disclose only "Pending SEC Investigation Charge[s]," and that these charges do not exist until an OIP is issued. But it was Zavanelli, not Bauchle, who advanced this theory at the hearing.[115] And because Zavanelli disclaimed any role in preparing the Morningstar reports, his testimony is irrelevant.[116] Bauchle explained that he was influenced by ZPRIM's internal attempts to minimize the importance of the investigation. He did not claim to have parsed the language of the Morningstar database input form.

Respondents also suggest that ZPRIM did not act with scienter with respect to the 2011 Morningstar report because those reports are available only to certain fee-paying Morningstar clients. But fee-paying clients and those persons to whom ZPRIM sent the reports were entitled to accurate information from ZPRIM.[117]

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[115] Zavanelli also testified that Morningstar agreed with his interpretation of the input form. As support, Zavanelli cited a conversation that his son, Mark Zavanelli, ostensibly had with Morningstar but did not recount in his own testimony at the hearing. We do not find this convincing.

[116] Zavanelli also testified that ZPRIM "didn't consider we had a formal investigation until the Wells notice of June 2012."

[117] *Cf. Dolphin & Bradbury*, 2006 WL 1976000, at *9 (explaining that "the protection of the antifraud provisions of the securities laws extends to sophisticated investors as well as those less sophisticated").

B. ZPRIM also violated Advisers Act Rule 206(4)-1(a)(5) through each of its misrepresentations.

ZPRIM violated Advisers Act Rule 206(4)-1(a)(5) through each of the misrepresentations discussed above. Rule 206(4)-1(a)(5) prohibits registered investment advisers from directly or indirectly publishing, circulating, or distributing any advertisement that "contains any untrue statement of a material fact, or which is otherwise false or misleading."[118]

Each of the requirements for liability is satisfied with respect to the misstatements at issue in this case. First, ZPRIM was a registered investment adviser at the time of the misstatements. Second, each of the magazine advertisements, newsletters, and Morningstar reports constituted advertisements under the broad definition set forth in Rule 206(4)-1(b).[119] Third, ZPRIM directly or indirectly published, circulated, and distributed these advertisements. Finally, as explained above, each advertisement contained a false or misleading statement of material fact.

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[118] 17 C.F.R. § 275.206(4)-1(a)(5). The Rule also applies to investment advisers required to be registered under Advisers Act Section 203. 15 U.S.C. § 80b-3.

[119] Rule 206(4)-1(b) broadly defines advertisement to include any "any notice or other announcement in any publication," which offers any "investment advisory service with regard to securities." 17 C.F.R. § 275.206(4)-1(b).

C. Zavanelli also violated the Advisers Act.

1. Zavanelli violated Advisers Act Sections 206(1) and (2) in connection with the charged magazine advertisements and newsletters.

We also find that Zavanelli is primarily liable under Advisers Act Sections 206(1) and (2) for ZPRIM's false and misleading magazine advertisements and newsletters.[120] Associated persons who fall under the statutory definition of investment adviser, which includes "any person who, for compensation, engages in the business of advising others . . . as to the advisability of investing in, purchasing, or sel ling securities,"[121] may be subject to liability under Section 206.[122] It is undisputed that Zavanelli qualifies as an investment adviser under the statutory standard because he provided investment advisory services to others for money, which he concedes he continues to do. Because he approved, authored, or directly made, the false and misleading statements in ZPRIM's magazine

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[120] The OIP did not charge Zavanelli with primary violations of Advisers Act Section 206(4) or Rule 206(4)-1(a)(5), which rule applies only to registered investment advisers. In addition, the Division did not appeal the law judge's finding that Zavanelli was not primarily liable for ZPRIM's Morningstar reports.

[121] Advisers Act Section 202(a)(11), 15 U.S.C. § 80b-2(a)(11).

[122] *Warwick Capital*, 2008 WL 149127, at *9 n.37 ("We have held that an associated person may be charged as a primary violator under Section 206 where his activities cause him to meet the 'broad' definition of 'investment adviser.'" (quoting *Kenny*, 2003 WL 21078085, at *17 & n.54)); *see also* 15 U.S.C. § 80b-6 (making certain conduct "unlawful for any investment adviser").

advertisements and newsletters, acting with scienter, Zavanelli violated Sections 206(1) and (2) in connection with these misstatements.

2. Zavanelli also aided, abetted, and caused ZPRIM's violations of Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5) with respect to the magazine advertisements and newsletters.

We also find that Zavanelli is secondarily liable for the misrepresentations in ZPRIM's magazines and newsletters. To hold Zavanelli liable for aiding and abetting, we must find that ZPRIM committed primary violations of the securities laws; Zavanelli substantially assisted ZPRIM's conduct constituting the primary violations; and Zavanelli provided that assistance with the requisite scienter.[123] Zavanelli acted with scienter if he knew of, or recklessly disregarded, the wrongdoing and his role in furthering it.[124]

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[123] *See Brendan E. Murray*, Advisers Act Release No. 28519, 2008 WL 4964110, at *5 (Nov. 21, 2008) (citing *Robert J. Prager*, Exchange Act Release No. 51974, 58 SEC 634, 646 & n.17 (July 6, 2005) (citing additional cases)); *accord v. Finance Invs. Inc.*, Exchange Act Release No. 62448, 2010 WL 2674858, at *13 (July 2, 2010) (citing *Graham v. SEC*, 222 F.3d at 1000).

[124] *Murray*, 2008 WL 4964110, at *5 (citing *e.g.*, *Monetta Fin. Servs., Inc. v. SEC*, 390 F.3d 952, 956 (7th Cir. 2004); *Howard v. SEC*, 376 F.3d 1136, 1143, 1149 (D.C. Cir. 2004); *Graham v. SEC*, 222 F.3d at 1000)); *accord Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874, at *10 n.16 (Feb. 27, 2012) ("The scienter requirement for aiding-and-abetting liability in administrative proceedings may be satisfied by evidence that the respondent knew of, or recklessly disregarded, the wrongdoing and

Under this standard, we find that Zavanelli aided and abetted ZPRIM's violations relating to its magazine advertisements and newsletters. First, ZPRIM violated Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5) with respect to those advertisements, as explained above. Second, Zavanelli substantially assisted ZPRIM's violations in that he either drafted or approved the false or misleading documents. And third, for the reasons explained above, Zavanelli provided the assistance with the requisite scienter. We accordingly find that Zavanelli aided and abetted ZPRIM's violations in connection with its magazine advertisements and newsletters, and thus also caused them.[125]

In contrast, we cannot discern, on the record before us, the role that Zavanelli played with respect to the misstatements in ZPRIM's Morningstar reports. Accordingly, we dismiss the allegations that he caused those violations.

V.

The law judge permanently barred Zavanelli from association with any investment adviser, broker,

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his or her role in furthering it."), *petition denied sub nom.*, *SEC v. Collins*, 736 F.3d 521 (D.C. Cir. 2013).

[125] *Warwick Capital*, 2008 WL 149127, at *7 n.21 (explaining that finding that respondent willfully aided and abetted primary violations "necessarily makes him a 'cause' of those violations" (citing *Sharon M. Graham*, Exchange Act Release No. 40727, 53 SEC 1072, 1998 WL 823072, at *7 n.35 (Nov. 30, 1998), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000))); *Richard D. Chema*, Exchange Act Release No. 40719, 53 SEC 1049, 1998 WL 820658, at *6 n.20 (Nov. 30, 1998) (same).

dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization (an "industry bar"); censured ZPRIM; imposed cease-and-desist orders with respect to Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5); and ordered ZPRIM to pay a civil money penalty of $250,000 and Zavanelli to pay a civil money penalty of $660,000. We impose essentially the same sanctions, with the exception of the civil money penalty against Zavanelli, which we reduce in light of our dismissal of the Morningstar allegations against him.[126]

A. Zavanelli is barred from the securities industry.

We find it appropriate to impose an industry bar against Zavanelli based on his misconduct between 2008 and 2011. Advisers Act Section 203(f) authorizes us to impose an industry bar on any person who, at the time of the misconduct, was associated with an investment adviser if we find that the person willfully violated or "aided, abetted, counseled, commanded, induced, or procured" a violation of the securities laws and the bar is in the public interest.[127] At the time of his misconduct, Zavanelli was associated with ZPRIM, an investment adviser. As explained below, we find that Zavanelli's misconduct was willful and that an industry bar is in the public interest.

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[126] The law judge imposed civil money penalties on Zavanelli for the three Morningstar misrepresentations.

[127] 15 U.S.C. § 80b-3(f) (referencing, among other provisions, Advisers Act Section 203(e)(5), (6), 15 U.S.C. § 80b-3(e)(5), (6) (referencing willful violations of the securities laws, among other things)).

1. Zavanelli willfully violated, and willfully aided and abetted violations of, the securities laws.

Zavanelli willfully violated, or aided and abetted violations of, Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5) thereunder. To find willfulness, it is sufficient that the respondent "intentionally commit[ed] the act which constitutes the violation."[128] There is no requirement that the respondent "also be aware" that he "violat[ed] one of the Rules or Acts."[129] We find that the willfulness standard is satisfied because Zavanelli intentionally authored or approved the advertisements and investment reports containing the misrepresentations at issue.

2. Imposing an industry bar on Zavanelli is in the public interest.

We find that imposing an industry bar on Zavanelli would serve the public interest. In determining the public interest, we consider, among other things, "the egregiousness of a respondent's actions, the degree of scienter involved, the isolated or recurrent nature of the infraction, the recognition of the wrongful nature of the conduct, the sincerity of any assurances against future violations, and the likelihood that the respondent's occupation will present opportunities for

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[128] *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (internal citation omitted).

[129] *Id.* (internal citation omitted).

future violations."[130] Our inquiry into the public interest "is flexible, and no single factor is dispositive."[131] We find that an industry bar is necessary to protect the public interest for the reasons set forth below.[132]

Egregiousness and scienter: Zavanelli's conduct was egregious and he acted with a high degree of scienter. Despite his knowledge and familiarity with GIPS, Zavanelli flouted the requirements of the GIPS Advertising Guidelines and guidance that Ashland, ZPRIM's GIPS verification firm, provided. In 2008, during some of ZPRIM's worst performance, Zavanelli approved a dramatic change to its advertising format that concealed that ZPRIM's SCV composite had experienced substantial losses and was underperforming its benchmark in 2008. With respect

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[130] *Robert L. Burns*, Advisers Act Release No. 3260, 2011 WL 3407859, at *8 (Aug. 5, 2011) (citing *Steadman v. SEC*, 603 F.2d at 1140).

[131] *Id.* (citing *Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004)).

[132] Courts have rejected Zavanelli's argument that before we impose a bar we also must "explain why a less drastic remedy would not suffice." *See, e.g.*, *PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009) (concluding that "the petitioners err in arguing the Commission must, in order to justify expulsion as remedial, state why a lesser sanction would be insufficient" and stating that, so long as a sanction is remedial and not punitive, the Court would "not require the Commission to choose the least onerous of the sanctions meeting those requirements"); *cf. Sheldon v. SEC*, 45 F.3d 1515, 1517 n.1 (11th Cir. 1995) (explaining that "the Commission's choice of sanction may be overturned only if it is found 'unwarranted in law or . . . without justification in fact'" (quoting *Steadman*, 603 F.2d at 1140)).

to the 2009 newsletters, Zavanelli chose not to follow the GIPS Advertising Guidelines or distribute a GIPS-compliant presentation in defiance of Ashland's advice. Zavanelli's justification for doing so — a personal understanding of the meaning of advertisement — was inconsistent with the plain language of the definition provided in the Guidelines. And Zavanelli made additional false claims of GIPS compliance in 2011 after ZPRIM promised Commission staff it had taken corrective action with respect to such claims.

We are unpersuaded by Zavanelli's arguments that his conduct was not egregious for several reasons. First, Zavanelli argues that "so far as Zavanelli is concerned, more than 45% of the violations – five out of the 11 – involved either 'relatively low' or no scienter."[133] But as explained above, we find that Zavanelli acted with a high degree of scienter with respect to the six 2008 and 2011 magazine advertisements, and that he was, at a minimum, reckless with respect to the two 2009 newsletters. These recurrent fraudulent misrepresentations, regardless of the percentage they make up of the total violations, are egregious.[134]

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[133] The eleven violations that Zavanelli references are the three 2008 advertisements, the two 2009 newsletters, the three 2011 advertisements, and the three misrepresentations contained in the 2010 and 2011 Morningstar reports.

[134] Zavanelli's resort to a percentage-based approach to scienter is misguided. Depending on the circumstances, it may be appropriate to bar a respondent based on a single violation. If such a respondent also committed a negligence-based violation, at least 50% of his violations would not involve scienter. But that

Second, Zavanelli argues that he did not cause any direct financial harm to investors and made no money from the misrepresentations, and that ZPRIM's false claims of compliance with the GIPS Advertising Guidelines are less serious than false statements of performance that are inconsistent with the GIPS Performance Standards. But Zavanelli's conduct harmed the market generally because he disseminated false information regarding his firm's GIPS compliance and denied investors the ability to make direct comparisons between ZPRIM's performance and that of other investment advisers.[135] Moreover, we have imposed bars where misconduct did not cause financial harm or lead to monetary gain for the respondent.[136] To the extent that the absence of pecuniary harm and

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additional violation would not make the respondent any less culpable or a bar less appropriate than if the respondent committed only the single violation.

[135] *See Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *5 (July 26, 2013) ("Although the record does not contain evidence of direct investor harm, 'our focus is on the welfare of investors generally and the threat one poses to investors and the markets in the future.'" (*quoting Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *9 n.41 (Feb. 13, 2009))).

[136] *See, e.g.*, *Seghers v. SEC*, 548 F.3d 129, 136 (D.C. Cir. 2008) (noting that in imposing a permanent bar we "considered the fact that Seghers did not benefit financially from his conduct"); *Kornman*, 2009 WL 367635, at *9 (declining to give mitigating weight to fact that "no particular investor was directly harmed by [the] conduct"); *see also Korem*, 2013 WL 3864511, at *5 (rejecting respondent's argument that his conduct was not egregious because there was no harm or loss).

benefit is mitigating, it is outweighed by the other factors we consider.

Third, Zavanelli asserts that there was no possibility that any investor would be misled by ZPRIM's false claims of GIPS compliance because ZPRIM otherwise disclosed the financial returns it failed to include in its advertisements. We disagree for the reasons set forth above.[137]

Fourth, Zavanelli asserts that his conduct was less serious than that in other cases in which we and the courts declined to impose permanent bars of various types. But "[t]he employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."[138] In any event, the cases that Zavanelli cites are distinguishable.[139]

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[137] *See supra* section IV.A.1.b. (availability of omitted information through other means).

[138] *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973).

[139] In *SEC v. Benger*, the court declined to impose a penny stock bar where, unlike here, the defendant's misconduct (as an escrow agent) was non-fraudulent, he was "a cog in the machinery of the overall scheme," and his decades-long career had been "unblemished." 64 F. Supp. 3d 1136, 1140, 1143, 1144-45 (N.D. Ill. 2013). Similarly, in imposing a six-month suspension in *Leo Glassman*, we noted that the respondent had not violated the anti-fraud provisions of the securities laws, and we observed that he cooperated, told the full truth, and appeared genuinely contrite. Exchange Act Release No. 11929, 46 SEC 209, 1975 WL 160418, at *2 (Dec. 16, 1975). And in *SEC v. Metcalf*, the court relied on the defendant's lack of any other reported violations (unlike this case)

Recurrence: Zavanelli's conduct was recurrent. In 2008, 2009, and 2011, Zavanelli either authorized or authored multiple advertisements that claimed GIPS compliance but did not comply with the GIPS Advertising Guidelines. Zavanelli conceived of and approved the 2011 advertisements after ZPRIM promised the previous year to take corrective action. And although we do not consider it part of Zavanelli's current misconduct, we note that, in 1987, we accepted an offer of settlement from Zavanelli and Zavanelli Portfolio Research, censured them for violations of Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5), and prohibited them from soliciting or accepting new advisory clients for 180 days.[140] This disciplinary history further weighs in favor of a bar.

Zavanelli argues that ZPRIM's six false magazine advertisements arose from "just two distinct publishing decisions" in 2008 and 2011 and that it accordingly is a "distortion" to characterize them as recurrent. Yet Zavanelli concedes that "[t]he same sin was committed

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to limit the length of penny stock and officer and director bars to five years. No. 11 Civ. 493 (CM), 2012 WL 5519358, at *7 (S.D.N.Y. Nov. 13, 2012).

[140] Order Instituting Public Proceedings Pursuant to Section 203(e) and 203(f) of the Investment Advisers Act of 1940, Making Findings and Imposing Remedial Sanctions, *Max Edward Zavanelli*, Advisers Act Release No. 1077, 1987 WL 755988, at *3 (Aug. 17, 1987). We found that Zavanelli and ZPRIM's predecessor had disclosed investment results that included three years during which no actual trading occurred and filed a Form ADV stating that Zavanelli had earned a doctorate from Columbia University, which he never completed. The respondents consented to the findings without admitting or denying them.

in each of the six ads – the inclusion of a footnote statement that ZPRIM was GIPS-compliant without setting forth all information called for by GIPS Advertising Guidelines." In other words, the same misstatement recurred at least six times.[141]

No recognition of wrongful conduct: Zavanelli does not genuinely recognize the wrongfulness of his conduct. Instead, he contends that he did nothing improper because, although ZPRIM's claims of compliance with the Advertising Guidelines were false, investors could have found the information omitted from the advertisements elsewhere. And Zavanelli blames others for the 2008 advertisements he concedes he approved.[142]

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[141] Zavanelli argues that, in *Benger*, the defendant's involvement in 1400 transactions was not deemed recurrent. But in that case, the court assessed the propriety of sanctions for a single count of failing to register as a broker-dealer, not repeated misrepresentations. 64 F. Supp. 3d at 1138. And Zavanelli's reliance on *In re Reserve Fund Securities and Derivative Litigation*, for the proposition that his conduct was not recurrent is also misplaced. There, the court concluded that the infractions were isolated occurrences where it found that the "wrongful conduct took place over a period of less than 36 hours," and the prior violations of one defendant did not involve the same or similar illegal conduct. No. 09 MD.2011(PCG), 2013 WL 5432334, at *20, *23 (S.D.N.Y. Sept. 30, 2013). In contrast, Zavanelli's misconduct here spanned years and he previously consented to Commission findings that he violated the same statutory and regulatory provisions at issue here by misleading investors.

[142] *See vFinance Invs., Inc.*, 2010 WL 2674858, at *15 ("As we have stated, 'attempts to shift blame are additional indicia of [a respondent's] failure to take responsibility for his actions.'" (quoting *Clyde J. Bruff*, Exchange Act Release No. 40583, 53 SEC

Zavanelli presents several contrary arguments, but we find each of them lacking. First, Zavanelli asserts that he recognized that his conduct was wrongful because he admitted that the 2008 and 2011 magazine advertisements did not follow the Guidelines. But conceding that the advertisements did not comply with the Guidelines is not the same thing as recognizing that, under the circumstances, Respondents' claims of GIPS compliance were wrongful. Zavanelli still attempts to minimize the gravity of his misconduct, and he continues to assert that the 2009 newsletters did not violate the Guidelines.

Second, Zavanelli asserts that "[h]is willingness to take on a lesser role and fewer responsibilities for ZPRIM is a clear acceptance of responsibility." Again, we are not convinced. Zavanelli's transfer of ownership of ZPRIM to his son and his resignation from management positions were business decisions, not acceptance of responsibility for his misconduct. In any event, Zavanelli continues to manage ZPRIM's investments and retains substantial input into other decisions.

Third, Zavanelli argues that, in imposing sanctions, the law judge was improperly swayed by Zavanelli's "pugnacious personality," as reflected by his behavior at the hearing and his investigative testimony. Zavanelli has a right to vigorously contest liability. But his continued insistence that his newsletters did not need to comply with the Guidelines in the face of contrary advice from the expert GIPS verification firm

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880, 1998 WL 730586, at *5 (Oct. 21, 1998), *petition denied*, 198 F.3d 253 (9th Cir. 1999))).

he retained and his assertion that ZPRIM's false claims of GIPS compliance are not actionable because investors might have found the omitted information elsewhere show a lack of understanding of the antifraud provisions that endangers the investing public. Zavanelli's failure to recognize the wrongfulness of his conduct is relevant to our consideration of the public interest[143] and demonstrates a risk of future violations.[144]

Inadequacy of assurances against misconduct: We also are not convinced by Zavanelli's assurances against future misconduct. He asserts that there is no likelihood of future violations because he currently plays a limited role with ZPRIM, his son now owns and controls it, and ZPRIM has hired an outside compliance firm. But Zavanelli continues to provide investment

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[143] *Seghers v. SEC*, 548 F.3d at 136-37 (rejecting argument that the Commission violated respondent's due process rights by taking into account his failure to recognize the wrongfulness of his conduct); *see also SEC v. Lipson*, 278 F.3d 656, 664 (7th Cir. 2002) ("[A]cceptance of responsibility for illegal conduct is a routine and unexceptionable feature even of criminal, let alone of civil, punishment.").

[144] *Wendy McNeeley, CPA*, Exchange Act Release No. 68431, 2012 WL 6457291, at *18 (Dec. 13, 2012) (finding that, while the respondent had the right to present a vigorous defense, her testimony and arguments on appeal reflected a continuing failure to grasp her role as a professional); *cf. SEC v. Lipson*, 278 F. 3d at 664 ("The criminal who in the teeth of the evidence insists that he is innocent, that indeed not the victims of his crime but he himself is the injured party, demonstrates by his obduracy the likelihood that he will repeat his crime, and this justifies the imposition of a harsher penalty on him. . . . It makes no difference whether, as in this case, the government is seeking only a civil remedy.").

advisory services,[145] and even after his son joined ZPRIM Zavanelli continued to give input into a great many areas, including GIPS compliance. Nor are we convinced that Zavanelli's son and outside consultants effectively could prevent Zavanelli from engaging in future misconduct.

Zavanelli's occupation will present opportunities for future violations: Zavanelli would remain involved in an occupation that would present opportunities for future violations. As noted, Zavanelli wishes to continue to work in ZPRIM's core investment advisory business.

The factors discussed above and Zavanelli's serious misconduct demonstrate his unfitness for the securities industry in general. The risks to customers from misrepresentations of the sort in which Zavanelli engaged exist throughout the industry. Indeed, each area covered by the industry bar "presents continual opportunities for [similar] dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence."[146] We find that an industry

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[145] Specifically, Zavanelli asserts that "[h]is only function for ZPRIM is to provide investment advice to clients and manage or co-manage ZPRIM's composites." In other words, Zavanelli concedes that he remains engaged in ZPRIM's core business.

[146] *Seghers*, 2007 WL 2790633, at *7; *see also Charles Phillip Elliot*, Exchange Act Release No. 31202, 50 SEC 1273, 1992 WL 258850, at *3 (Sept. 17, 1992) (noting that the industry "presents many opportunities for abuse and overreaching"), *aff'd*, 36 F.3d 86 (11th Cir. 1994).

bar[147] will protect investors from future violations by Zavanelli.[148]

B. Cease-and-desist orders are appropriate with respect to each Respondent.

We also find it appropriate to issue cease-and-desist orders against Respondents. Advisers Act Section 203(k)(1) authorizes the Commission to impose a cease-and-desist order on any person we find has violated or a caused a violation of the Advisers Act or rules thereunder.[149] In determining whether a cease-and-desist order is appropriate, we consider, among other things, the same factors used in determining whether a bar is in the public interest. We also take into account "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings."[150] In

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[147] Although some of Zavanelli's misconduct occurred before the effective date of the Dodd-Frank Act (July 22, 2010), we find that Zavanelli's 2011 misconduct, which authorized ZPRIM's repeated false claims of GIPS compliance despite its representation to Commission staff that it would cease those misrepresentations, amply supports imposing an industry bar on him.

[148] Respondents do not challenge the law judge's censure of the firm, and we find it is in the public interest to censure ZPRIM for its willful violations of the Advisers Act. Advisers Act Section 203(e)(5), 15 U.S.C. § 80b-3(e)(5).

[149] 15 U.S.C. § 80b-3(k)(1).

[150] *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 54 SEC 1135, 2001 WL 47245, at *26 (Jan. 19, 2001), *petition denied*,

addition, we consider the risk of future violations.[151] Although "'some' risk is necessary, it need not be very great to warrant issuing a cease-and-desist order."[152] "Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation."[153]

We find it is appropriate to order ZPRIM and Zavanelli to cease and desist from committing or causing violations or future violations of Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5).[154] Our findings with respect to the imposition of an industry bar strongly support the need for a serious sanction against Zavanelli and ZPRIM. Respondents' violations occurred within the last four to seven years. Although the Division does not point to evidence of substantial harm to investors, Respondents provided false information to the marketplace regarding ZPRIM's GIPS compliance and verification. A cease-and-desist order will play a substantial remedial role with respect to ZPRIM considering that we have not revoked its registration as an investment adviser.

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289 F.3d 109 (D.C. Cir. 2002); *see also Herbert Moskowitz*, Exchange Act Release No. 45609, 55 SEC 658, 2002 WL 434524, at *8 (Mar. 21, 2002).

[151] *KPMG Peat Marwick*, 2001 WL 47245, at *26.

[152] *Id.* at *24.

[153] *Id.*

[154] The law judge also ordered Zavanelli to cease and desist from aiding and abetting such violations. But Advisers Act Section 203(k)(1) does not grant this authority; it authorizes cease-and-desist orders that prohibit "committing or causing" violations.

Finally, we find that Respondents' recurrent misconduct, as well as Zavanelli's prior regulatory violations, establish the risk of future violations necessary to impose cease-and-desist orders.[155]

C. Second-tier civil money penalties are appropriate.

We also find it appropriate to order ZPRIM and Zavanelli to pay civil money penalties. Advisers Act Section 203(i)(1) authorizes the Commission to assess civil money penalties, among other things, where a respondent has willfully violated any provision of the federal securities laws or the rules or regulations thereunder or willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person.[156] We apply a three-tier system of civil penalties. Each tier is applicable to increasingly serious misconduct and subject to progressively higher maximum penalties,[157] which are periodically adjusted.[158]

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[155] *See supra* note 151 and accompanying text.

[156] 15 U.S.C. § 80b-3(i)(1).

[157] Advisers Act Section 203(i)(2)(A)-(C), 15 U.S.C. § 80b-3(i)(2)(A)-(C).

[158] 17 C.F.R. §§ 201.1003, 1004, and 1005 (effecting adjustment of civil monetary penalties for violations after, respectively, February 14, 2005, March 3, 2009, and March 5, 2013), Tables III, IV, and V to Subpart E of Part 201 (specifying such adjusted penalty amounts); *see also* Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, ch. 10, sec. 31001 (providing for, among other things, periodic adjustment of penalty amounts).

In considering whether a penalty is in the public interest, we may consider (1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the harm to other persons resulting either directly or indirectly from such act or omission; (3) the extent to which any person was unjustly enriched, taking into account any restitution made to injured persons; (4) any previous Commission, other regulatory agency, or SRO findings that the person violated federal or state securities laws or SRO rules, court orders enjoining the person from violations of such laws or rules, or specified felony or misdemeanor convictions; (5) the need to deter such person and other persons from committing such acts or omissions; and (6) such other matters as justice may require.[159] In addition, as relevant here, second-tier penalties require a showing that the act or omission giving rise to the penalty "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement."[160]

Respondents repeatedly violated the antifraud provisions with scienter. Respondents' misconduct was especially serious because it involved attempts to promote their firm through false claims of GIPS

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[159] Advisers Act Section 203(i)(3), 15 U.S.C. § 80b-3(i)(3).

[160] Advisers Act Section 203(i)(2)(B), 15 U.S.C. § 80b-3(i)(2)(B). Third-tier penalties may be imposed on an additional showing that the violation "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain" to the violator. Advisers Act Section 203(i)(2)(C), 15 U.S.C. § 80b-3(i)(2)(C).

compliance or verification or by concealing the existence of a Commission investigation. The market was harmed by Respondents' misrepresentations, but the Division has not sought to quantify any unjust enrichment to Respondents. Zavanelli previously settled an enforcement proceeding with the Commission involving misrepresentations. There is a need to deter Respondents from committing future acts or omissions because, among other things, their conduct was egregious and recurrent, they ignored the advice of their verification firm, and they repeated their misconduct after ZPRIM represented to Commission staff that it would correct its noncompliance.

With respect to Zavanelli, we find it appropriate to impose a maximum second-tier penalty for each of his eight violations of the Advisers Act. We accordingly assess a $65,000 civil money penalty for each of the three 2008 advertisements ($195,000 total) and a $75,000 penalty for each of the three 2011 advertisements and two 2009 newsletters (an additional $375,000), for a total of $570,000.[161] Because we find that Zavanelli acted with scienter, we reject his argument that first-tier penalties are appropriate because his conduct was only negligent.

ZPRIM also violated the statute on eleven occasions. But below, the Division requested only a single second-tier penalty. We find that the law judge appropriately

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[161] As stated above, we reduce the civil money penalties ordered by the law judge in light of our finding that the record does not support causing liability for Zavanelli with respect to the Morningstar reports.

issued a penalty of two-thirds of the statutory maximum, i.e., $250,000. Such a penalty takes into account ZPRIM's efforts under Mark Zavanelli to comply with its disclosure obligations, as well as the impact that the industry bar on Max Zavanelli will have on ZPRIM.

An appropriate order will issue.[162]

By the Commission (Chair WHITE and Commissioners AGUILAR and STEIN; Commissioner PIWO WAR concerning in part and dissenting with respect to the finding that ZPR Investment Management, Inc., violated Advisers Act Section 206(1) in connection with the Morningstar report for the period ended March 31, 2011).

Brent J. Fields
Secretary

/s/Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

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[162] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

APPENDIX D

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4249

Admin. Proc. File No. 3-15263

[Filed October 30, 2015]

In the Matter of	)
	)
ZPR INVESTMENT MANAGEMENT, INC., and MAX E. ZAVANELLI.	)

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Max E. Zavanelli be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and it is further

ORDERED that ZPR Investment Management, Inc., be censured for violations of Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-1(a)(5) thereunder; and it is further

ORDERED that ZPR Investment Management, Inc., and Max E. Zavanelli cease and desist from committing or causing any violations or future violations of Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-1(a)(5) thereunder; and it is further

ORDERED that ZPR Investment Management, Inc., pay a civil money penalty of $250,000; and it is further

ORDERED that Max E. Zavanelli pay civil money penalties of $570,000.

Payment of the civil money penalties shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed to Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding.

By the Commission.

Brent J. Fields
Secretary

APPENDIX E

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

INITIAL DECISION RELEASE NO. 602
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15263

[Filed May 27, 2014]

In the Matter of	)
	)
ZPR INVESTMENT MANAGEMENT, INC., and MAX E. ZAVANELLI	)
	)

INITIAL DECISION

APPEARANCES: Amie Riggle Berlin and Robert K. Levenson representing the Division of Enforcement, Securities and Exchange Commission

Philip J. Snyderburn and K. Michael Swann representing Respondents ZPR Investment Management, Inc., and Max E. Zavanelli

BEFORE: Cameron Elliot, Administrative Law Judge

SUMMARY

This Initial Decision (ID) finds that Respondent ZPR Investment Management, Inc. (ZPRIM) violated Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 (Advisers Act) by misrepresenting compliance with Global Investment Performance Standards (GIPS) in magazine advertisements and investment report newsletters, and violated Advisers Act Sections 206(2) and 206(4) and Advisers Act Rule 206(4)-(a)(5) by making misrepresentations to Morningstar, Inc. (Morningstar), resulting in two false Morningstar reports on ZPRIM, and that Respondent Max E. Zavanelli (Max Zavanelli) aided and abetted ZPRIM's violations of Sections 206(1), 206(2), and 206(4) regarding the magazine advertisements and investment report newsletters. The ID orders, as to ZPRIM, censure, a cease-and-desist order, and civil penalties of $250,000, and as to Max Zavanelli, a permanent bar from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization, a cease-and-desist order, and civil penalties of $660,000.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) issued its Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on April 4, 2013, pursuant to Sections 203(e), 203(f), and 203(k) of the Advisers Act, and Section 9(b) of the Investment Company Act of 1940 (Investment

Company Act). ZPRIM and Max Zavanelli (collectively, Respondents) filed a joint Answer on April 29, 2013.

A hearing was held on September 30, 2013, and October 1, 15-17, and 24-25, 2013, at the Commission's headquarters in Washington, D.C. The admitted exhibits are listed in the Record Index issued by the Secretary of the Commission on May 5, 2014. The Division of Enforcement (Division) and Respondents thereafter filed post-hearing briefs and post-hearing reply briefs by December 19, 2013.[1]

On September 23, 2013—the day on which the hearing was originally scheduled to commence—the parties asked for a one-day continuance so that the Division and Respondents could explore production of an internal electronic portal (ZPR Portal) used by Respondents that the Division alleged ZPRIM withheld from production during the Commission's investigation. Tr. 6-8. The Division represented that it learned about the ZPR Portal on September 22, 2013, during preparation of a witness, and that the parties would need more time to determine what information should be produced and whether the data was available. Tr. 6-8. I adjourned the hearing until the next day. Tr. 12. On September 24, 2013, the parties requested a multi-week continuance to work on outstanding issues surrounding the ZPR Portal. Tr. 17-39. I denied the

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[1] Citations to the transcript of the hearing are noted as "Tr. __." Citations to exhibits offered by the Division and Respondents are noted as "Div. Ex. __" and "Resp. Ex. __", respectively. The Division's and Respondents' post-hearing briefs are noted as "Div. Br. __."and "Resp. Br. __.", respectively. The Division's and Respondents' post-hearing reply briefs are noted as "Div. Reply __" and "Resp. Reply__," respectively.

request, but granted the parties a one-week continuance, to September 30, 2013, to regroup and recall witnesses. Tr. 34-35. On October 1, 2013, the Division requested that I issue a subpoena to ZPRIM to produce documents from the ZPR Portal and communications from ZPRIM's email system, which I issued (Trial Subpoena). Tr. 315, 323. ZPRIM produced approximately 860,000 documents from the portal and ZPRIM email system to the Division by October 11, 2013. Respondents' Initial Notice of Partial Compliance With Trial Subpoena (filed Oct. 8, 2013); Respondents' Second Notice of Partial Compliance With Trial Subpoena (filed Oct. 11, 2013); see Tr. 571-72. On October 11, 2013, counsel for ZPRIM filed a request for temporary relief from further production in order to focus efforts on representing the Respondents at the hearing. Respondents' Motion for Temporary Relief From Compliance With Trial Subpoena (filed Oct. 11, 2013). I granted a stay of the Trial Subpoena on October 11, 2013, and I subsequently deemed production under the Trial Subpoena complete. Tr. 1341-42.

B. Summary of Allegations

The instant proceeding concerns allegedly misleading performance return advertisements by Respondents, arising from Respondents' failure to comply with GIPS. GIPS is a standardized set of voluntary, ethical principles for investment advisers; it is published by the CFA Institute, is based on ideals of full disclosure and fair representation, and includes guidance on how to calculate and to report investment performance results to prospective clients. OIP at 3. GIPS includes specific guidelines required for

performance advertisements, when those advertisements claim GIPS compliance. Id. The OIP alleges that ZPRIM, through Max Zavanelli, made false claims that its performance result presentations complied with GIPS in six magazine advertisements in October, November, and December 2008, and in February and May 2011. Id. at 2-5. The OIP alleges that by omitting GIPS-required information in the October, November, and December 2008 advertisements, ZPRIM concealed the fact that it was underperforming one of its benchmarks rather than outperforming it. Id. at 1-2. The OIP further alleges that: ZPRIM, through Max Zavanelli, distributed monthly investment report newsletters that advertised performance returns while falsely claiming GIPS compliance in April and December 2009; ZPRIM, through Max Zavanelli, advertised performance returns in reports published by Morningstar, for the periods ending September 30, 2010, and March 31, 2011, during the Commission's investigation of ZPRIM, falsely claiming in both that there was no pending investigation by the Commission; ZPRIM, through Max Zavanelli, falsely claimed in the September 30, 2010, Morningstar report that performance returns of ZPRIM's Fundamental Small Cap Value Composite (SCV Composite) had been "audited" by Ashland Partners & Company, LLP (Ashland), instead of correctly reporting that Ashland had "verified" the results' compliance with GIPS; and the September 30, 2010, Morningstar report falsely claimed that Ashland had audited ZPRIM's SCV Composite performance returns for the period "December 31, 2000 to the present,, when Ashland had resigned as ZPRIM," GIPS verifier in July 2010, and Ashland's last attestation

report for ZPRIM concerned results for the period ended December 31, 2009. Id. at 5-6.

The OIP alleges that ZPRIM willfully violated Sections 206(1) and 206(2). of the Advisers Act; that Max Zavanelli violated or, in the alternative, aided and abetted and caused ZPRIM's violations of Sections 206(1) and 206(2) of the Advisers Act; and that ZPRIM willfully violated, and Max Zavanelli aided and abetted and caused ZPRIM's violations of, Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder by advertising untrue statements of material fact. Id.

Respondents admit in their Answer that the six magazine advertisements from October, November, and December 2008, and February and May 2011, standing alone, fail to comply with GIPS advertising guidelines, but deny that the advertisements constitute materially misleading claims of performance returns. Answer at 3-6. Respondents deny that the April and December 2009 investment report newsletters failed to comply with GIPS or were misleading. Id. at 6. Respondents admit that the September 30, 2010, Morningstar report incorrectly stated that Ashland "audited" its performance results and had not attested to performance results past December 31, 2009, but aver that these were typographical errors and were not materially misleading. Id. at 6-7. Respondents deny that ZPRIM falsely indicated in the September 30, 2010, and March 31, 2011, Morningstar reports that there was no pending Commission investigation. Id. at 7. Respondents deny violating the Advisers Act and the rules thereunder. Id. at 7-9.

II. FINDINGS OF FACT

The findings and conclusions herein are based on the entire record. I applied preponderance of the evidence as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 102 (1981). I have considered and rejected all arguments, proposed findings, and conclusions that are inconsistent with this ID.

A. Background

1. Max Zavanelli

Max Zavanelli was sixty-seven years old at the time of the hearing. Tr. 1350. He earned a bachelor's degree in business administration from Baruch College and attended four years of a Ph.D. program in finance at Columbia University's business school, but left before graduating. Tr. 1357-58. After working for a couple of years at Mellon Bank in Pittsburgh as a senior financial analyst and at American National Bank of Chicago as a stock market theoretician and investment strategies analyst, he created Zavanelli Portfolio Research in 1979, through which he sold financial research to institutions and money managers. Tr. 739, 1358-61. In 1982, prompted by research subscribers, he registered Zavanelli Portfolio Research as an investment adviser. Tr. 1361.

In 1987, the Commission made findings, pursuant to an offer of settlement from Max Zavanelli and Max Zavanelli d/b/a Zavanelli Portfolio Research, that he, without admitting or denying any allegations, violated Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) for performance return claims in a 1986 Form ADV and for claims regarding his educational background in a 1982 Form ADV. Tr. 1362-67; Div. Ex.

12; Resp. Ex. 33. Max Zavanelli and Zavanelli Portfolio Research were censured and prohibited from soliciting or accepting new clients for 180 days. Div. Ex. 12 at 3. Zavanelli has had no disciplinary issues with the Commission since the 1987 order. Tr. 742, 752, 1367-68.

In 1991, Max Zavanelli moved from Chicago, Illinois, to teach and manage a student investment fund at Stetson University in Deland, Florida, and he moved his research and money management business with him. Tr. 1368-70. In 1994, he split Zavanelli Portfolio Research into three separate companies: ZPRIM, ZPR International, and ZPR Investment Research. Tr. 741-42, 1371. ZPR Investment Research is no longer active. Tr. 329. In 1998, ZPR International was re-headquartered in Lithuania and continues to provide money management services outside of the United States; ZPR International operates independently from ZPRIM and has separate personnel. Tr. 175, 327, 1376. ZPR International's offices in Lithuania house ZPR Service Co., a research company that provides research to ZPRIM. Tr. 328. Max Zavanelli is currently a forty-nine percent owner of ZPR International. Tr. 1375.

Max Zavanelli spends only about a quarter of his time in the United States. Tr. 786. Ted Bauchle (Bauchle), a former ZPRIM employee, testified that Max Zavanelli still made all day-to-day decisions for ZPRIM until his son, Mark Zavanelli, took over as president and chief compliance officer, despite Max Zavanelli spending little time in the United States. Tr. 145-46, 753. Max Zavanelli was responsible for, and had final authority over, the creation, distribution, and

publication of all marketing and advertising materials for ZPRIM, prior to the time Mark Zavanelli became president and chief compliance officer. Tr. 1483-84, 1695-96; Div. Ex. 89 at 29. Max Zavanelli admitted that he was responsible for ensuring that ZPRIM's marketing materials were GIPS compliant and for making all claims of GIPS compliance on ZPRIM's behalf. Tr. 1557; Div. Ex. 89 at 46. According to Bauchle, Max Zavanelli was the "boss man," and he made all decisions. Tr. 429.

Max Zavanelli believes be is "possibly the best money manager," because of his "spectacular" numbers. Tr. 1715. He testified that a twenty-year study of ZPRIM's returns showed his performance second among money managers. Tr. 1715. Only Peter Lynch of Fidelity had better performance, "but be didn't have as long a track record." Tr. 1715.

Max Zavanelli was the president of ZPRIM from its inception, and chief compliance officer from 2009 to 2011; in 2011, he turned both roles over to Mark Zavanelli. Tr. 753, 1482, 1599. Until December 2011, Max Zavanelli "made all final decisions on behalf of" ZPRIM. Tr. 1833. He remains heavily involved in ZPRIM business, and continues to serve as ZPRIM's director and treasurer. Tr. 757-58, 1228-29, 1480, 1612-13, 1615; Div. Ex. 98. He regularly consults with Mark Zavanelli, and they discuss and make many decisions together about ZPRIM. Tr. 1599-1600, 1612-13. But, according to Max Zavanelli, Mark Zavanelli now makes all final, non-investment decisions. Tr. 1600, 1608. Max Zavanelli continues to make investment decisions for ZPRIM and receives daily reports from ZPRIM on performance and valuation. Tr. 1608.

2. ZPRIM

ZPRIM is a registered investment adviser located in Orange City, Florida. Tr. 1361, 1370; ZPRIM Form ADV filed December 12, 2013 (2013 Form ADV).[2] As of its last Form ADV, filed December 12, 2013, ZPRIM had approximately 105 clients and approximately $164 million in assets under management. 2013 Form ADV. ZPRIM began with four employees when it opened in 1994, has fluctuated in size to as many as sixteen employees, and currently has five employees. Tr. 1371, 1850. ZPRIM maintains several composites, including the SCV Composite, the Global Equity Composite, the Earnings Quality and True Profitability (EQTP) Composite, and the All Asian Composite. Tr. 216, 418, 553; Div. Ex. 21; Resp. Ex. 16.

Until October 2011, Max Zavanelli owned one hundred percent of ZPRIM and was ZPRIM's president and chief compliance officer. Tr. 761-62, 1744. That month, Max Zavanelli transferred twenty-five percent of the company's shares to his son, Mark Zavanelli, in addition to making him president and chief compliance officer of ZPRIM. Tr. 761-62, 1744. Mark Zavanelli testified that he maintains final authority on all non-investment decisions, but that he frequently consults and makes decisions with his father. Tr, 1762, 1785-86. On September 30, 2013, during the pendency of the hearing, Max Zavanelli transferred the remaining seventy-five percent stake in ZPRIM to Mark Zavanelli,

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[2] ZPRIM's most recent Form ADV was not introduced as an exhibit in the proceeding, but I take official notice of it as a document in the public official records of the Commission, pursuant to Rule 323 of the Commission's Rules of Practice. 17 C.F.R. § 201.323.

making Mark Zavanelli the one-hundred percent owner of ZPRIM. Tr. 761, 1615. Max Zavanelli testified that the arrangement for Mark Zavanelli to join ZPRIM always included a transfer of one-hundred percent ownership, but that the formal change in control took nearly two years due to legal and regulatory hurdles. Tr. 761, 1616-17.

A composite is an aggregation of individual investment portfolios representing a similar investment objective or strategy. See Div. Ex. 25 at App. E. ZPRIM's composites have had good years and some bad years, and performance in parts of 2008 and 2009 was particularly poor. The April 30, 2009, board minutes reported that ZPRIM realized income of less than $7,000 in 2008. Tr. 1216-17; Div. Ex. 79. Max Zavanelli loaned ZPRIM money at least twice in 2009, in the amounts of $60,000 and $75,000. Tr. 1218-19, 1426-27; Div. Exs. 80, 82, 83. In March 2008, ZPRIM's SCV Composite recorded its worst, or close to its worst, month ever as compared to its Russell 2000 Index benchmark. Tr. 1497; Div. Ex. 18. The SCV Composite continued to underperform its benchmark intermittently through early 2009, though it outperformed another benchmark, the S&P 500 Index, in some of those same months. Tr. 1681-83; Div. Ex. 18.

Other than the 1987 settlement with the Commission, involving its predecessor, Zavanelli Portfolio Research, ZPRIM has not had any regulatory issues. Tr. 742.

3. Significant ZPRIM Employees and Related Parties

Ruth Ann Fay (Fay), Max Zavanelli's ex-wife, has worked for ZPRIM since 1994. Tr. 1227. Fay graduated with a bachelor's degree from Grinnell College and has a law degree from the John Marshall Law School. Tr. 1227. Fay was previously a licensed attorney in Illinois, but has not been licensed to practice law anywhere since sometime prior to 1993. Tr. 1228. Between 2006 and April 2009, Fay was ZPRIM's chief compliance officer.[3] Tr. 1229. Fay stepped down as chief compliance officer following concerns from Commission staff that Fay was not particularly capable, which they discovered during an examination of ZPRIM in February 2009. Tr. 1282-83. After Max Zavanelli took over as chief compliance officer, Fay remained at ZPRIM as a director and corporate secretary, reporting to Max Zavanelli, and after 2011, to Mark Zavanelli. Tr. 1228-29.

Bauchle received a bachelor's degree from, and was a student of Max Zavanelli's at, Stetson University; ZPR Investment Research subsequently hired him

[3] Fay testified that she became chief compliance officer in 2006, and that prior to 2006, when ZPRIM registered as an investment adviser after a gap in registration, the position of chief compliance officer did not exist. Tr. 1229, 1289. Max Zavanelli referred to her as the firm's chief compliance officer beginning when the firm first registered in 1994. Div. Ex. 89 at 21-22. Fay was apparently involved in a quasi-legal and compliance type role from 1994 onward.

around 1994.[4] Tr. 139, 142. After two years at ZPR Investment Research, Bauchle began working at ZPRIM, beginning as a trader, then manager of operations, and eventually Vice President, though his duties did not change when he became Vice President. Tr. 142-44. Bauchle was considered "number two" at ZPRIM, behind Max Zavanelli. Tr. 266.

Max Zavanelli terminated Bauchle on April 13, 2013, nine days after the OIP was issued. Tr. 140. Bauchle testified that Max Zavanelli terminated him because he thought Bauchle had made inculpatory statements against ZPRIM and Max Zavanelli during his 2011 testimony in the Commission's investigation into ZPRIM and Max Zavanelli. Tr. 141. He added that Max Zavanelli terminated him by telephone and that Max Zavanelli told him the termination decision was also based upon an issue regarding Bauchle's failure to

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[4] Respondents attempted to paint Bauchle as a "disgruntled" former employee with a grudge to settle for his termination from ZPRIM in April 2013. Tr. 19. As noted infra, particular instances of Bauchle's testimony were not credible. However, his testimony overall was generally believable. Despite a lack of incentive to do so due to his largely retaliatory firing by Max Zavanelli, Bauchle continued to defend some of Max Zavanelli's and ZPRIM's conduct against Division contentions; his 2011 investigative testimony, that was perceived as damaging by Respondents, occurred while he was still employed by ZPRIM; and at several points in his testimony, Bauchle readily admitted to facts that made him look unwise, including admitting that he was incorrect that there had been no notice of an investigation prior to the OIP. See, e.g., Tr. 266-68, 361, 400, 422-23, 437-38. Bauchle has never been the subject of a Commission action or civil suit. Tr. 362-63. His demeanor on the stand was straightforward and matter-of-fact, and he answered questions with nowhere near the evasiveness and discursiveness of Max Zavanelli. See generally infra.

follow firm billing protocols. Tr. 413-14. Bauchle did not think that his billing practices had been a problem. Tr. 414-15. Max Zavanelli testified that be terminated Bauchle due to multiple factors, including failure to perform duties required of Bauchle's position, stating that he had "gotten lazy;" for making purportedly false statements to the Commission during Bauchle's 2011 investigative testimony; and for defiantly choosing to leave for vacation at a time when ZPRIM was to meet with counsel regarding how to respond to the Division's Wells notice. Tr. 1470-79. Max Zavanelli excoriated Bauchle in a February 18, 2012, email, before ZPRIM received its Wells notice, for "what [Bauchle] said in the deposition." Div. Ex. 102. Bauchle's wife, Amy Bauchle, also worked at ZPRIM between 2005 and April 13, 2013, and resigned the day Bauchle was terminated. Tr. 141. Amy Bauchle performed administrative duties for ZPRIM, including maintaining a log of potential investor contacts and sending out marketing material to potential investors. Tr. 1142, 1428; Resp. Ex. 12.

Bauchle was responsible for maintaining monthly and annual composite calculations. Tr. 177. Bauchle was also responsible for producing daily reports, with returns for each of the securities in the composites, and cash sheets. Tr. 177-78.

In 2007, David Sappir (Sappir),[5] after meeting Max Zavanelli in 2006 or 2007, created ZPR Client Management, an independent entity wholly owned by Sappir. Tr. 1131-32. ZPR Client Management entered into a contract with ZPRIM in 2007 to provide marketing support to ZPRIM, including soliciting customers to invest with ZPRIM. Tr. 1133-34; Div. Ex. 59. The agreement between ZPRIM and ZPR Client Management provides ZPR Client Management with a thirty percent commission on fees referred to ZPRIM. Tr. 1136, Div. Ex. 59. ZPR Client Management's duties include marketing to potential and prospective ZPRIM clients and maintaining a log of Form ADV delivery and customer contact. Tr. 1140; Div. Ex. 59 at 2. ZPR Client Management's telephone number is typically included as the contact number for ZPRIM in advertisements. Tr. 1141. Sappir acted as the first contact level for ZPRIM's potential customers, and if they were interested, he would forward their contact information to ZPRIM, which would send a package of information to the potential clients. Tr. 1141. ZPR Client Management has no clients other than ZPRIM. Tr. 1134.

4. Mark Zavanelli

Mark Zavanelli received a bachelor's degree from the University of Pennsylvania's Wharton School of

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[5] Sappir has a bachelor's degree and a master of business administration from the State University of New York at Albany, graduating in 1983 and 1985, respectively. Tr. 1130-31. Prior to opening ZPR Client Management, he was a registered representative of Punk Ziegel, a brokerage firm. Tr. 1131. He previously held Series 7, 24, and 63 licenses, but they have all lapsed. Tr. 1132.

Business in 1992. Tr. 1739. After graduating, he worked for ZPRIM for two to three years before leaving to participate in several "entrepreneurial type" activities. Tr. 1297, 1739. In 1998, Mark Zavanelli began working at Oppenheimer Funds as a security analyst, and he rose to become manager to several funds, including its Main Street Fund, which was comprised of large cap investments, and its Main Street Small Cap Fund. Tr. 1739-40. Mark Zavanelli also became the co-head of one of Oppenheimer Funds' investment teams before leaving in 2009. Tr. 1739, 1840. He has received several awards, including being named more than once to Barron's top 100 managers list. Tr. 1741. Mark Zavanelli has been a chartered financial analyst (CFA) since 1997, having completed the courses and tests administered by the CFA Institute. Tr. 1298. He did not collect a salary as an employee of any company between the time he left Oppenheimer Funds in 2009 and when he joined ZPRIM in 2011. Tr. 1840.

B. GIPS

1. Background

GIPS is a set of voluntary ethical standards that investment firms can choose to follow for reporting investment performance results. Tr. 903. It was developed to standardize performance result reporting to provide comparability and facilitate investor confidence in reported returns. Tr. 903; Div. Exs. 25, 26. It is considered a "best practice" in the investment industry. Tr. 903. GIPS is voluntary, but if a firm claims that it complies with GIPS, it has an ethical obligation to follow all of the standards and requirements. Tr. 904. Firms that do not meet all of

GIPS' requirements cannot represent that they are in compliance with GIPS. Tr. 938, 1090; Div. Ex. 25 at 16.

The CFA Institute administers GIPS and administered GIPS' predecessor standards, the Association for Investment Management and Research standards (AIMRS). Tr. 441-42, 615-16, 907, 1743-44. GIPS was first published in 1999; it was first amended in 2005 (2005 GIPS Guidelines) and amended again in 2010 (2010 GIPS Guidelines). Tr. 925; Div. Exs. 25, 26. GIPS has become almost mandatory for firms seeking institutional investors. Tr. 904-05. Firms that are not GIPS compliant are unlikely to appear in final searches by institutional investors. Tr. 905.

2. Performance Return Calculations, Disclosures, and Reporting

Firms claiming GIPS compliance are required to lump all fee-paying, discretionary accounts into composites that are defined according to investment strategy. Div. Ex. 25 at 10; Div. Ex. 26 at 16. Firms must clearly define their composites and adhere to their definitions as long as they claim GIPS compliance. Tr. 633-34, 978; Div. Ex. 25 at 19; Div. Ex. 26 at 16. Carve-outs—where a firm carves out an asset class from a multiple asset portfolio for which returns are presented as part of a single composite—are permitted, but where a firm claiming GIPS compliance uses carve-outs, it must clearly disclose the policy used to allocate cash to the carve-out returns. Tr. 631-32, 926; Div. Ex. 25 at 19; Div. Ex. 26 at 17, 28.

A fundamental requirement of GIPS is that a firm claiming compliance must make every reasonable effort to provide a compliant presentation of its composites

(GIPS-Compliant Presentation) to all prospective clients if it has not done so within the previous twelve months.[6] Tr. 1000; Div. Exs. 25 at 16 (Item 0.A.11 of 2005 GIPS Guidelines), 26 at 14 (Item 0.A.9 of 2010 GIPS Guidelines). A GIPS-Compliant Presentation must include a minimum of five years of annual performance returns calculated according to GIPS. Div. Ex. 25 at 11; Div. Ex. 26 at 20. A GIPS-Compliant Presentation's mandatory disclosures include: the number of portfolios and the amount of assets in each composite; the percentage of total firm assets represented by the composite or the amount of total firm assets at the end of each annual period; benchmark returns; and disclosures about the firm and composites. Tr. 960; Div. Ex. 25 at 22; Div. Ex. 26 at 20. The 2005 GIPS Guideline publication includes sample compliant presentations for firms' use. Div. Ex. 25 at 34-39.

GIPS compliant firms are required to calculate returns quarterly, on an asset weighted basis, with individual portfolio returns weighted quarterly for periods between January 1, 2006, and December 31, 2010, and monthly for periods after January 1, 2010. Tr. 623, 1002; Div. Ex. 25 at 18; Div. Ex. 26 at 16. Returns that are for periods less than one year may not

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[6] GIPS defines "prospective client" as any person or entity that is qualified to and expresses interest in investing in a strategy. Tr. 1065; Global Investment Performance Standards § V glossary (CFA Inst. 2010). Max Zavanelli referred to prospective investors as those who qualified to invest by having the minimum amount of money. Div. Ex. 89 at 151-52. Once interested investors were deemed qualified, they received the applicable GIPS-Compliant Presentations. Id. at 152.

be annualized. Tr. 1073; Div. Ex. 25 at 22; Div. Ex. 26 at 21. Firms may link non-GIPS compliant returns to their compliant returns, but must provide only GIPS compliant returns for periods after January 1, 2000, and the noncompliant returns must follow certain rules set forth in the GIPS guidelines. Div. Ex. 25 at 22; Div. Ex. 26 at 21.

GIPS encourages, but does not require, that firms claiming GIPS compliance be verified by a third-party verifier; however, third-party verification has, practically speaking, become "almost mandatory" within the industry. Tr. 904-05; Div. Ex. 25 at 17; Div. Ex. 26 at 14. GIPS compliance ultimately rests with the firm, even if it chooses to be verified. Tr. 922. The primary purpose of GIPS verification is to ensure that the firm claiming compliance with GIPS has in fact adhered to GIPS and that the firm's procedures and processes are designed to calculate and present performance results in compliance with GIPS. Tr. 912; Div. Ex. 25 at 29; Div. Ex. 26 at 37. A verification report cannot be provided just for individual composites; it can only be provided for an entire firm. Tr. 912; Div. Ex. 25 at 17; Div. Ex. 26 at 37.

3. Advertising Guidelines

GIPS first adopted advertising guidelines on October 1, 2003. Tr. 925-26; Div. Ex. 27. Appendix A to the 2005 GIPS Guidelines and Section III to the 2010 GIPS Guidelines include guidelines for advertising performance returns, modified with each new adoption, for firms that are already GIPS compliant. Div. Ex. 25 at 41-43; Div. Ex. 26 at 35-36. The 2005 GIPS Guidelines' advertising guidelines define "advertisement" broadly to include

> any materials that are distributed to or designed for use in newspapers, magazines, firm brochures, letters, media, or any other written or electronic material addressed to more than one prospective client. Any written material (other than one-on-one presentations and individual client reporting) distributed to maintain existing clients or solicit new clients for an advisor is considered an advertisement.

Div. Ex. 25 at 41. The 2010 Guidelines slightly revised the definition of advertisement to include materials designed for the firm's website. Div. Ex. 25 at 41; Div. Ex. 26 at 35. The GIPS advertising guidelines are mandatory for any GIPS compliant firm that claims GIPS compliance in its advertisements. Tr. 926, 938; Div. Ex. 25 at 41; Div. Ex. 26 at 35. Item 3 of the GIPS advertising guidelines provides a standardized claim of compliance that must be included in a GIPS compliant advertisement: "[Firm] claims compliance with the Global Investment Performance Standards (GIPS®)" (the Standardized Claim). Div. Ex. 25 at 42; Div. Ex. 26 at 35. The 2005 GIPS Guidelines include sample advertisement formats that firms may follow. Tr. 931-32; Div. Ex. 25 at 44-45.

All advertisements that make a claim of GIPS compliance must include disclosures in accordance with an itemized list in the advertising guidelines Div. Ex. 25 at 41-43; Div. Ex. 26 at 35-36. Relevant to this proceeding are that firms must disclose: a description of how an interested party can obtain a GIPS-Compliant Presentation and/or a list and description of all firm composites (Item 2); the currency used to express returns (Item 8 or 10); which returns are

noncompliant, if including returns from periods prior to January 1, 2000 (Item 10 or 12); and whether performance returns are gross or net of fees (Item 6). Tr. 970; Div. Ex. 25 at 42; Div. Ex. 26 at 35-36. Additionally, advertisements claiming GIPS compliance must, under the 2005 GIPS Guidelines, include either (A) a period-to-date composite return with one, three, and five-year cumulative annualized composite returns, with end-of-period date clearly identified, or (B) five years of annual composite returns, with the end-of-period date clearly identified (Item 5). Tr. 939; Div. Ex. 25 at 42.

The 2010 GIPS Guidelines modified the requirements for performance return reporting in advertisements, requiring either: (A) one, three, and five-year annualized composite returns through the most recent period, with the end-of-period date clearly identified; or (B) period-to-date composite returns on top of one, three, and five-year annualized returns through the same period of time presented in the firm's GIPS compliant presentation, with the end-of-period date clearly identified; or (C) period-to-date composite returns on top of five years of annual composite returns, with the end-of-period date clearly identified (Item 5). Div. Ex. 26 at 36. The 2005 GIPS Guidelines required that advertisements' annualized returns be calculated through the same period as the corresponding GIPS-Compliant Presentation. Div. Ex. 25 at 42. The 2010 GIPS Guidelines, however, allowed firms to provide annualized returns through the most recent period. Div. Ex. 26 at 36. When presenting non-GIPS compliant return information from periods prior to January 1, 2000, the advertisement must specify the figures that are not GIPS compliant and (before 2010)

the reason for the non-compliance. Tr. 614-15; Div. Ex. 25 at 42; Div. Ex. 26 at 36.

C. ZPRIM's Claims of GIPS Compliance

ZPRIM began claiming GIPS compliance no later than 2007. Tr. 168, 181, 829, 1726. Max Zavanelli was responsible for ensuring ZPRIM's marketing materials were GIPS compliant. Div. Ex. 89 at 46. There were varying accounts in the testimony about why the firm opted to follow the GIPS guidelines and claim compliance. Bauchle testified that ZPRIM had hired Greg Reed & Associates (Greg Reed), an institutional consultant, in late 2005 to help ZPRIM attract institutional clients. Tr. 184. Greg Reed recommended ZPRIM claim GIPS compliance as it would aid ZPRIM in attracting institutional clients. Tr. 184-85. Max Zavanelli testified that the decision to claim GIPS compliance had nothing to do with attempts to gamer institutional investors, though he conceded that Greg Reed had suggested that claiming GIPS would help attract institutional investors. Tr. 1391-92. He testified that he wanted to be compared with other firms to see how he matched up against them; he did not believe that by claiming GIPS, the firm would actually attract new clients. Tr. 1391. He testified that his motive for GIPS-based comparison was to claim "bragging rights." Tr. 829.

From the outset, ZPRIM claimed GIPS compliance for its performance returns reaching back to periods as early as 1987 or 1988. See, e.g., Div. Exs. 117, 118. ZPRIM linked performance returns from prior to January 1, 2001, and included carve-outs in at least one composite. Div. Ex. 89 at 83-86; Div. Exs. 117, 118. The Commission conducted examinations of ZPRIM in

1996 and 2009, and despite concerns by the examination team regarding the issue of carve-outs in pre-2001 performance returns during the 2009 examination, ZPRIM continued to report the early numbers in its advertisements and in its GIPS compliant presentations without disclosing the carve-outs. Tr. 444, 1509; Div. Ex. 89 at 83-86; Div. Exs. 117, 118.

Bauchle became the "point person" for ZPRIM's GIPS compliance when ZPRIM began claiming GIPS compliance in 2006. Tr. 168, 1392-93, 1557. But his role was limited to being the "numbers guy," according to Max Zavanelli, and Max Zavanelli had the final say on GIPS compliance. Tr. 836. Bauchle never received any formal training on GIPS. Tr. 183. He familiarized himself with GIPS by reading the GIPS handbook and by working with Ashland, ZPRIM's first GIPS verifier. Tr. 183. Bauchle understood that a firm had to follow all of the GIPS guidelines when claiming GIPS compliance in advertisements. Tr. 399.

Bauchle testified that ZPRIM maintained "annual disclosure presentations" or "annual disclosure statements" for each composite that were updated each January with the prior year's figures. Tr. 194-95, 198. ZPRIM's annual disclosure presentations appear, at least in part, to be the firm's GIPS-Compliant Presentations, and will be referred to as such.[7] Tr. 194,

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[7] It is not entirely clear whether ZPRIM's entire annual disclosure presentation comprised its GIPS-Compliant Presentation or just a portion of it. Bauchle referred to the annual disclosure presentation document as a three-page presentation. Tr. 420-21. At one point in the hearing, Max Zavanelli referred to ZPRIM's

961; Div. Ex. 19 at 3; see also Div. Ex. 25 at 22-23; Div. Ex. 26 at 20-21. These presentations were available on ZPRIM's website until 2010. See, e.g., Resp. Ex. 8 at 22-27. Jean Cabot (Cabot), a Commission exam manager, testified that she: believed she reviewed the ZPRIM website during the Commission's examination in 2009 and that there was an accessible GIPS-Compliant Presentation; and remembered that ZPRIM included a GIPS-Disclosure Presentation on its website. Tr. 730-31, 1057-58. In March 2010, Max Zavanelli directed that ZPRIM stop posting at least the SCV Composite's full GIPS-Compliant Presentation on its website because he did not want to publicize the composite's assets. Tr. 373. ZPRIM sent the GIPS-Compliant Presentations to its clients at least once every twelve months. Tr. 373-75; Div. Ex. 89 at 147.

ZPRIM calculated and updated its returns quarterly, though if there had been a particularly strong performance for a month or two, ZPRIM would calculate intra-quarterly. Tr. 194, 221. ZPRIM made its quarterly returns available on its website. See, e.g., Resp. Ex. 8. ZPRIM maintained tables that reported annualized performance returns for one, three, and five-year periods through each quarter, in addition to its quarterly data. Tr. 194; Resp. Ex. 8. The website also included, for certain periods, bar charts, providing visualizations of the firm's composites' performance as

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annual disclosure presentation's three pages as the firm's GIPS-Compliant Presentation. Tr. 1450. Nikola Feliz (Feliz), a senior manager from Ashland, testified that one page of ZPRIM's three-page annual disclosure presentation was ZPRIM's GIPS-Compliant Presentation. Tr. 961; Div. Ex. 19.

compared to their benchmarks. Tr. 543-44; Resp. Exs. 9-11.

Interested investors who contacted ZPRIM—usually through ZPR Client Management—were sent a package of marketing materials about the firm. Tr. 1144. Sappir testified that he was not entirely sure what was in the packages, but knew that it consisted of at least a brochure, a letter, and a track record of the firm. Tr. 1144. Sappir testified that he was unsure whether ZPRIM's GIPS-Compliant Presentation was sent with the initial package, though in his 2011 investigative testimony, he unequivocally stated that it was not. Tr. 1147. Sappir sometimes sent performance tables to interested investors himself, and would tell them that the firm was GIPS compliant. Tr. 1151-53; Div. Ex. 60.

Max Zavanelli testified in 2011 that everyone who qualified as a prospective client received a GIPS-Compliant Presentation "right away." Div. Ex. 89 at 146. He clarified during the hearing that ZPRIM would send a GIPS-Compliant Presentation to interested investors with a contract, after ZPRIM determined that they qualified as a prospective client. Tr. 1455. Bauchle also testified that prospective clients received a copy of the GIPS-Compliant Presentation. Tr. 210.

Max Zavanelli's testimony on his level of responsibility for GIPS compliance up until 2011, when Mark Zavanelli took over as chief compliance officer, was inconsistent. He suggested during some of his testimony that all GIPS-related decisions were made by Bauchle with input from Ashland. Tr. 1557. He stated that Bauchle and Ashland made the decisions, but that he "accepted" them, and that he was just kept

"informed" on GIPS and advertising issues. Tr. 1527, 1557-58. Earlier testimony by Max Zavanelli, including his investigative testimony in 2011, was more resolute, however; he stated that he had ultimate responsibility for GIPS compliance, and that for GIPS compliance, the "buck stops here." Tr. 836-37; Div. Ex. 89 at 46. During his investigative testimony, Max Zavanelli told Commission staff that he was "more than familiar" with the 2005 GIPS Standards and that he was "the closest thing to an expert" on GIPS. Tr. 848; Div. Ex. 89 at 42. Later during his investigative testimony, when asked how he authorized a noncompliant advertisement when he was an expert on GIPS, he stated that he was "the closest thing to an expert here," but that ZPRIM hired Ashland as its expert. Tr. 850; Div. Ex. 89 at 59. Bauchle testified that Max Zavanelli had the final say on running advertisements or newsletters claiming GIPS compliance and for any GIPS compliance claims on ZPRIM's website. Tr. 186-87. As chief compliance officer prior to Max Zavanelli, Fay had some responsibility for ZPRIM's GIPS compliance, but for the most part, she left the GIPS issues up to Bauchle and Max Zavanelli. Tr. 1230-32, 1275. Fay testified that she reviewed the GIPS footnotes, but was never involved with reviewing the actual performance returns or presentations for GIPS compliance. Tr. 1230. She rarely communicated with Ashland. Tr. 1275.

ZPRIM continues to claim GIPS compliance. Tr. 1711. Max Zavanelli does not believe that ZPRIM's running some advertisements that were not GIPS

compliant ruins the firm's ability to claim compliance. Tr. 1726-27.[8]

D. ZPRIM GIPS Verification

1. Ashland

Greg Reed recommended that ZPRIM hire Ashland as its GIPS verifier.[9] Tr. 184. ZPRIM hired Ashland in early 2006 to verify its returns for periods between January 1, 2001, and December 31, 2005, and onward. Tr. 186, 906, 1390; Div. Ex. 37. Ashland did not examine or verify any of ZPRIM's returns from prior to 2001. Tr. 962. ZPRIM also hired Ashland to provide performance exams on several of its composites on a quarterly basis. Tr. 912-13. ZPRIM maintained an engagement with Ashland to verify ZPRIM's GIPS compliance on a quarterly basis through the period ended December 31, 2009. Tr. 398, 919. Bauchle was ZPRIM's main contact for Ashland from the original

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[8] In 2008, GIPS published the first error correction policy for GIPS-compliant firms to follow, and updated the policy in 2011. Tr. 406-07, 1060, 1063; Resp. Exs. 40, 41. One of the requirements set forth in the original error-correction policy is that GIPS-compliant firms adopt their own error-correction policies no later than January 1, 2010, and follow them for errors in any GIPS-Compliant Presentation after December 31, 2009. Tr. 406-07, 1062; Resp. Ex. 40 at 6. The GIPS error-correction policy specifically states that it does not encompass advertisement errors. Tr. 406; Resp. Ex. 40 at 3. ZPRIM adopted an error-correction policy in accordance with the guidelines. Tr. 407.

[9] Feliz described Ashland as a member of the AICPA and as the oldest and largest GIPS verification firm in the world, with over 750 clients in twenty countries. Tr. 902.

engagement in 2006 through the end of ZPRIM's relationship with Ashland. Tr. 186-87, 924.

Feliz, a senior manager at Ashland, testified for the Division on Ashland and its relationship with ZPRIM.[10] Feliz was involved with ZPRIM's engagement from start to finish, and she communicated with Max Zavanelli on a few occasions. Tr. 924. She communicated with Bauchle mainly, but sometimes spoke to Fay and Max Zavanelli. Tr. 924. In response to claims by Respondents that Ashland wrote the GIPS claim footnote used in ZPRIM's advertisements and GIPS-Compliant Presentations, Feliz did not remember working with ZPRIM on the footnote it used to claim GIPS compliance.[11] Tr. 1070. She conceded that ZPRIM could have spoken to someone at Ashland about footnotes, but she testified that Ashland did not write GIPS footnotes. Tr. 1070-72.

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[10] Feliz has worked at Ashland since graduating from college, beginning as a verifier, and she is currently a senior manager there. Tr. 901, 908. She holds a bachelor's degree in accounting and business administration, and she became a licensed CPA in 2005. Tr. 907. In either 2008 or 2009, she received a certificate in investment performance management, which demonstrates an understanding of the investment business and GIPS. Tr. 907.

[11] Max Zavanelli testified that the language for the footnote in ZPRIM advertisements came from Ashland, including arguably insufficient language describing how to request information from the firm. Tr. 1397. Most of the language required for claiming GIPS compliance in ZPRIM's footnotes is standardized in the GIPS guidelines. Div. Ex. 25 at 16-17, 42; Div. Ex. 26 at 17-18. It is unlikely that Ashland would have advised ZPRIM how to craft the footnote other than to direct ZPRIM to the standardized language found in the GIPS guidelines.

Before beginning its first review, Ashland sent a letter to ZPRIM, asking for certain materials required to complete the verification. Div. Ex. 37. The letter noted that verification is a "continuous" process and Ashland would be providing quarterly reviews to ensure proper firm compliance. Id. at 2. The letter also noted that verification would include a review of ZPRIM's marketing. Id. at 1. A February 26, 2006, follow-up letter requested ZPRIM's "most recent marketing materials" for all ZPRIM composites. Tr. 916-17; Div. Ex. 40 at 3-4. According to Feliz, Ashland requests marketing materials as part of all verifications. Tr. 918. On March 23, 2006, ZPRIM sent Ashland a representations letter, required by Ashland to complete verifications, representing that ZPRIM had provided all of its "performance presentation materials and disclosures" for Ashland's review, and that the representations were accurate for subsequent periods of verification unless amended or withdrawn. Tr. 919-20; Div. Ex. 40 at 7-8. Feliz testified that Ashland now requires new representation letters for each verification period. Tr. 920-21. Bauchle testified that ZPRIM sent marketing materials, other than advertisements, to Ashland for review every quarter, and Feliz believed that was true. Tr. 389, 1019.

In response to a January 10, 2008, email from Ashland, ZPRIM included a January 2008 Kiplinger magazine advertisement in its marketing material package for Ashland's verification review. Tr. 927, 935-36, 947, 952; Div. Ex. 21 at 2; Div. Ex. 55. Feliz and Carrie Hoxmeier (Hoxmeier), another member of the Ashland verification team, spoke to Bauchle on the telephone after receiving the advertisement, and explained that they were missing some information

required under the GIPS advertising guidelines. Tr. 927-28, 1020. They did not follow up with any written comments. Tr. 1020.[12] Feliz told Bauchle that the advertisement failed to disclose the currency used for the returns, did not clearly disclose how an investor could receive a GIPS-Compliant Presentation,[13] and incorrectly referred to Ashland as ZPRIM's "auditor." Tr. 293-94, 928-33, 953. Bauchle believed that ZPRIM removed the word "audited" from its advertisements after and because of Ashland's comments. Tr. 293-94. Hoxmeier raised the same issue in an April 3, 2008,

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[12] Respondents' counsel attempted to impeach Feliz's credibility regarding her memory of this call with answers she gave during her investigative testimony, noting that, during her investigative testimony, she did not recall that Ashland had reviewed any of ZPRIM's advertisements or had any issues with ZPRIM's advertisements or marketing materials other than a December 2009 newsletter, discussed infra. Tr. 1026-27. She convincingly explained that she had not reviewed her notes on ZPRIM prior to her investigative testimony because she had no prior notice of what the testimony would be about, and that she only remembered the telephone call with Hoxmeier and Bauchle when her memory was refreshed by reviewing the advertisement and her notes. Tr. 1100-02.

[13] The language regarding this requirement is part of Item 2 in the 2005 GIPS Guidelines, which were applicable to this advertisement. The requirement calls for disclosure on how an interested party can obtain a compliant disclosure "and/or" a list of firm composites. Div. Ex. 25 at 42. Cabot and Feliz contended, in the face of questioning suggesting otherwise, that the language requires disclosure of how a party can obtain either a compliant presentation or a list of composites or both, not that a firm can choose to disclose how to obtain one but not the other. Tr. 701, 930, 1052. Both Cabot and Feliz concede that their interpretations were merely their opinions. Tr. 734, 1053. I find that the plain language of the requirement conforms to Feliz's and Cabot's understanding.

email to Bauchle, regarding a "flash report," a one-page marketing piece ZPRIM used. Div. Ex. 64.

ZPRIM never sent any advertisements to Ashland after sending the January 2008 advertisement. Tr. 935-36, 947-48, 972-73. Feliz first saw ZPRIM advertisements other than the January 2008 Kiplinger advertisement when giving investigative testimony in 2011. Tr. 935. Feliz testified during the hearing that, had Ashland been shown ZPRIM's other advertisements, Ashland would have discussed with ZPRIM the problems Feliz identified. Tr. 946-47. She represented that, had ZPRIM promptly corrected the problems in its advertisements, ZPRIM could have continued to claim GIPS compliance. Tr. 947. However, if Ashland continued to receive erroneous advertisements from ZPRIM, despite warnings of compliance issues, Ashland would likely have been unable to continue the verification process. Tr. 947, 973-74.

Bauchle agreed that after January 2008 the firm did not send advertisements to Ashland before running them. Tr. 419-20. However, he did not recall receiving an objection to the January 2008 advertisement from Ashland. Tr. 290-91, 293. He testified that format changes to the April 2008 advertisement in SmartMoney were "probably" at Max Zavanelli's direction, and removal of the word "audited," starting with the October 2008 advertisement, was at Ashland's direction. Tr. 292-94. He further testified that he did not send any advertisements to Ashland after January 2008, even after they were run, because it was not ZPRIM's "procedure to send them every ad." Tr. 419. This was because of "timing constraints," in that

advertisements had to be submitted to magazines so far in advance that the listed performance data was not always up to date. Tr. 289, 419-20. He testified that Max Zavanelli had final say on whether to run advertisements. Tr. 421.

However, Bauchle told Cabot, both during the examination and while preparing for his hearing testimony, that ZPRIM stopped sending advertisements to Ashland when its performance declined, as Max Zavanelli wanted. Tr. 517-19. Max Zavanelli admitted during investigative testimony that he did not believe ZPRIM was required to provide its advertising to Ashland, and to his knowledge, ZPRIM did not. Div. Ex. 89 at 49. Bauchle's explanation to Feliz as to why Ashland was not receiving ZPRIM's advertising was that it did not intend to continue advertising after January 2008. Tr. 936, 947-48, 973. Fay, the chief compliance officer at the time, was apparently unaware that ZPRIM should have sent advertisements to Ashland; she sent an email to Ashland following the Commission's examination, conveying the Commission's recommendation to send the advertisements and asking whether Ashland believed doing so was necessary. Resp. Ex. 13. Fay testified that she never heard Max Zavanelli instruct Bauchle not to send additional advertisements to Ashland. Tr. 1275, 1288.

Max Zavanelli's testimony on this point was confusing, inconsistent, and evasive. In his investigative testimony he stated that Bauchle did not tell him that Ashland had an issue with ZPRIM's marketing materials. Tr. 1701. Similarly, he initially testified at the hearing, when questioned by his

counsel, that Bauchle never informed him of the issues Ashland had raised regarding the January 2008 Kiplinger advertisement. Tr. 1394-96. However, a short time later he testified that Bauchle did tell him, in late April or May 2008, after the April 2008 advertisement ran, that there were problems with all of the 2008 advertisements, and that Bauchle told him the footnote had to "greatly expand." Tr. 1397, 1405. Later yet, he testified that Bauchle instead told him that there would be only one correction to the footnote, to remove the word "audited." Tr. 1405-06. Max Zavanelli admitted, however, that ZPRIM "added three entire new lines to the footnote." Tr. 1406. Although Max Zavanelli initially testified that he put together the format, and Ashland wrote the new footnote language, he later testified both that Ashland "did the format for us" and "approved" the format. Tr. 1394-95, 1397, 1406, 1697-98. He could not recall telling Bauchle to forward advertisements to Ashland, and could not remember any advertising being forwarded, other than the January 2008 advertisement. Tr. 1696-97. However, in his investigative testimony he stated that he did not know whether Ashland reviewed ZPRIM's advertising. Tr. 1700. His understanding was that ZPRIM was not required to give its advertisement materials to Ashland, even though Ashland requested them. Tr. 1697-98. In his view, once Ashland found the format acceptable, ZPRIM did not need to send each advertisement to Ashland. Tr. 1698. In his investigative testimony, he also stated that Ashland was not required to receive ZPRIM's advertising, but when asked about this testimony at the hearing, he gave multiple non-responsive answers. Tr. 1701; Div. Ex. 89 at 54. He testified both that "I know" Bauchle gave Ashland ZPRIM's marketing materials "every

quarter," and then moments later changed his mind and said he did not know that. Tr. 1702, 1704.[14]

2. Deterioration of ZPRIM's Relationship with Ashland

In November 2008, Ashland sent ZPRIM an email attaching a list of comments generated from its review of ZPRIM's website, which included GIPS compliant presentations for its composites. Tr. 199; Div. Ex. 47. Ashland took particular notice of two of ZPRIM's investment report newsletters for October and November 2008. Div. Ex. 47. The comments included

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[14] Although the evidence plainly and overwhelmingly demonstrates that ZPRIM failed to send its advertisements to Ashland after January 2008, more scrutiny is required to determine whether that failure was intentional. I conclude that it was intentional, and I do not credit Bauchle's testimony on this point. His explanation at the hearing for not forwarding advertising to Ashland—that the advertising could not be prepared in time—is not convincing, because Ashland was conducting quarterly reviews, not monthly reviews, and transmitting advertising was thus generally not urgent. By contrast, Cabot testified that Bauchle admitted, both during ZPRIM's examination and right before the hearing, to intentionally withholding advertisements from Ashland (at Max Zavanelli's direction), and Feliz testified that Bauchle told her (falsely) that ZPRIM did not intend to run advertisements after January 2008. Max Zavanelli admitted during the investigation that he did not believe ZPRIM had to provide its advertising to Ashland, and to his knowledge, ZPRIM did not. Div. Ex. 89 at 49, 54. Fay's testimony is of little help, except to demonstrate her lack of compliance oversight. In view of Max Zavanelli's inconsistency and evasiveness on this subject, and his admission that he did not think he had to provide advertising to Ashland, I credit the testimony of Cabot and Feliz, and conclude that Max Zavanelli directed Bauchle to stop sending advertising to Ashland, and to provide Ashland a plausible, but false, explanation.

concerns that ZPRIM had listed performance returns with a claim of GIPS compliance without including all of the information required by the GIPS advertising guidelines. Tr. 199-200; Div. Ex. 47. Ashland suggested that if ZPRIM decided to continue to claim GIPS compliance in the investment report newsletters, ZPRIM would need to either include the required information from the GIPS advertising guidelines or attach a copy of its GIPS compliant presentations for the composites. Div. Ex. 47. During Ashland's review of ZPRIM's second quarter 2009 returns, it again informed Bauchle by letter that the investment report newsletter for June 2009 reported performance returns and would have to follow GIPS guidelines. Div. Ex. 48. Sometime in late 2009, Ashland contacted Bauchle and told him to send ZPRIM's GIPS-Compliant Presentation to everyone on the monthly investment report newsletter distribution list.[15] Tr. 206-07; 1449. Without consulting Max Zavanelli, Bauchle sent a copy of ZPRIM's GIPS-Compliant Presentations to everyone who received a copy of the recent investment report newsletter. Tr. 206-07. Bauchle testified that Max Zavanelli was upset that Bauchle sent out the GIPS-Compliant Presentations because Max Zavanelli did not want to reveal the composites' asset levels. Tr. 207-08. Max Zavanelli's unhappiness with the decision to send the firm's GIPS-Compliance Presentation to everyone on the investment report newsletter distribution list was evident in an article he included in

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[15] Bauchle testified that this occurred in 2008, but the December 2009 investment report newsletter discusses the issue as though it had recently occurred. I find that Bauchle's claim that it occurred in 2008 was an error, and that it occurred in 2009.

ZPRIM's December 2009 investment report newsletter (December 2009 Newsletter). Div. Ex. 9 at 4.

Max Zavanelli and Feliz spoke to each other by telephone around the end of 2009, after Ashland saw a copy of the December 2009 Newsletter, part of which claimed GIPS compliance. Tr. 991, 1449; Div. Ex. 50. During that conversation, Feliz told Max Zavanelli that the newsletters should be considered advertisements and that ZPRIM should either follow the advertising guidelines or attach GIPS-Compliant Presentations. Tr. 956-57. Max Zavanelli explained that he did not believe that the investment report newsletters were considered advertisements because they were not, in his mind, marketing material. Tr. 1451-52. He added that he did not believe the investment report newsletters were being provided to prospective clients, as the term is defined in the GIPS guidelines, and thus the GIPS advertising guidelines would not apply. Tr. 1449, 1453. He provided the newsletters to members of the investment community to keep them apprised of his activities and strategies as well as current market events and predictions. Tr. 1439. He argued that the non-client recipients would never be interested in investing with ZPRIM and thus a GIPS-Compliant Presentation did not need to be provided. Tr. 1438. Max Zavanelli told Feliz that he did not want to include a GIPS-Compliant Presentation with the investment report newsletter because it would be burdensome and because he did not want the general public to see how small the firm was. Tr. 956-57, 1449-50. Feliz disagreed with Max Zavanelli and told him that he either needed to comply with the GIPS advertising guidelines or attach GIPS-Compliant Presentations going forward, if claiming GIPS compliance. Tr. 993. At the end of the

telephone conversation, Max Zavanelli asked Feliz to provide some options for ZPRIM to follow for the future. Tr. 993.

Max Zavanelli said Ashland's concerns about his investment report newsletters were based upon criticisms that he made about GIPS in his December 2009 newsletter, which, according to Max Zavanelli, upset Ashland. Tr. 830, 1449; Div. Ex. 9; Div. Ex. 89 at 36, 38. In that newsletter, he included an article in which he criticized the GIPS requirement to report asset-weighted returns. Div. Ex. 9 at 4. He characterized his December 2009 newsletter comments in his 2011 investigative testimony as a "political mistake." Tr. 831; Div. Ex. 89 at 35. Feliz testified that the concern with the December 2009 newsletter was that ZPRIM made a claim of GIPS compliance on reported performance returns without following the GIPS advertising guidelines. Tr. 1081-82. The article itself was not noncompliant with GIPS, because it made no claim of compliance. Tr. 1082. Feliz, however, was concerned with Max Zavanelli's article on GIPS because it seemed to display an intent to flout certain GIPS requirements in the future, and as the firm's GIPS verifier, Ashland had a responsibility to ensure the firm's ongoing GIPS compliance. Tr. 991-92.

Feliz and Toby Cochrane (Cochrane), the Ashland partner assigned to ZPRIM, held a follow-up telephone call with Max Zavanelli in March or April 2010. Tr. 993-94, 1451. Feliz's recollection of the call was strikingly different from Max Zavanelli's. Feliz testified that Max Zavanelli said his "team had brought him more up to speed on GIPS compliance" and that he agreed to comply with whatever options Ashland

provided. Tr. 994. Max Zavanelli, in contrast, testified that the Ashland staff "didn't seem to know about" the 2005 GIPS Standards' 0.A.11, governing the provision of compliant presentations to all prospective clients and "had no response" to his comments about it, and that he had "won the debate." Tr. 1451-52, 1456. Feliz sent a letter after the call providing two options for how ZPRIM's investment report newsletters could comply with GIPS. Tr. 994-95; Div. Ex. 52. The undated letter was addressed to Bauchle and Feliz believes it was sent in March or April 2010. Tr. 995; Div. Ex. 52. The two options presented were for ZPRIM to either cease claiming GIPS compliance in the newsletters or follow the GIPS advertising guidelines. Tr. 998-1003; Div. Ex. 52.

Max Zavanelli testified that the first time he saw the letter from Feliz was during his investigative testimony in 2011. Tr. 1457. He said that when he asked Bauchle to call and find out why Ashland was resigning, that Bauchle did so and reported that the newsletter triggered the resignation, and that Bauchle never told him anything about the letter he received from Ashland.[16] Tr. 1457-58. By contrast, during the investigation, Max Zavanelli testified that Ashland did not tell him why it resigned (see infra), that he never spoke to anyone at Ashland about it, and that he suspected Ashland resigned because it received a Commission subpoena, but that he did not actually know. Div. Ex. 89 at 32, 34, 38. He testified that he

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[16] It is utterly implausible that Ashland would have sent the letter had Max Zavanelli "won the debate" on the telephone, and I accord no credit to his testimony on that point; or to his testimony that Bauchle never told him about the letter.

would have chosen the first option in the letter, removing all mention of GIPS. Tr. 1458. Feliz did not know whether Max Zavanelli received the letter, but believes, based on subsequent conversations she had with Bauchle, that Bauchle received it. Tr. 1087.

As part of its next verification review, Ashland requested recent marketing materials from ZPRIM, including a recent investment report newsletter. Tr. 1004. Feliz received an investment report newsletter and determined that it did not comply with either option provided in Ashland's letter. Tr. 1004. Feliz brought the issue of ZPRIM's failure to comply with Ashland's guidance to Mel Ashland, the managing partner of Ashland. Tr. 1004. He determined that it would be best for Ashland to resign as ZPRIM's verifier. Tr. 1004. On July 9, 2010, Ashland sent a letter to ZPRIM notifying the firm that it was terminating its relationship as ZPRIM's GIPS verifier, citing its inability to reach a "necessary level of comfort which would allow [Ashland] to continue to attest to the firm's claim of GIPS compliance." Tr. 209, 1005; Div. Ex. 36. Feliz testified that she has been involved with over 400 clients during her tenure at Ashland, and ZPRIM was the only client she could recall Ashland terminating. Tr. 1006-07.

Ashland completed its verification of ZPRIM's GIPS compliance through the final quarter of 2009. Tr. 975; Div. Ex. 36. Though Ashland terminated its relationship with ZPRIM in mid-2010, it did not perform any verification services for periods in 2010. Tr. 975.

3. Alpha

Following Ashland's resignation, ZPRIM engaged Alpha Performance Verification Services (Alpha) in November or December 2010 to perform third-party verification reviews for the periods ended December 31, 2010, onward. Tr. 398; Div. Ex. 89 at 31, 161. Alpha verified ZPRIM's GIPS compliance for the period ended December 31, 2011, but no evidence was introduced that Alpha verified ZPRIM's GIPS compliance for 2012. Resp. Ex. 22.

E. Commission Examination and Investigation

1. Onsite Examination and Document Review

The Commission conducted an examination of ZPRIM that included an onsite inspection at ZPRIM's Orange City, Florida headquarters between February 3, 2009, and February 13, 2009.[17] Tr. 444. Cabot, joined by staff examiner Jesse Alvarez, led the examination.[18] Tr. 444, 492. The examination team requested and

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[17] The Commission examined ZPRIM once before in 1996. Tr. 1509-10.

[18] Cabot earned a bachelors of science degree in business administration from Bryant College and a master of business administration from Nova Southeastern University. Tr. 439. Cabot is a certified fraud examiner, and she previously took and passed the first level of the CFA designation exams. Tr. 442-43. She worked at Franklin Templeton as a performance analyst, working to ensure that its offices, globally, were compliant with AIMR and then GIPS. Tr. 441. She joined the Commission in 2003, first as an examiner, and became an exam manager in 2011. Tr. 440-41. Her examinations of investment advisers include GIPS compliance reviews, if the firm claims GIPS compliance. Tr. 440.

reviewed documents related to the firm's business activities, disclosures, and books and records. Tr. 444-45. They also interviewed Bauchle, Fay, and, on a limited basis, Max Zavanelli. Tr. 445. Among the materials requested were all emails among Max Zavanelli, Bauchle, and Fay. Tr. 1243; Resp. Ex. 42 at 30. The examination team uncovered several deficiencies at ZPRIM, including inadequate GIPS compliance. See Div. Ex. 77.

Cabot testified for the Division regarding the examination. She found ZPRIM cooperative during the examination, responsive to the examination team's requests, and forthright in their answers. Tr. 523. The examination team did not find that ZPRIM had provided them with any incorrect performance return numbers. Tr. 681. Cabot testified that she discussed some of the GIPS-related issues in the advertisements with Max Zavanelli and that he was defensive. Tr. 488-90. Her interaction with Max Zavanelli was very brief, and she had no recollection of speaking with him in detail about the GIPS deficiencies the examiners discovered. Tr. 724-25. However, she distinctly remembered discussing with Max Zavanelli ZPRIM's false claims in its advertisements that Ashland had audited the firm for GIPS compliance. Tr. 508, 724.

Prior to concluding the onsite examination, Commission staff, including Cabot, conducted an exit interview with Bauchle and Fay, and the staff made certain deficiencies known at that time. Tr. 736. One finding relayed to ZPRIM was that it should send all of its advertisements to Ashland for review. Tr. 431; Div. Ex. 77. Fay relayed Cabot's recommendation in an email to Ashland on February 17, 2009. Tr. 1270; Resp.

Ex. 13. Fay testified that ZPRIM ceased advertising after the exit interview until November 2009, while it considered the Commission's comments. Tr. 1270-71.

Fay testified that after the exit interview, she typed up her notes on the issues raised by Commission staff and informed Max Zavanelli of the findings shortly thereafter (he was not present for the exit interview, except possibly for a portion in the morning). Tr. 1254, 1259. Max Zavanelli did not remember when he spoke to Fay about the exit interview, but believed that it would have been shortly after its conclusion. Tr. 1254.

2. Deficiency Letter

The examination team sent a deficiency letter to ZPRIM on January 28, 2010 (Deficiency Letter), regarding the problems uncovered during the examination.[19] Tr. 475-76; Div. Ex. 77. The Deficiency Letter stated, in relevant part, that: (1) ZPRIM's SCV Composite may have included improper periods of returns that did not "befit the investment strategy of the Composite"; (2) a December 2008 SmartMoney performance advertisement failed to comply with GIPS advertising guidelines; (3) ZPRIM's January 2009

[19] Ashland learned that the Commission would be conducting an examination of ZPRIM sometime in 2009. Tr. 978-79. At one point, Fay reached out to Ashland regarding questions posed by the examination staff regarding ZPRIM's compliance and Ashland's verification. Tr. 979; Resp. Ex. 13. As part of ZPRIM's representation letter on March 23, 2006, ZPRIM represented that it would provide Ashland with findings and related correspondence by regulatory agencies. Tr. 980; Div. Ex. 40 at 7-8. ZPRIM never provided the Deficiency Letter that it received in January 2010 to Ashland. Tr. 981; Div. Ex. 77.

investment report newsletter failed to comply with GIPS advertising guidelines and made an inaccurate claim that its performance returns had been "audited," when the firm's GIPS compliance had only been "verified"; and (4) ZPRIM's January and February 2008 performance return advertisements in Kiplinger had incorrectly stated that ZPRIM's performance returns had been "audited," when the firm's GIPS compliance had only been "verified." Div. Ex. 77.

3. ZPRIM' s Response to the Deficiency Letter

Fay and Max Zavanelli drafted and sent a response to the Deficiency Letter (Response) on February 26, 2010. Tr. 491; Div. Ex. 78. The Response attempted to explain the SCV Composite's use of carve-outs, and it stated that going forward, the composite would either exclude the carve-outs or add appropriate disclosure. Div. Ex. 78 at 2.

The Response represented that ZPRIM and Max Zavanelli were unaware that the GIPS guidelines required one, three, and five-year annualized returns, disclosure of the currency, or a description of the composite's benchmark, noting, "[w]e wonder why Ashland Partners did not mention this during their verification process."[20] Tr. 985; Div. Ex. 78 at 2-3. It also represented that it would correct the deficiencies going forward. Div. Ex. 78.

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[20] This comment was at best disingenuous; Ashland had alerted ZPRIM in November 2008 to ZPRIM's failure to include a disclosure of currency and a description of the composite's benchmark. Tr. 233; Div. Ex. 47.

Cabot testified that, although ZPRIM represented that it would make corrections in response to the examination team's findings, several of the deficiencies were not corrected. Tr. 491; Div. Ex. 78. For example, in advertisements run after the Response, ZPRIM reported performance returns with no period-to-date numbers and ZPRIM also claimed that its returns had been audited instead of verified. Tr. 491-92.

4. Commission Investigation of ZPRIM

On August 16, 2010, the Division sent ZPRIM a letter notifying it that the Commission was conducting an investigation of ZPRIM. Tr. 252; Div. Ex. 92. The letter requested, pursuant to Advisers Act Rule 204-2, that ZPRIM produce certain documents by September 1, 2010. Div. Ex. 92. The letter enclosed a Form 1661, Supplemental Information for Regulated Entities Directed to Supply Information Other Than Pursuant to a Subpoena. Id. Additional letters requesting documents were sent to ZPRIM on October 27, 2010, and November 30, 2010. Id. These additional letters explained that the Commission was conducting an investigation of ZPRIM. Id. The August 16, 2010, letter was addressed to Max Zavanelli, but the latter two letters were addressed to counsel for ZPRIM, indicating that it had hired counsel by that point to assist it with its responses to Commission staff. Id. Commission staff took the investigative testimony of Max Zavanelli on June 13, 2011, Bauchle on October 14, 2010, and Feliz on February 22, 2011. Tr. 258, 837, 1013, 1101, 1143, 1168, 1249; Div. Exs. 88, 89, 155. Commission staff also took testimony of Fay and Sappir. Tr. 258, 1142.

Bauchle participated in the document production in response to the August 16, 2010, letter and subsequent

requests. Tr. 170. According to Bauchle, all of ZPRIM's communications were produced in accordance with the requests, but, as discussed infra, documents from the ZPR Portals were not produced. Tr. 172-73. The Commission issued a Wells notice to ZPRIM in May 2012. Tr. 1312, 1467.

F. ZPRIM's Magazine Advertisements

1. Early Advertisements

ZPRIM began running magazine advertisements in 2006. Tr. 187-88. The original magazine template was designed with Ashland's help, according to Bauchle, and it included year-by-year performance returns, back to 2001, and period-to-date information. Tr. 187-88. Advertisements in SmartMoney in January and April 2008 reported year-by-year performance returns for the SCV Composite between 2001 and September 30, 2007, for the January advertisement, and December 31, 2007, for the April advertisement, in addition to compounded returns for the seven and twenty year periods ended at the same respective dates. Div. Ex. 21 at 1, 4. ZPRIM also ran advertisements in Kiplinger in January and February 2008, which both reported performance returns for the SCV Composite between 2001 and September 30, 2007, in addition to compounded returns. Id. at 2-3.

2. Fall 2008 Magazine Advertisements

In October, November, and December 2008, ZPRIM ran advertisements in SmartMoney, reporting its performance returns. Div. Ex. 21 at 5-8. Each of these advertisements included a footnote with the standard format GIPS advertising compliance claim, "ZPR Investment Management claims compliance with the

Global Investment Performance Standards (GIPS®)." Id.; see also Div. Ex. 25 at 42. The advertisements were placed with SmartMoney as part of a three-advertisement package deal that ZPRIM purchased. Tr. 1408.

The October 2008 SmartMoney advertisement reported ten-year compounded and annualize returns for ZPRIM's SCV Composite for the period through June 30, 2008, for its SCV Composite as compared to its two benchmarks. Div. Ex. 21 at 6. According to these returns, the SCV Composite had outperformed its benchmarks. Id. The November 2008 SmartMoney advertisement included the same performance returns for the SCV Composite as the October 2008 SmartMoney advertisement, but with returns through August 31, 2008. Id. at 7. According to these returns, the SCV Composite had outperformed its benchmarks. Id. The December 2008 SmartMoney advertisement reported compounded, but not annualized, performance returns for the SCV Composite for five, ten, and twenty-year periods through September 30, 2008.[21] Div. Ex. 21 at 5. According to these returns, the SCV Composite had outperformed its benchmarks. Id.

As the Division alleges in the OIP, as found by examination staff during the 2009 exam, and as admitted by Respondents and Bauchle, none of the October, November, or December 2008 SmartMoney

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[21] The returns were incorrectly reported in the December 2008 SmartMoney advertisement as being through August 31, 2008; the numbers were actually reflective of returns through September 30, 2008. Tr. 480. The incorrect data was an error by the formatter of the advertisement. Tr. 404, 1415.

advertisements provided returns through the same period as any GIPS-Compliant Presentations for the SCV Composite, nor did any provide period-to-date returns. Tr. 196, 214-15, 478, 939; Div. Ex. 21 at 5, 6, 7. None of the three ads include one, three, or five-year annualized returns. Tr. 214-15, 939; Div. Ex. 21 at 5, 6, 7. Accordingly, the October, November, and December 2008 advertisements failed to comply with the GIPS advertising guidelines in the 2005 GIPS Guidelines, the applicable standards at the time of the advertisements. Tr. 214-15, 939; Div. Ex. 21 at 5, 6, 7.

Cabot testified that, had ZPRIM followed the GIPS advertising guidelines and reported performance returns for the stub periods between January 1, 2008, and June 30, August 31, and September 30, 2008, the advertisements would all have shown that ZPRIM's SCV Composite "significantly underperformed" the Russell 2000 Index. Tr. 478-481. Cabot testified that, instead, ZPRIM chose reporting periods that reflected more favorable returns to the firm. Tr. 485-86. Cabot recalculated the SCV Composite returns for the periods that GIPS required the advertisements to include period-to-date returns. Tr. 480. She calculated that the SCV Composite's return for the period January 1, 2008, to June 30, 2008, was -17.02% and the Russell 2000 Index's return for the same period was -9.38%. Tr. 483. She determined that the SCV Composite's return for the period January 1, 2008, to August 31, 2008, was -12.7% while the Russell 2000 Index's return was -2.63% for the same period. Tr. 485. She determined that the composite's performance return for January 1, 2008, through September 30, 2008, was -18.42% whereas the Russell 2000 Index's return for the same period was -10.39%. Tr. 481.

Bauchle agreed with Cabot that the 2008 advertisements would have shown the SCV Composite's negative performance, had they complied with the GIPS advertising guidelines. Tr. 189-90. Bauchle emailed Max Zavanelli on April 8, 2013, after the OIP was issued, informing him that the advertisements would have shown that the SCV Composite was underperforming the benchmark if they had followed the GIPS advertising guidelines. Tr. 865-66; Div. Ex. 116. The advertisement format was changed, according to Bauchle, to avoid publicizing the firm's poor returns. Tr. 188-89. Max Zavanelli conceded that had the 2008 advertisements complied with GIPS, they would have shown that the SCV Composite's one-year return was underperforming its Russell 2000 Index benchmark. Tr. 1502, 1679. Max Zavanelli conceded that ZPRIM changed its advertising format to exclude annual returns after knowing that ZPRIM's performance at the time was poorer than its benchmarks, although he initially maintained that he did not personally approve or know about the changes in format until after the advertisements had run. Tr. 1500-02.

Bauchle testified that the information showing performance through each quarter was available on the website, and that would have shown the firm's underperformance of its benchmark. Tr. 364-65, 409. Additionally, Bauchle believed that all prospective clients that requested information received GIPS-Compliant Presentations that reflected the returns through the prior year's end. Tr. 407-08. ZPRIM also sent a one-page fact sheet with the firm's standard package to potential investors that included periodically updated performance return information.

Tr. 376-78. An example of the fact sheet sent in August 2008 to a potential investor shows SCV Composite returns through the first quarter of 2008, which reported ZPRIM's poor performance for its prior year and year to date, including ZPRIM's underperformance of the Russell 2000 Index. Tr. 379; Resp. Ex. 11 at 3.

Bauchle testified that he expressed concern to Max Zavanelli about the advertisements' failure to comply with GIPS in August or September 2008, when Max Zavanelli wanted to change the format of the advertisements by switching to annualized returns rather than year-by-year returns, as ZPRIM had used in the past. Tr. 193, 402-03; see also Div. Ex. 21 at 1-4. Bauchle was particularly concerned that the advertisements would have to include one, three, and five-year returns, which Max Zavanelli's plans did not include, and he discussed this concern with Max Zavanelli prior to ZPRIM publishing the October 2008 advertisement. Tr. 225, 401. Bauchle expressed a similar concern to Sappir and Fay in September 2008 concerning posting performance returns on ZPRIM's website, stating "[s]omething is sticking in my head that you need to show 1, 2, 3 and 5 year Annualized performance." Div. Ex. 142. Bauchle stated during the hearing that Max Zavanelli dismissed Bauchle's concerns because, Max Zavanelli reasoned, investors would receive a GIPS-Compliant Presentation with all of the required information if they contacted the firm. Tr. 225-26, 402-04. Bauchle testified that he brought the issue to Fay and told her that the advertisements with revised return periods were not compliant with GIPS, but that the two decided that they had to follow Max Zavanelli's direction. Tr. 204-05. Cabot testified that Bauchle had told her the same thing during the

Commission's examination. 486-88, 490. Bauchle did not know whether Fay relayed his concerns to Max Zavanelli. Tr. 205. According to Cabot, Bauchle and Fay told her they knew the advertisements were not GIPS compliant, but the advertisements ran anyway at Max Zavanelli's direction. Tr. 488.

Max Zavanelli disputed Bauchle's account of the creation of the advertisements and the events transpiring afterward, factors that led in part to his decision to terminate Bauchle's employment. E.g., Tr. 1408-15. His own account of events was confusing and inconsistent, however. Max Zavanelli testified that he had purchased a three-advertisement package deal, and that he had told Bauchle that he wanted to run advertisements similar to the April 2008 SmartMoney advertisement,. Tr. 1408-10. He provided Bauchle with draft advertisements in the same format as the April 2008 advertisement, which included year-by-year annual performance returns, but also included period-to-date returns. Tr. 1409; Div. Ex. 21 at 4; see also Resp. Ex. 46 at 2, 4. He testified that Sappir and Bauchle chose a format different from the one he drafted, without his knowledge, and he attempted to bolster this claim by pointing to a July 16, 2008, email exchange between Sappir and Bauchle in which Bauchle selected a format similar to what was used in the October 2008 advertisement, instead of a format similar to the April 2008 advertisement. Tr. 1410, 1414-15; Resp. Ex. 46. Max Zavanelli claimed that he was not a recipient of that email exchange, and that, prior to when the fall 2008 advertisements ran, he was not shown the advertisement format Sappir and Bauchle chose. Tr. 1410. He testified that the first time he saw the October, November, and December 2008

advertisements was during the Commission examination, when Cabot pointed out to him that two of the advertisements had the same return date, but different returns. Tr. 1415-16.

Contradicting his own account, Max Zavanelli testified during both the investigation and the hearing that the advertisements were edited on the eve of the October 2008 advertisement, because of a last-minute call from the formatter they hired for the advertisement, telling them that the advertisement was too long. Tr. 1418-19; Div. Ex. 89 at 55, 140. Max Zavanelli testified that he was traveling around the time he received the call about having to chop the advertisements due to their length, and that "unfortunately, I made the approval without thinking and these ads got out."[22] Tr. 1418-19; Div. Ex. 89 at 62. He said "no way" to cutting the footnote with the claim of GIPS compliance and verification. Tr. 1419. Max Zavanelli said that he should have tried to make it fit to comply with GIPS, but he "sort of lost control" and "forgot the format was wrong." Div. Ex. 89 at 140. Also, Max Zavanelli said during his investigative testimony that Sappir did not "create anything," he only provided input, and that he, not Sappir, was "absolutely" responsible for creation and distribution, which contradicts his hearing testimony that Sappir and Bauchle selected the advertisement format. Tr. 1486; Div. Ex. 89 at 29.

In addition to claiming that the first time he saw the October, November, and December 2008

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[22] Bauchle, by contrast, testified that he did not remember the length of the advertisement ever being a problem. Tr. 403-04.

advertisements was during the 2009 examination, he testified at the hearing that he was never informed that there were serious problems with any of the advertisements until ZPRIM received the Deficiency Letter in 2010. Tr. 1433, 1446. During his investigative testimony, however, he testified that Bauchle informed him that the December 2008 advertisement was not GIPS compliant after it had been published, and that upon review of the advertisement, Max Zavanelli determined that the October and November 2008 advertisements were also not GIPS compliant. Div. Ex. 89 at 47, 59. Also, as noted, Max Zavanelli denied in his investigative testimony that Bauchle ever told him that Ashland had any problems with ZPRIM's marketing materials or advertisements, but during the hearing he said that Bauchle told him in April or May 2008 that Ashland said that they needed to remove the word "audited" from the footnote and "greatly expand the footnote." Tr. 1397; Div. Ex. 89 at 49.

Max Zavanelli also denied that he had a conversation with Cabot about the GIPS issues in the advertisements, other than Cabot's pointing out inconsistent returns. Tr. 1415-16, 1418.

Fay disputed Bauchle's testimony regarding when she was told there were problems with the 2008 advertisements. Tr. 1267. She testified that she had no knowledge of problems with the 2008 advertisements prior to the Commission's examination team raising the issues with her in 2009. Tr. 1264-65. Fay claims that she had no discussions with either Bauchle or Max Zavanelli on GIP issues in the 2008 advertisements before the advertisements were run. Tr. 1266-67. Fay testified that, after the Commission's examination staff

raised the issues with her, she contacted Ashland for the first time about the advertisements. 1268-69. An email from Fay to Ashland staff on February 17, 2009, after the examination had concluded, asked Ashland questions arising from issues raised by the examination staff. Tr. 1269; Resp. Ex. 13. However, the email does not discuss issues raised by the examination staff regarding the October, November, and December 2008 advertisements. Resp. Ex. 13. Fay testified that she had telephone conversations with Ashland during the course of the examination regarding some of the issues raised by the examination staff regarding the October, November, and December 2008 advertisements. Tr. 1276.

Fay testified that she first learned about the issues with ZPRIM's advertisements during the examination. Tr. 1264-65. She had been unaware that there was an issue with use of the term "audited" in the footnote regarding Ashland's verification, or that there was a problem in the lack of one, three, and five-year returns in certain advertisements. Tr. 1261-64. She claimed that she was unaware how the term "audited" came to be removed from advertisements after the April 2008 SmartMoney advertisement. Tr. 1263. Fay understood that Ashland verified ZPRIM's performance returns, but was unaware that they reviewed any advertisements. Tr. 1272. She did not recall any conversations about Ashland's comments on ZPRIM's January 2008 SmartMoney advertisement. Tr. 1274-75. She testified that ZPRIM did not run advertisements between the examination and November 2009, in order to assure compliance. Tr. 1277.

Bauchle and Max Zavanelli both testified that the fall 2008 advertisements failed to generate any new ZPRIM clients; Max Zavanelli said that the advertisements were a "disaster." Tr. 358, 1427-29.

3. 2011 Magazine Advertisements

ZPRIM began reporting its performance returns to Pensions & Investments magazine on a regular basis in 1991, so that it could be compared against peer money managers. Tr. 1463. In its November 15, 2010, issue, Pensions & Investments named ZPRIM top performing manager in three categories: Global Equity Composites, 1 Year Return; Global Equity Composites, 5 Years Annualized Return; and International Equity Composites, 1 Year Return. 1460; Resp. Ex. 15. In its February 21, 2011, issue, Pensions & Investments named ZPRIM leading manager in three categories: World Stock Composites, 1 Year Return; World Stock Composites; 5 Years Annualized Return; and International Equity Composites, 1 Year Return. Tr. 1460; Resp. Ex. 17. ZPRIM wanted to reprint the tables from Pensions & Investments in its advertisements, and it approached the magazine about doing so. Tr. 1460. Pensions & Investments and ZPRIM entered into a contract to reprint the table, but the contract required that ZPRIM reprint the tables exactly as they were published in Pensions & Investments. Tr. 1462; Resp. Ex. 21. ZPRIM published the November 15, 2010, tables in an advertisement run in the February 2011 issue of SmartMoney. Tr. 1460; Resp. Ex. 15. ZPRIM ran a similar advertisement with the February 21, 2011, tables in the May 2011 issue of SmartMoney. Tr. 1460; Resp. Ex. 17. ZPRIM ran the same advertisement with the February 21, 2011, tables in the March 21,

2011, issue of Barron's. Resp. Ex. 19. ZPRIM sent the February and May 2011 SmartMoney and Barron's advertisements to Pensions & Investments magazine to ensure that they complied with that publication's requirements. Tr. 1462. ZPRIM made claims of GIPS compliance in the three advertisements, but did not provide the advertisements to anyone, including Pensions & Investments, for review of GIPS compliance. Tr. 1661.

The Pensions & Investments tables reprinted in the February and May 2011 SmartMoney advertisements and March 21, 2011, Barron's advertisement showed that ZPRIM reported the highest gross return percentages within each category. Resp. Exs. 15, 17, 19. ZPRIM's advertisements also included Morningstar ratings for the ZPR Global Equity Composite as well as for three, five, and ten-year returns, and overall returns. Resp. Exs. 15, 17, 19. All of the advertisements included one and five-year performance returns for the ZPR Global Equity Composite, but no three-year returns; it also included one-year performance returns for the ZPR All Asian Composite, but no three or five-year returns. Resp. Exs. 15, 17, 19. According to Max Zavanelli, the return percentages reflected annualized returns. Tr. 1670-72.

Max Zavanelli stated that he did not include the three-year performance returns for the Global Equity Composite, or the three or five-year returns for the All Asian Composite, because of the requirements in the agreement with Pensions & Investments not to alter the tables. Tr. 1460; Resp. Ex. 21. Additionally, ZPRIM did not have information on the other listed money managers' performance returns for other years, and

including more years' worth of returns for ZPRIM composites would be an incomplete comparison. Tr. 1565, 1670. He conceded, however, that ZPRIM added the footnote with all of the claims of GIPS compliance, the ZPRIM logo, the Morningstar ratings, and language about account minimums to the February and May 2011 SmartMoney advertisements and the March 21, 2011, Barron's advertisement—all of which were done without disturbing the Pensions & Investments tables. Tr. 1504-05, 1663, 1668.

Additionally, the advertisements, contrary to GIPS' requirements, showed gross returns instead of net returns. Tr. 1461. Max Zavanelli explained that reporting gross, rather than net, returns is the industry standard, because institutional investors can often negotiate their own fee rates. Tr. 1461-62. Max Zavanelli added that a footnote to the tables informed readers that net return information was available on ZPRIM's website. Tr. 1463; Resp. Exs. 15, 17, 19. Max Zavanelli approved the 2011 advertisements, with the claims of GIPS compliance. Tr. 1503.

Max Zavanelli averred that claiming GIPS compliance in the 2011 advertisements was to convey that the firm was GIPS compliant—not to convey that the advertisements were GIPS compliant. Tr. 1661.

4. Additional Advertisement Issues

In addition to the GIPS compliance failures in the 2008 and 2011 advertisements alleged in the OIP, the Division established at the hearing that twenty of twenty-one advertisements ZPRIM published between January 2008 and April 2010, all making claims of

GIPS compliance, failed to comply with GIPS.[23] Tr. 936; Div. Ex. 21 at 1-11 and 13-21. None of the twenty advertisements correctly provided information on how to receive a GIPS-Compliant Presentation from ZPRIM, which is required by the GIPS advertising guidelines' Item 2. Tr. 602, 627, 936-37; Div. Ex. 21 at 1-11 and 13-21; Div. Ex. 25 at 42; Div. Ex. 26 at 36. None of the twenty advertisements complied with Item 8 of the 2005 GIPS Guidelines advertising guidelines, requiring that the advertisement identify the currency of the reported returns. Tr. 608-13, 627, 937; Div. Ex. 21 at 1-11 and 13-21; Div. Ex. 25 at 42.

Feliz testified that, in addition to the ubiquitous Jack of currency disclosure and information on how to receive a GIPS-Compliant Presentation in ZPRIM's advertisements, several of the advertisements also failed to include mandatory performance returns. For example, a January 2010 SmartMoney advertisement and two January 2010 Barron's advertisements for ZPRIM's Global Equity Composite and one January Barron's advertisement for ZPRIM's SCV Composite failed to include one-year annualized returns, as GIPS required; instead, they included only one-year compounded returns. Tr. 943; Div. Ex. 21 at 13-16. Feliz conceded that one-year compounded returns for ZPRIM could have been the same as one-year annual returns, but the fact that the returns were not labeled as annual is itself contrary to GIPS' requirements. Tr. 1073-75.

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[23] A January 2010 ZPRIM advertisement in SmartMoney did not make a claim of GIPS compliance. Div. Ex. 21 at 12.

Cabot testified that several advertisements, including the October, November, and December 2008 SmartMoney advertisements, failed to disclose whether performance return numbers from prior to 2000 were calculated using methods other than those required under GIPS, as required by Item 10 of the advertising guidelines. Tr. 614-19. Cabot also faulted the advertisements between January 2008 and April 2010, which reported on the SCV Composite, for failure to follow ZPRIM's own definitions of its SCV Composite in calculating and reporting performance returns. Tr. 635. Feliz testified that if the firm added accounts to the composite that did not comport with the composite definition, the returns would not comply with GIPS. 976-78. Cabot also criticized ZPRIM for failure to disclose the use of carve-outs in the advertisements as GIPS required.[24] Tr. 635. The examination staff conveyed these issues to ZPRIM in the Deficiency Letter. Tr. 634; Div. Ex. 77. ZPRIM represented in its response letter that it would correct the problems. Div. Ex. 78.

Feliz testified on the 2011 SmartMoney and Barron's advertisements' non-compliance with the GIPS advertising guidelines. The March 21, 2011, Barron's advertisement lacked disclosure of the currency used in the performance returns, as required by Item 8 of the GIPS advertising guidelines, and failed

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[24] Cabot claimed that Item 10 of the GIPS advertising guidelines required disclosure of the use of carve-outs in performance returns. Tr. 635. Though Item 4.A.11 of the 2005 GIPS Guidelines required disclosure of the use of carve-outs, Item 10 of the advertising guidelines does not explicitly require disclosure in the advertisements. Div. Ex. 25 at 42.

to properly inform interested investors where they could obtain a GIPS-Compliant Presentation, as required by Item 2 of the GIPS advertising guidelines.[25] Tr. 968; Div. Ex. 7. The February and May 2011 SmartMoney advertisements include the same failings. Tr. 970-71; Div. Exs. 6, 66.

ZPRIM ran advertisements in November and December 2009 in SmartMoney that included one, three, and five-year annualized returns, but failed to include period-to-date returns, as required by the advertising guidelines in the 2005 GIPS Guidelines. Div. Ex. 21 at 8-9; see Div. Ex. 25 at 42. Max Zavanelli testified that he purposely left out the period-to-date returns in these advertisements because he knew that the 2010 GIPS Guidelines would rid advertisers of the requirement, and that he was adopting "best practices" under GIPS by following the new guidelines ahead of time.[26] Tr. 1432, 1434.

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[25] The requirement for currency disclosure became Item 10 in the advertising guidelines in the 2010 GIPS Guidelines. Div. Ex. 26 at 36. According to Feliz, the advertising guidelines from the 2005 GIPS Guidelines still applied to the three 2011 advertisements because the returns advertised were for periods ending no later than December 31, 2010. Tr. 967-68. According to Feliz, the 2010 GIPS Guidelines only affect presentations that include returns for periods after December 31, 2010. Tr. 967; Div. Ex. 26 at 9.

[26] I do not credit this testimony, because the 2010 GIPS Guidelines were not published until March 29, 2010, well after the November and December 2009 advertisements were submitted to, and published by, Smart Money. Div. Ex. 26 at 2. Although it is theoretically possible that Max Zavanelli could have been aware in 2009 of the planned 2010 GIPS Guidelines' option to drop period-to-date returns, there is no record evidence explaining how he gained such awareness, and in any event, Ashland took the

G. Investment Report Newsletters

ZPRIM sent its monthly investment report newsletters to clients, academics, institutional investors, journalists, family members, and friends, among others. Tr. 1438. Max Zavanelli testified that he and ZPRIM have been sending them out for over twenty years. Tr. 1437. He contends that his investment report newsletters are unique among the investment industry, and that ZPRIM works at getting its returns out quickly, which makes it difficult to provide fully GIPS-compliant returns. Tr. 1445; Div. Ex. 89 at 40. Max Zavanelli testified that compiling data for the investment report newsletters was a team effort, but that he wrote the majority of the content. Tr. 1437-38.

ZPRIM sent an April 2009 investment report newsletter (April 2009 Newsletter) to its distribution list, which reported performance returns for the prior month for the SCV and EQTP Composites, among others. Resp. Ex. 23 at 3. The reported returns included positive results for the prior month's SCV, EQTP, All Asian, and Global Equity Composite returns. Id. at 2-3. The discussion added that the EQTP's one-year return was negative, but better than its S&P 500 Index benchmark. Id. at 2. The newsletter did not include one-year returns for the SCV, All Asian, or Global Equity Composites. Id. at 3-4. The newsletter also discussed the impact of the "uptick" rule that had recently been in the news, and included data on how the uptick rule affected the SCV Composite: Id. at 5.

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position that firms could not do what Max Zavanelli claimed he had done. Tr. 967.

The purpose of discussing the impact of the rule change was to "explain [ZPR's] performance," why the firm was "getting killed." Tr. 1441. Max Zavanelli testified that he wanted to show people "why we're losing money, why we're making money." Tr. 1442. The April 2009 Newsletter included a footnote at the end of the performance return descriptions that made a claim of GIPS compliance, and stated that Ashland had verified its returns. Id. at 4. The April 2009 Newsletter, however, failed to include disclosures required by the GIPS advertising guidelines, including period-to-date returns and three and five-year annualized returns for the EQTP Composite or one, three, or five-year returns for the SCV, All Asian, and Global Equity Composites. Resp. Ex. 23.

A December 2009 investment report newsletter (December 2009 Newsletter) included tables from the November 16, 2009, issue of Pensions & Investments, which ranked ZPRIM's International Global Equity Composite first among world stock composites for one-year returns and sixth for five-year returns, and the SCV Composite seventh among "composite U.S. value stock" for five-year returns. Resp. Ex. 24 at 4. The two world stock composite tables provide ZPRIM's International Global Equity Composite's one and annualized five-year gross returns, but not net returns, and the composite U.S. value stock table provides one-year gross and net returns for the SCV Composite. Id. The December 2009 Newsletter states, below the Pensions & Investments tables, that "[a]ll numbers are GIPS compliant." Id. Additionally, the newsletter discussed returns for the SCV, EQTP, All Asian, and Global Equity Composites' monthly results. Id. at 2-3. The December 2009 Newsletter did not include period-

to-date returns for any of the composites and did not include one or three-year returns for the SCV Composite, three-year returns for the Global Equity Composite, or one, three, or five-year returns for the All Asian or EQTP Composites. Resp. Ex. 24.

Max Zavanelli conceded that the April and December 2009 newsletters had normal GIPS compliance language, and that neither complied with the GIPS advertising guidelines. Tr. 1694. He testified that ZPRIM was not attempting to mislead anyone with the investment report newsletters; rather, ZPRIM intended to provide information to investors as fast as possible. Tr. 1445. ZPRIM sent the newsletters out on the first day of each month, and it took at least ten days to perform the complex calculations necessary under GIPS because the firm could not determine asset weightings any faster. Tr. 1444-45. Max Zavanelli makes this point in ZPRIM's December 2009 Newsletter, in an article he wrote criticizing certain GIPS requirements. Tr. 1444; Resp. Ex. 24 at 5. The article specifically stated that the "investment report you are now reading is not GIPS compliant." Id. Max Zavanelli testified that the claim of GIPS compliance on the page with the Pensions & Investments tables pertained only to the fact that the performance returns were calculated in accordance with GIPS. Tr. 1443; Resp. Ex. 24 at 4.

Additionally, as he had argued to Ashland, Max Zavanelli believed that the investment report newsletters were not advertising materials and that the GIPS advertising guidelines did not apply. Tr. 1438-39.

H. Morningstar Reports

According to Bauchle, ZPRIM began providing information to Morningstar in approximately 1998 to attract institutional investor clients. Tr. 249-50. In 2005 Morningstar expanded access to its database beyond institutional investors. Tr. 249-51. Bauchle made the decision to provide information to Morningstar. Tr. 250.

According to Max Zavanelli, ZPRIM began providing information to Pensions & Investments in 1991, at Max Zavanelli's direction and before Bauchle began working there, because Pensions & Investments maintained performance data on institutional managers. Tr. 163-64, 1577. At some point, Morningstar purchased the data compilation feature, and thereafter ZPRIM gave its information to Morningstar, which forwarded it to Pensions & Investments. Tr. 1463-64.

Bauchle and Max Zavanelli agreed that Bauchle was responsible for submitting data to Morningstar, and that there was no fee for doing so. Tr. 249-550, 259, 1579. Bauchle submitted the data quarterly. Tr. 1579. After ZPRIM referred to Morningstar's positive star ratings in an advertisement, Morningstar contacted ZPRIM and informed it that it would have to pay Morningstar for references. Tr. 269, 1464. ZPRIM then entered into a contract with Morningstar that allowed it to refer to Morningstar "star" ratings in its advertisements. Tr. 269, 1465; Resp. Ex. 35. Bauchle was the only person at the firm with login credentials to access the Morningstar portal. Tr. 269-70, 1466, 1808. Max Zavanelli did not have the login password, Bauchle was not aware of Max Zavanelli ever accessing the Morningstar portal, and Max Zavanelli testified

that he never used Morningstar himself. Tr. 269-70, 277, 1466, 1581.

Max Zavanelli's testimony on this point was not credible. He admitted that he had been in the financial industry since the 1970s. Tr. 1589. But he contended that prior to 2011, he was unaware that investors had access to the data that ZPRIM, or other firms, sent to Pensions & Investments and Morningstar; he said he did not know that the information ZPRIM submitted went anywhere other than Morningstar's database. Tr. 1578-79, 1589. He knew that Morningstar rated money managers, but apparently thought because Morningstar reports were marked "not for distribution," that others did not have access to the information. Tr. 1577-80. He testified that he learned only upon signing the contract with Morningstar in 2011 that the data was available to subscribers, and that he had previously never inquired of Morningstar regarding who had access to the information, or directed anyone else to do so. Tr. 1578, 1580, 1588-89. He testified that the purpose of submitting information to Morningstar was to measure ZPRIM's performance against everyone else, to win awards, and to "possibly" show he was a great manager. Tr. 1577, 1581. The awards, in turn, were used in ZPRIM's advertising. Tr. 1581. However, he also testified that he had never read a Morningstar report until "after he saw them in exhibits," that he did not read Morningstar reports on companies he was researching, and that he had never visited Morningstar's website. Tr. 1581-82, 1586, 1589. Later he testified both that he had never read a "complete" report until 2011, and that he could not recall reading a complete report. Tr. 1585-86. In fact, he received a seven-page March 31, 2011, Morningstar

report by email on May 12, 2011. Div. Ex. 157. He initially denied providing information to Morningstar for the purpose of gaining institutional clients. Tr. 1587. He later admitted that the purpose of the Morningstar reports was to provide information to potential institutional investors to compare advisers. Tr. 1688-89. Max Zavanelli testified that ZPRIM never gained institutional clients as a result of the information it provided to Morningstar. Tr. 1587.

During the hearing, Mark Zavanelli explained Morningstar's different products and how they were interconnected. ZPRIM paid for a Morningstar "Essentials" license, which allowed ZPRIM to download Morningstar reports regarding ZPRIM, provide those reports to third parties, and use the Morningstar ratings assigned to ZPRIM in its advertisements. Tr. 1795-96. The Essentials license had a separate login protocol from the other Morningstar products. Tr. 1795-96. To access reports on other managers, Morningstar requires a separate, premium subscription, known as Morningstar Direct, which is mostly for institutional investors. Tr. 1798-99; Div. Ex. 37. Morningstar Data Manager is the portal, accessible only with unique login information, which firms, including ZPRIM, use to update their data. Tr. 1800-01. Data Manager is what Bauchle used to update Morningstar on ZPRIM. Tr. 1801. Updates could be made manually or automatically, with software to provide quick updates. Tr. 1801.

Prior to 2011, when ZPRIM signed an agreement with Morningstar, it was not ZPRIM's policy to send Morningstar reports to clients or prospective clients, but Max Zavanelli conceded that reports could have

been sent to them prior to that time without his authorization. Tr. 1633, 1687. Indeed, Sappir sent Morningstar reports to some prospective clients as early as 2008. Tr. 1636, 1644-45; Div. Exs. 153, 154.

A thirteen-page September 30, 2010, Morningstar report for ZPRIM's SCV Composite stated that Ashland had audited ZPRIM's GIPS-compliant performance returns. Div. Ex. 10. That statement was incorrect because Ashland was never ZPRIM's auditor (it was its GIPS verifier), and at that time Ashland had already resigned as ZPRIM's GIPS verifier. Tr. 1690. ZPRIM also had not hired Alpha yet and had no GIPS verifier at the time, and none of the data past the period ended December 31, 2009, had been verified. Tr. 1690. The statement was also incorrect because Ashland never audited any returns. Tr. 1691-92. Mark Zavanelli testified that he believed that a seven-page Morningstar report for September 30, 2010, which included a watermark prohibiting distribution, was a "teaser" report that money managers could view without paying for the full report. Tr. 1802-03; Resp. Ex. 25. The seven-page report also reported no Commission investigation and that Ashland had verified ZPRIM's performance returns "to the present." Resp. Ex. 25.

A seven-page version of the March 31, 2011, Morningstar report stated that performance returns had been audited by Ashland from 2000 "to the present."[27] Div. Ex. 11 at 2. Bauchle told Max Zavanelli in an email that the "to the present" language was

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[27] The OIP makes no allegations regarding this incorrect statement.

mistakenly left over from prior reports, and that he mistakenly failed to update it to reflect the fact that Ashland had resigned. Resp. Ex. 27. He did not include fiscal period end dates in that section of the Morningstar updates as a practice because he was afraid that he would forget to do an update to reflect each report's end date. Resp. Ex. 27. A thirteen-page version of the March 31, 2011, Morningstar report for ZPRIM's SCV Composite also stated that there was no Commission investigation, but differed from the seven-page version by stating that Alpha had verified ZPRIM's performance returns from December 31, 2009, to December 31, 2010, and that Ashland had verified the returns between December 31, 2000, and December 31, 2009. Tr. 1809; Resp. Ex. 26 at 10. Mark Zavanelli did not know the reason for the disparity between the seven and thirteen-page March 31, 2011, Morningstar reports, but surmised that Bauchle might have updated the Morningstar database. Tr. 1810-11, 1835. Bauchle did not have an explanation for the discrepancy, except that it "surprise[d]" him. Tr. 282-83.

The thirteen-page September 30, 2010, Morningstar report and the seven-page March 31, 2011, Morningstar report for ZPRIM's SCV Composite state that there was no Commission investigation pending. Tr. 253-55, 1692; Div. Exs. 10, 11. Bauchle testified that he answered the question of Commission investigations in the negative because he believed that the investigation was not formal until after the OIP issued on April 4, 2013. Tr. 255-56. He testified that after receipt of letters from the Commission during the period of its investigation, the firm held meetings where ZPRIM staff would "downplay" the investigation's significance; this the box for pending

investigation was not checked. Tr. 285. Bauchle was unaware that ZPRIM received a Wells notice, and testified that he was unfamiliar with the term. Tr. 413. After having his memory refreshed, Bauchle testified that he knew in October 2010, when he gave his investigative testimony, that there was "a formal SEC investigation" at the time. Tr. 435-38.

Minutes from an August 30, 2010, ZPRIM board meeting state that ZPRIM had received a letter from the Commission, had retained counsel, and was gathering documents to respond to the Commission's "inquiry." Tr. 1220; Div. Ex. 81. Max Zavanelli agreed that ZPRIM was aware of the Commission investigation when the Commission sent its August 16, 2010, letter, and that ZPRIM had hired counsel at that point. Tr. 772, 1220; Div. Ex. 92. He agreed that the Commission took testimony of ZPRIM staff in 2010, including Bauchle's in October 2010, and that counsel was assisting the firm prepare for that testimony. Tr. 773-74. As noted, he received a copy of the March 31, 2011, seven-page Morningstar report on May 12, 2011. Div. Ex. 157. He testified that he never instructed Bauchle not to check the box indicating the firm was under investigation. Tr. 1466. He testified that he first learned that Morningstar had a "pending SEC investigation" box when ZPRIM received the Wells notice, in 2012. Tr. 1467.

Max Zavanelli's testimony on this point was otherwise not credible. He was the subject of a Commission investigation in the 1980s, and thus must have known what was going on in 2010. Resp. Ex. 32. Nonetheless, he testified that the "Pending SEC investigations: no" entries in the two Morningstar

reports were true at the time because ZPRIM had not yet received a Wells notice. Tr. 767, 1692-93.[28] But he also testified, just moments after testifying differently, that he knew in August 2010 that there was an investigation. Tr. 767, 773. He was provided with a copy of the formal order of investigation when he gave testimony in June 2011. Div. Ex. 89 at 177.

When I questioned him about how he would have answered the Morningstar question regarding "pending SEC investigation," had he been the one to do so, his answers were evasive and inconsistent with his previous testimony. First, he said he would have consulted National Compliance Services (NCS), a compliance firm ZPRIM began working with after Mark Zavanelli took over as chief compliance officer, that is, at a time well after the events in question. Tr. 1713. Next, he said he would have consulted with his lawyers. Tr. 1714. Finally, he said he would have checked the "no" box, not because he had a sincere belief that "no" was the right answer, but because he understood that if "yes" is checked, the Morningstar portal requires specification of "what are the charges, what's the date," which were not applicable at the time. Tr. 1714. Although he admitted that he never accessed Morningstar, he testified that his son asked Morningstar about this in 2013, and they said that if there are no charges, then the "no" box should be checked.[29] Tr. 1714-15.

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[28] The transcript records him as saying that ZPRIM received the Wells notice in 2010; this is clearly a typographical error. Tr. 1692.

[29] Mark Zavanelli did not testify about an inquiry made to Morningstar. In any event, it seems highly unlikely that

After the April 4, 2013, OIP was issued, Bauchle reported the initiation of a Commission proceeding in the Morningstar reporting database, and screen shots from Morningstar's website entry for ZPRIM reflect Bauchle's update disclosing the OIP. Tr. 284-85; Resp. Ex. 38.

I. Post-2011 Compliance

Prior to joining ZPRIM, Mark Zavanelli's compliance experience was limited to his dealings with Oppenheimer Funds' compliance department while working as a fund manager there. Tr. 1740, 1840. He familiarized himself with GIPS by reading the standards and guidelines. Tr. 1746-47. He also familiarized himself with ZPRIM's books and records by reviewing them, and familiarized himself with the company, generally, by speaking with employees, including Bauchle and Fay. Tr. 1748. He knew when he joined ZPRIM there were issues with the firm's GIPS compliance that had been flagged by the Commission. Tr. 1750. He attended a seminar by Investment Advisers Watch in preparation for his role as chief compliance officer, although he admitted that the seminar was not "too in depth." Tr. 1746. Max Zavanelli testified that he believed his son was

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Morningstar would require this, because the target of an investigation may not know the tentative charges, and indeed, no charges may ever be filed. See generally BDO China Dahua CPA Co., Ltd., Initial Decision Release No. 553, 2014 WL 242879, at *4-*47 (Jan. 22, 2014) (describing various Commission investigations). In this case, for instance, the Commission's August 16, 2010, letter discloses no tentative charges and explicitly states that it "should not be construed as an indication by the Commission or its staff that any violation of law has occurred." Div. Ex. 92.

qualified for the chief compliance officer position, despite a lack of compliance experience, because of his experience at Oppenheimer Funds and his energy, skill, and talent. Tr. 1618-19.

Mark Zavanelli began acting as ZPRIM's chief compliance officer in October 2011. Tr. 1744. Subsequently, he reviewed ZPRIM's practices, identified certain GIPS-related problems, and pointed out many of them to his father. Tr. 1222. Since becoming chief compliance officer, Mark Zavanelli has been responsible for working with Alpha and NCS. Tr. 1319, 1618. Mark Zavanelli conceded that he was not an experienced chief compliance officer, but ZPRIM chose to rely on NCS for compliance issues beyond his expertise, in consideration of minimizing ZPRIM's expense. Tr. 1841-42.

When Mark Zavanelli first arrived at ZPRIM, he provided copies of ZPRIM's investment report newsletters to NCS, and probably Alpha, to review. Tr. 1765-66, 1771. In consultation with NCS and Alpha, he determined that the newsletters were advertising that reported performance returns. Tr. 1766. He sent an email to Max Zavanelli informing him that he had reviewed the definition of advertisements in GIPS, and determined that it included the investment report newsletters. Tr. 1316; Div. Ex. 133. Mark Zavanelli decided that ZPRIM should attach tables to the investment report newsletters going forward, containing performance returns that comply with the advertising guidelines for each composite. Tr. 1528-31, 1766; Div. Exs. 137, 138. He changed the policy over Max Zavanelli's objections. Tr. 1526, 1773. The December 2012 investment report newsletter shows

that by that point, ZPRIM was attaching the GIPS advertising compliant tables. Tr. 1768; Resp. Ex. 30.

Mark Zavanelli learned that Max Zavanelli had for years included all accounts in the SCV Composite, rather than only those that qualified under the composite definition. Tr. 1223-24. He told Max Zavanelli in an email that those numbers did not comply with GIPS, but that because the GIPS guidelines permitted use of older numbers in performance returns, they could continue including them. Tr. 1324; Div. Ex. 134. Mark Zavanelli consulted with Alpha regarding how to deal with the pre-2001 numbers and determined that ZPRIM would have to either disclose the non-compliance, or drop the pre-2001 numbers, or restate the pre-2000 returns to comply with the GIPS guidelines. Tr. 1324, 1760-62; Div. Exs. 117, 134. Max Zavanelli disagreed with Mark Zavanelli's analysis and argued that the pre-2000 numbers were GIPS compliant. Tr. 1324, 1331; Div. Exs. 134, 135. Over Max Zavanelli's objection, Mark Zavanelli decided to eliminate ZPRIM's use of pre-2000 numbers in the SCV Composite's performance returns. Tr. 881, 1536-37; Div. Exs. 117, 118, 128.

Mark Zavanelli testified that the compliance process for advertisements has been bolstered since he arrived at ZPRIM, and that he has made changes to the firm's website, brochures, and investment report newsletters, and to its GIPS footnote. Tr. 1755-56, 1763-64. To begin with, he had NCS perform a review of the firm's website and its investment report newsletters. Tr. 1753. He also engaged Alpha on the firm's marketing and GIPS compliance and made changes in response to Alpha's comments. Tr. 1754-55. A snapshot taken of

ZPRIM's website in August 2013 shows that the website, which Mark Zavanelli concedes is itself an advertisement, claims GIPS compliance and includes one, three, and five-year returns for the SCV and Global Equity Composites. Tr. 1757-58; Resp. Ex. 29. It also shows that ZPRIM no longer advertises its performance returns from prior to January 1, 2001. Tr. 1758-59.

Additionally, Mark Zavanelli has modified the firm's advertising format and has asked Alpha to review advertisements before they run. Tr. 1776-77. Mark Zavanelli or staff at his direction will have responsibility for uploading data to Morningstar, now that Bauchle is no longer with ZPRIM. Tr. 1800-01.

Mark Zavanelli claims that he was unaware that the Commission was conducting an investigation into ZPRIM until it received the OIP. Tr. 1299-1300. He testified that he was aware that ZPRIM employees, including Max Zavanelli, had provided testimony to the Commission, and that ZPRIM had hired counsel. Tr. 1301-02. He conceded that those facts made him aware that the Commission's involvement with ZPRIM was more than a "routine thing," but maintained that he was unaware that the examination phase had progressed into an investigation. Tr. 1301. Though he read the transcripts from Commission testimony, he did not "recognize the verbiage" of the investigation at the beginning of each transcript. Tr. 1300. On October 8, 2012, Mark Zavanelli sent Bauchle an email to update the firm's submissions to Morningstar, and he told Bauchle that he should mark "No" for the question asking whether there were any pending Commission investigations. Tr. 1308-09; Div. Ex. 132. He believed

at the time that it was the correct answer. Tr. 1309. He also told Bauchle to mark "Yes" to "SEC investigations in last 5 years." Div. Ex. 132. His explanation for this apparent inconsistency was that he had "maybe" understood the term "investigation" to refer to the 2009 examination. Tr. 1309-10.

Mark Zavanelli testified that he had learned of several significant issues during the hearing that he would go back and address. Tr. 1844. For example, he had not performed a review of the ZPR Portal emails for the annual compliance review; he represented that he would do so in the future. Tr. 1816.

J. Books and Records and Electronic Communications

1. The First ZPR Portal

In approximately 2002 or 2003, Max Zavanelli invested in building ZPR International's first portal (First ZPR Portal), a cloud-based research support database and an internationally networked communication hub, so that he and his businesses could communicate and share research from anywhere globally. Tr. 146, 1378. The First ZPR Portal was Internet-based, accessible at www.zprinternational.net, and required a login and password for access.[30] Tr. 182.

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[30] A dispute arose at the hearing over the identity of the electronic address "ZPRPortAdmin," and whether it indicated the sender was sending a message through the ZPR Portal. The best explanation provided was that it did not reflect a ZPR Portal communication; rather, ZPRPortAdmin was short for ZPR Portfolio Administrator and was a ZPRIM email address used to send the firm's information packets to potential investors after they had spoken with Sappir. See, e.g., Tr. 166, 349, 424; Resp. Exs. 11, 18, 20. Amy

The First ZPR Portal had many technological drawbacks. Communications were archived on the server, but could not be saved to a personal account; the only methods for preserving single communications was to print off hard copies or forward them to an email address. Tr. 173-74, 335, 1383-84.

A former student and employee of Max Zavanelli, Richard Bigot (Bigot), a French and Thai citizen, built the First ZPR Portal. Tr. 332, 1383. Bigot remained the First ZPR Portal's webmaster and hosted the server, maintaining complete administrative control. Tr. 333, 1385-86. According to Max Zavanelli, Bigot became greedy and attempted a "major coup," which included perpetration of fraudulent acts and stealing funds, and, as a result, Max Zavanelli terminated the contract with Bigot in around March 2011. Tr. 1384. According to Max Zavanelli, Bigot threatened to steal the First ZPR Portal away from Max Zavanelli even before their relationship ended. Tr. 1384-85.

After the contract with Bigot was ended, Bigot did not return the portal's archived data, including communications, to ZPRIM. Tr. 1384. On March 1, 2011, ZPR International sent a letter to Bigot (March 2011 Letter) confirming his contract's termination and demanding that he release control and deliver the First ZPR Portal assets to ZPR International within seven days, but Bigot disregarded the demand. Tr. 332-33, 1514-15; Resp. Ex. 44. Max Zavanelli testified that he has brought a civil lawsuit against Bigot and that there is a pending criminal action against him as well, but

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and Ted Bauchle were the most frequent users of the address. Tr. 349, 383, 667; Resp. Ex. 11.

they do not appear to address recovery of the First ZPR Portal. Tr. 1514-15. Max Zavanelli testified that since the March 2011 Letter, he has not taken any further action to recover the contents of the First ZPR Portal. Tr. 1516.

According to Max Zavanelli, Bigot maintained the First ZPR Portal in Thailand and France, which Max Zavanelli said makes recovery of the data difficult. Tr. 1385. ZPRIM and its employees could no longer access the First ZPR Portal after Bigot's contract ended. Tr. 333-35; 1385. Respondents cited Bigot's lack of cooperation and ZPRIM's inability to recover the First ZPR Portal data for not producing materials from the First ZPR Portal, in response to the Trial Subpoena. Tr. 316.

2. The Second ZPR Portal

In 2011, after Bigot threatened to abscond with the First ZPR Portal data, Max Zavanelli built a new portal (Second ZPR Portal). Tr. 1385-86. The Second ZPR Portal serves the same purposes as the First ZPR Portal, but is more technologically advanced than the earlier version; notably, it is able to catalogue and save all messages for individual user access. Tr. 1387. The Second ZPR Portal is hosted on a server located in Lithuania. Tr. 149, 327. Vaidotas Petrauskas, ZPR International's research manager, who also performs some services for ZPRIM, maintains the Second ZPR Portal. Tr. 797. The Second ZPR Portal went live in March 2011, and Petrauskas sent a message on March 25, 2011, informing ZPR Portal users that use of the portal provided better security than traditional email. Tr. 799-800; Div. Ex. 108. He also included instructions for accessing the Second ZPR Portal. Div. Ex. 108. The

Second ZPR Portal requires a login and password, as the First ZPR Portal did. Id. The Second ZPR Portal's address is www.zprintl.com, and the syntax for user communications consists of the employee's name followed by a slash and "zpr@zpr.com," so for example, Max Zavanelli's ZPR Portal address is maxzavanelli/zpr@zpr.com. Tr. 162, 334, 744-45.

3. ZPR Portal Usage

Max Zavanelli used the ZPR Portal as his primary method of communicating with ZPRIM and ZPR International employees. Tr. 1517-20. He believed that he had been assigned an email on the ZPRIM email system, but he never used it. Tr. 1647. The ZPR Portals permitted communication among his multiple companies that were scattered globally. Tr. 1381. He may or may not have used email as well as the ZPR Portal while in Lithuania; his testimony on this point was confusing. Tr. 1517-20.

It is clear, however, that one of the reasons he preferred to use the ZPR Portal was to stymie Commission scrutiny of its contents, as Bauchle testified. Tr. 153. Max Zavanelli denied this, but the record contains numerous examples supporting this conclusion. Tr. 1716. On March 20, 2011, Max Zavanelli sent an email through the ZPR Portal stating that ZPR International should maintain its records completely separate from ZPRIM's and that related communications should be maintained on the ZPR Portal so that they could keep them away from the "prying eyes of the SEC Monster." Tr. 767-68; Div. Ex. 101. In the fall of 2011, Mark Zavanelli established ZPRIM's current email system, using the address syntax "zprim.net," and Max Zavanelli responded to

this by warning Mark Zavanelli that ZPRIM emails were "available to the SEC . . . and they did ask for all zprim emails." Div. Ex. 105. Similarly, on November 17, 2011, he responded to a message from Fay regarding ZPRIM disclosures on its Form ADV, by removing the discussion to the ZPR Portal, stating "use only the portal [for] such discussions." Div. Ex. 106.

Max Zavanelli testified that he also used the ZPR Portals to discuss trading strategy and relay trading instructions. Tr. 803, 823, 826; Div. Ex. 98. For instance, a January 4, 2012, ZPR Portal email among Sappir, Bauchle, Max Zavanelli, and a representative from Grace Financial, ZPRIM's former clearing broker, discussed a dispute over fees charged by Grace Financial for failed trades. Tr. 1171-72; Div. Ex. 122.

Bauchle testified that he sent daily trade, client, and valuation reports to Max Zavanelli over the ZPR Portal, and Max Zavanelli provided instructions to Bauchle over the ZPR Portal. Tr. 149-50. He said that the majority of ZPRIM's operations were conducted over the ZPR Portal, and that the ZPRIM email system was used mainly for client communications. Tr. 151. ZPR International staff typically updated ZPRIM's website, and often, ZPRIM staff would send data, including performance return numbers, over the ZPR Portal to either Max Zavanelli or the individuals in charge of uploading the data at ZPR International. Tr. 350. According to Bauchle, Max Zavanelli sent some trading instructions on clients' behalf over one of the ZPR Portals. Tr. 163. Marketing was also discussed over the ZPR Portals, as were GIPS compliance and ZPRIM's performance return rates. Tr. 168-69.

Sappir testified that he has used the ZPR Portal since 2007, which is inconsistent with testimony from Max Zavanelli that he first added Sappir to the Second ZPR Portal in 2011, and that he had not provided Sappir with access to the First ZPR Portal. Tr. 1170-71, 1716. Sappir communicated with others at ZPRIM over the ZPR Portal at least a few times a week, including for the purpose of receiving updates from Bauchle, Max and Mark Zavanelli, and Fay, who were all in different locations from Sappir. Tr. 1159-60. Max Zavanelli used the ZPR Portal to discuss potential marketing and trade recommendations with Sappir. Div. Ex. 149. Sappir did not ordinarily communicate with clients over the ZPR Portals. Tr. 1187.

Max Zavanelli testified that it was his policy not to allow client communications or marketing communications over the ZPR Portal. Tr. 1716. ZPRIM did not, however, maintain any written rules or make any mention of these policies in the firm's compliance manual. Tr. 411-12, 1717, 1819-20, 1837. Max Zavanelli testified, incredibly, that the ZPR Portal was not mentioned in the compliance manual because it "wasn't part of ZPR Investment Management." Tr. 1717. He said that where he saw infractions of his rule on client or marketing communications over the ZPR Portal, he would chastise the employee. Tr. 1717. He conceded, however, that nobody was policing or monitoring the ZPR Portal to ensure that employees followed his rules. Tr. 1718.

Max Zavanelli testified that ZPRIM did not maintain any records for ZPR International. Tr. 764. He first testified that he did not believe that ZPRIM had maintained information regarding any ZPR

International client accounts, though it may have maintained information on ZPR International capital accounts. Tr. 765-66. A March 20, 2011, ZPR Portal message, however, asked Bauchle to delete historical data related to certain ZPR International accounts from ZPRIM's records because "there is always the stupid possibility that the SEC will decide to seize all of our US computers." Tr. 768; Div. Ex. 101. He then admitted that this indicated there were some documents related to ZPR International accounts at ZPRIM, and that he had them deleted, but that they were not the official records, which were maintained at ZPR International in Lithuania. Tr. 776-79. Max Zavanelli also told Sappir to delete messages that he received from ZPRIM clients over the ZPR Portal. Div. Ex. 126.

Max Zavanelli testified that he told ZPRIM staff, including Bauchle and Sappir, that there should be no client communications over the ZPR Portal. Tr. 771, 785; Div. Exs. 103, 126. On June 19, 2012, he sent a message to Sappir to this effect, and told him to delete certain client communications that were sent over the ZPR Portal and not to allow ZPRIM clients to use ZPR Portal addresses, because the emails were not subject to access by the Commission. Div. Ex. 103. Fay sent a ZPR Portal message on October 14, 2011, to ZPRIM staff informing them that the ZPR Portal should only be used for internal communications, and not to allow third parties or clients to use the portal addresses. Div. Ex. 111. There were at least a few instances of subsequent client communications over the ZPR Portal, however. See, e.g., Div. Exs. 112, 122, 125. Both Max Zavanelli and Fay acknowledged that some employees did not follow the rules regarding usage of the ZPR

Portal, and that it was possible that clients communicated over it. Tr. 816, 1295. Fay testified that in her annual compliance reviews, she did not run any sort of forensic exam to determine whether any clients had used the ZPR Portal. Tr. 1292.

Fay testified that she and others at ZPRIM used the ZPR Portal like a drop box to transmit large files to Max Zavanelli, rather than sending the files by email. Tr. 1235. It was also used to communicate internally on issues that may have included GIPS. Tr. 1237; see also Div. Ex. 129. She represented that the ZPR Portal was not used to store ZPRIM books and records. Tr. 1233; Resp. Ex. 43 at 9; see also infra.

Fay testified that she was familiar with the books and records requirements under the Advisers Act and that ZPRIM did maintain everything required. Tr. 1283-84. She said that when books and records were transmitted over email or the ZPR Portal, the message was not usually saved, but the attached files would be saved independently. Tr. 1285. Max Zavanelli testified that all books and records sent over the ZPR Portal were saved twice, once in the ZPRIM computer system and once in the ZPR Portal, for messages sent after implementation of the Second ZPR Portal. Tr. 897.

4. Disclosures to Commission Staff

During the Commission's 2009 examination of ZPRIM, the examination team made multiple requests of ZPRIM for documents, prior to the onsite visit, during the onsite visit, and following the onsite visit. The examination staff sent their initial request on January 14, 2009, to which was attached a Commission Form 1661, which outlines requirements of

Commission regulated firms during inspections and in their responses and productions to Commission staff. Tr. 447-48, 453; Resp. Ex. 42. The letter also attached a Form 1662, advising recipients of the consequences of failing to provide truthful statements or comply with Commission subpoenas and requests. Resp. Ex. 42 at 19. Most of the language from the Form 1661 comes from the Advisers Act, according to Cabot. Tr. 527-28.

After arriving onsite, the examination staff made a follow-up request on February 4, 2009, for all communications for Bauchle, Fay, and Max Zavanelli between July 1, 2008, and December 31, 2008. Tr. 338, 529; Resp. Ex. 42. Bauchle testified that he did not gather documents from the ZPR Portal for production because those communications were considered confidential, meaning that they were not available to the outside public, including the Commission. Tr. 151-53. He added that Max Zavanelli specifically told him not to produce the ZPR Portal communications to Commission staff. Tr. 152, 165. ZPR International, not ZPRIM, owned the ZPR Portal, according to Bauchle, which is another reason the ZPR Portal's contents were not produced. Tr. 167. However, all of ZPRIM's communications files were produced, said Bauchle. Tr. 166-67. No log of ZPR Portal communications was provided to Commission staff. Tr. 172-73. Fay testified that she was involved with the gathering of records for the response to the Commission's requests. Tr. 1239. She conceded that the response to the Commission's request for communications between herself, Bauchle, and Max Zavanelli only included emails from ZPRIM's email system. Tr. 1239-40. Fay explained to Mark Zavanelli on September 9, 2011, that the firm's position had been that, as long as there was no client

correspondence on the ZPR Portal, it was not subject to Commission review. Div. Ex. 130.

In March 2009, ZPRIM sent a response to the Commission examination staff's February 4, 2009, request for documents. Resp. Ex. 43. In it, ZPRIM stated that "ZPR owned a password protected Internet Portal" that was hosted, maintained, and backed up by a third party vendor. Tr. 1247; Resp. Ex. 43 at 9. The response claimed that "[t]he portal is not used for any of the categories covered by Rule 204-2." Id. The explanation also stated that the portal did not have a typical inbox function, but users could check a box to have the message sent to their inbox. Id. The response noted that the portal was not located in the United States. Id.

Cabot admitted that the examination staff received the letter around February 4, 2009, but that the staff did not notice the response regarding the ZPR Portal. Tr. 492-93, 501. Cabot also admitted that the examination staff asked no questions about the ZPR Portal and did not request any documents from it. Tr. 341-42, 503. She testified that ZPRIM failed to provide any information on the firm's Internet and email service providers regarding the ZPR Portal in response to the request in the examination team's January 14, 2009, letter. Tr. 460. Cabot also testified that ZPRIM did not produce any emails from the ZPR Portal in response to the examination team's requests. Tr. 453. Bauchle, Fay, and Sappir conceded that they did not. Tr. 173, 1182, 1239-40.

The first time that Bauchle discussed either version of the ZPR Portal with the staff was during his testimony preparation on the day before he was

supposed to testify in the originally scheduled hearing. Tr. 147. He did not discuss the ZPR Portal during his investigative testimony in 2010, and he did not believe that any other ZPRIM employees or related parties disclosed it during the investigation. Tr. 336.

During Max Zavanelli's investigative testimony in June 2011, he was first asked if he had withheld any requested documents, and he said he had not. Div. Ex. 89 at 8-9. He was then asked what his email address was, and he first responded that it was max@zprintl.net. Div. Ex. 89 at 9-10. He then "corrected" himself and gave max@zprim.net as his email address, which, as he conceded during the hearing, he never used. Tr. 1647, 1656-57; Div. Ex. 89 at 9-10. He admitted that his first response during his investigative testimony was the ZPR Portal address. Tr. 1647, 1656. He testified during the hearing that he provided the incorrect email address during his investigative testimony because it was shortly after ZPR International had created the Second ZPR Portal, and the ZPR Portal email addresses had just changed. Tr. 1649, 1657.[31]

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[31] I do not credit this testimony, inasmuch as it suggests a simple mistake. The Second ZPR Portal had been operational at the time of Max Zavanelli's investigative testimony for over three months, he provided investigators with a "correct address" that in fact he never used, and, most importantly, the other record evidence establishes overwhelmingly that he used the ZPR Portal for the purpose of evading Commission scrutiny. Tr. 149-50, 1657; Div. Ex. 89 at 8-10; Div. Ex. 157.

III. DISCUSSION AND CONCLUSIONS OF LAW

A. Adverse Inference

The Division requests that an adverse inference be drawn against ZPRIM and Max Zavanelli, based upon their alleged withholding and spoliation of evidence during the Commission's examination and investigation. Div. Br. 52-70. The Division claims that despite rules requiring preservation of books and records and specific requests from the Commission, ZPRIM withheld documents, and after years of failure to produce or preserve those documents, irretrievably lost them. Id. The Division requests an adverse inference that, had the Respondents produced the communications from the First ZPR Portal, they would have been adverse to their defense in this case. Div. Br. 70.

There are three elements required to establish an adverse inference for spoliation of evidence: the requesting party must show that (1) the party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a 'culpable state of mind'; and (3) the evidence that was destroyed or altered was 'relevant' to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defense of the party that sought it. Mazloum v. D.C. Metro. Police Dep't, 530 F. Supp. 2d 282, 291 (D.D.C. 2008) (quoting Thompson v. HUD, 219 F.R.D. 93, 101 (D. Md. 2003)). Spoliation is not a substantive claim but an evidentiary issue, and is thus "administered at the discretion of the trial court." Hodge v. Wal-Mart

Stores, Inc., 360 F.3d 446, 450 (4th Cir. 2004) (quoting Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 155 (4th Cir. 1995)).

The Division's points are well taken. Respondents communicated through the ZPR Portal at least in part because they believed doing so would prevent discovery of those communications by the Commission. They deliberately withheld records in the First ZPR Portal after being requested to provide them, and intentionally misdirected examiners and investigators by, for example, disclosing an unused email address. They flouted the Commission's authority in a manner that likely would not have been discovered but for the filing of the present proceeding. All these factors are relevant to the present proceeding, even though they constitute uncharged conduct, and I have considered the ZPR Portal evidence in evaluating both liability and sanctions.

However, purely as an exercise of discretion, I decline to draw an adverse inference. As detailed infra, even without an adverse inference, the evidence is more than sufficient to show that ZPRIM made the charged material misrepresentations with scienter, and to support the Division's requested sanctions. As I noted during the hearing, the Division felt confident enough to pursue this proceeding even without any knowledge of the ZPR Portal. Tr. 21-22. The evidence shows that its confidence was well-placed, and there is no need for an adverse inference.

B. Max Zavanelli's Demeanor

Similarly, the written record and testimony are generally sufficient to resolve whatever credibility

issues have arisen, and I generally have not relied on Max Zavanelli's demeanor in resolving them. However, I would be remiss in failing to discuss it, because it was so extraordinarily poor.

Max Zavanelli was repeatedly disrespectful to Division counsel. When asked about an email "that [he] sent through the portal, an exchange between [Max Zavanelli] and Mark Zavanelli and some other people," he responded, "It's not from me. It's a follow-on e-mail. So get it right." Tr. 755, 757. In fact, the exhibit was an email string which included an email from Max Zavanelli and which was, overall, an exchange between him, Mark Zavanelli, and others. Div. Ex. 98. After admitting that he had directed employees to delete account records from ZPRIM's computers, he was asked, "Now, that's not the only time that you directed people at ZPR to destroy evidence, is it," to which he replied, "What kind of question is that?" Tr. 778, 780. In response to a series of questions regarding how attachments to ZPR Portal messages are automatically removed when a reply is sent, he stated, condescendingly, "You have to understand how e-mails work." Tr. 896.

His investigative testimony, which I admitted for substantive purposes, is replete with instances of combativeness, evasion, and non-responsive answers. Tr. 855; see generally Div. Ex. 89. Indeed, during the first half of his testimony, virtually every exhibit page of the transcript contains at least one example. The very first question was "Please state and spell your full name for the record," to which Max Zavanelli replied, "Okay. I'm the only child of two American hero[es] and I'm a former artillery officer with top secret crypto

clearance and that's the highest in the land." Div. Ex. 89 at 4. He was then asked, "Before we get into that, why don't you state your name for the record," to which he replied "I will do that in time. In time I will do that." Id. His counsel then instructed him, "Max, we need to be responsive to her questions," and then cautioned him even more thoroughly after his very next remark, which was discursive and largely irrelevant. Id. at 4-5. Later, regarding the GIPS advertising guidelines, he was asked, "When was the first time you read it?" Div. Ex. 89 at 46. This colloquy took place:

> A. Back in 2006. Now let me say –
>
> MR. SNYDERBURN: Just listen to her question.
>
> MR. ZAVANELLI: I just want to get to the heart of this. We are going to waste so much time.
>
> MR. SNYDERBURN: You are going to have an opportunity.
>
> MR. ZAVANELLI: I hope so, because this is pretty ridiculous.

Div. Ex. 89 at 46.

He was less defiant at the hearing, two years later, but he was still uncooperative, evasive, and discursive. Within moments of beginning his testimony, he talked over someone else (in this instance, Division counsel) for the first time. Tr. 740. He started evading questions at about the same time, and continued doing so throughout his testimony. Tr. 740; see generally Tr. 740-899, 1209-26, 1350-1738. He went off on a tangent for the first time shortly thereafter. Tr. 747.

Within the first hour of his testimony, I felt it necessary to caution Max Zavanelli regarding his conduct; he talked over me as I explained the problem:

> Q. Would you please –
>
> A. I know, but if I can't explain –
>
> JUDGE ELLIOT: Mr. Zavanelli, Mr. Zavanelli, you understand –
>
> THE WITNESS: I understand.
>
> JUDGE ELLIOT: – your attitude, your demeanor –
>
> THE WITNESS: I'm sorry.
>
> JUDGE ELLIOT: – the things you say, you are fighting with Ms. Berlin, I'm going to take all those things into account when I write my initial decision.
>
> THE WITNESS: I'm sorry. Okay.

Tr. 727, 768-69. I then ordered a short break to give Respondent a chance to confer with counsel. Tr. 769. It was just a few minutes later when, as noted supra, he responded to a question with, "What kind of question is that?" Tr. 780.

The next day, after a particularly dilatory and evasive series of answers to relatively simple questions, I ordered Max and Mark Zavanelli out of the courtroom and discussed the situation with counsel. Tr. 851-55. The parties agreed to admit Max Zavanelli's investigative testimony as a substantive exhibit, to avoid duplication of questioning and expedite the proceeding. Tr. 855. Just minutes later, after recommencing his testimony, I granted a motion to strike one of his answers as non-responsive, and

Respondents' counsel cautioned him, "Please try to be responsive to Ms. Berlin's questions, and do not offer any additional information unless Ms. Berlin asks you questions or asks for additional information." Tr. 861-62.

Eventually, after a question on cross-examination which he answered especially evasively, I warned Max Zavanelli that I was considering striking all of his testimony:

> JUDGE ELLIOT: All right. I will grant that motion [to strike]. So let me say this. I'm really, really getting tired of this, Mr. Zavanelli. You are not helping yourself. I told you this last time we were here. You are not helping yourself by being so resistant to answering questions, okay? I will - not now but I will, if you do this a few more times, I will sanction you and that sanction may be striking all of your testimony today. In other words, you will not be able to present your side of the story unless you answer questions under cross-examination. Do you understand? You may consider this your first warning. I will give you another warning when I think that you are not answering questions properly. And after that, I will entertain a motion from Ms. Berlin to strike all of your testimony today. Mr. Snyderburn will be able to be heard on that issue but I'm telling you now, I am seriously considering it so this is your first warning.

Tr. 1500-01.

Although I did not strike all of his testimony, on what was planned to be, and was, the last day of the hearing, when Max Zavanelli continued to misbehave

under the Division's cross-examination, I proposed that the hearing end that day even if Max Zavanelli was not finished with his testimony: "if Mr. Zavanelli insists on answering questions in this discursive manner, then that's his problem, and he's not going to get his case put in." Tr. 1622. In opposing this proposal, which I ultimately ordered, Respondents' counsel observed that my threat to strike all of Max Zavanelli's testimony was "very stressful for him." Tr. 1624, 1628-29. The following colloquy ensued:

> JUDGE ELLIOT: And, Mr. Zavanelli, I don't want to strike your testimony. I don't want to do that, okay? The point of my warning you was to get you to just answer the questions in a straightforward way, okay?
>
> THE WITNESS: I'm sorry. It's my nature to discuss, and I'll try to control it. Sorry.

Tr. 1631. Even after that, I still had to intervene or strike an evasive response on several occasions. Tr. 1651, 1653, 1655, 1684, 1703, 1732.

Max Zavanelli's demeanor, attitude, and overall presentation are entirely consistent with the finding that he, and therefore ZPRIM, acted willfully and with scienter. See In re Columbia Securities Litig., 155 F.R.D. 466, 479 (S.D.N.Y. 1994) (evaluating scienter "generally requires examination of a witness's demeanor and credibility"); SEC v. Elliot, No. 09-cv-7594, 2012 WL 2161647, at *2 (S.D.N.Y. June 12, 2012) (demeanor bolstered finding of scienter). I have specifically considered his demeanor in evaluating sanctions. See SEC v. Cavanagh, 1 F. Supp. 2d 337,

373 (S.D.N.Y. 1998) (demeanor relevant to evaluating likelihood of committing future violations).

C. Sections 206(1), 206(2), and 206(4) of the Advisers Act.

ZPRIM violated Sections 206(1), 206(2), and 206(4)[32] of the Advisers Act.[33] Section 206 provides:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—(1) to employ any device, scheme, or artifice to defraud any client or prospective client; (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client . . . (4) to engage in any act,

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[32] Violation of one of its associated Rules is not a precondition to finding a violation of Section 206(4) of the Advisers Act. See Warwick Capital Mgmt., Inc., Advisers Act Release No. 2694 (Jan. 16, 2008), 92 SEC Docket 1410, 1411 n.3 (finding a violation of Section 206(4) without an associated violation of Rule 206(4)-1(a)(5)). ZPRIM is also accused of violating Advisers Act Rule 206(4)- 1(a)(5), promulgated under Advisers Act Section 206(4), in connection with the Section 206(4) charge. The Rule 206(4)-1(a)(5) violation is evaluated separately, infra.

[33] ZPRIM was the "maker" of the fraudulent statements under Janus Capital Group, Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011), because it "created" the materials and had ultimate legal control and responsibility for them. See Tr. at 457. Max Zavanelli's statements and actions as the sole shareholder at the time are imputed to ZPRIM. SEC v. Blinder, Robinson & Co., Inc., 542 F. Supp. 468, 476 n.3 (D. Colo. 1982) (citing SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1096-97 nn.16-18 (2d Cir. 1972))

practice, or course of business which is fraudulent, deceptive, or manipulative.

15 U.S.C. § 80b-6. To establish violations under sections 206(1), (2), and (4) of the Advisers Act, the Division must prove that ZPRIM was an investment adviser, that it engaged in fraudulent activities by jurisdictional means, and that it breached its fiduciary duty by making false or misleading statements or omissions of material fact at least negligently. SEC v. Gotchey, 981 F.2d 1251 (4th Cir. 1992); SEC v. Merrill Scott & Assoc., Ltd., 505 F. Supp. 2d 1193 (D. Utah 2007); see SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191-92 (1963). To establish a violation of Section 206(1), the Division must also prove that ZPRIM and Max Zavanelli acted with scienter. SEC v. Steadman, 967 F.2d 636, 641 & n.3 (D.C. Cir. 1992). As with Section 206(2), which prohibits engaging in "any transaction, practice, or course of business which operates as a fraud or deceit," scienter need not be proven under Section 206(4). 15 U.S.C. § 80b-6(2), (4); Capital Gains Research Bureau, 375 U.S. at 195. To the extent Respondents' misrepresentations violated Sections 206(1) and 206(2), they also violated Section 206(4). See SEC v. Blavin, 557 F. Supp. 1304, 1315 (D. Mich. 1983) (Section 206(4)'s standard is looser than that of 206(1), and so liability under 206(1) also creates liability under 206(4)). Accordingly, by virtue of their violations of Sections 206(1) and 206(2) (see infra), Respondents also violated Section 206(4).

1. Registered Investment Advisers and Interstate Commerce

ZPRIM first registered as an investment adviser sometime soon after its formation in 1994, and after a

period of deregistration, re-registered in April 2006. See OIP at 2; Answer at 2; ZPRIM 2013 ADV. It has been registered continuously since then. ZPRIM 2013 ADV.

ZPRIM and Max Zavanelli engaged in interstate commerce. ZPRIM's clients were located throughout the United States, the advertisements at issue in this matter were placed in nationally published magazines, and ZPRIM, and at its direction, its solicitor ZPR Client Services, sent its newsletters and Morningstar Reports by email to recipients scattered countrywide and globally. Div. Exs. 3-11, 21, 153-54.

2. Misrepresentations

ZPRIM made misrepresentations and omissions in its advertisements, its investment report newsletters, and its Morningstar reports.

Each of ZPRIM's magazine advertisements named in the OIP, and its April 2009 Newsletter, state "ZPR Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®)," which is the exact language that the GIPS advertising guidelines require for claiming GIPS compliance in advertisements. Div. Ex. 21 at 5-7; Div. Ex. 25 at 42; 26 at 35. The December 2009 Newsletter does not include the same standardized language, but in the section reporting performance returns, it states, "All numbers are GIPS compliant." Div. Ex. 9 at 3. By claiming GIPS compliance in advertisements and newsletters, ZPRIM obligated itself to comply with all of the GIPS advertising guidelines in these advertisements and newsletters—which qualify as advertisements under GIPS. Div. Ex. 25 at 41; Div. Ex. 26 at 35. None of

these advertisements or newsletters, however, comply with the GIPS advertising guidelines.

The October, November, and December 2008 SmartMoney advertisements each claimed GIPS compliance, but failed to include either five years of annual returns or annualized one, three, and five-year returns. Div. Ex. 21 at 5-7. The October and November 2008 SmartMoney advertisements included only ten-year compounded and annualized returns, and the December 2008 SmartMoney advertisement included only five, ten, and twenty years of compounded, but not annualized, returns. Id. All three advertisements failed to provide period-to-date returns.[34] Id.

The February, March, and May 2011 magazine advertisements also made claims of GIPS compliance, using the GIPS advertising guidelines language. Div. Exs. 65-67. Each of these advertisements also failed to comply with the GIPS advertising guidelines. The February 2011 SmartMoney advertisement failed to provide three-year annualized returns for ZPRIM's Global Equity Composite and three and five-year returns for the ZPRIM's All Asian Composite. Div. Ex. 65. The March 2011 Barron's advertisement failed to provide three-year annualized returns for ZPRIM's Global Equity Composite and three and five-year returns for the ZPRIM's All Asian Composite. Div. Ex. 67. The May 2011 SmartMoney advertisement also

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[34] These advertisements also failed to include the currency used to express the returns and a description of how an interested investor could obtain a GIPS-Compliant Presentation, though the OIP did not make allegations regarding these missing items. Div. Ex. 21 at 5-7.

failed to provide three-year annualized returns for ZPRIM's Global Equity Composite and three and five-year returns for the ZPRIM's Asian Composite. Div. Ex. 66. All three advertisements failed to include period-to-date returns. Div. Exs. 65-67.

Respondents argue that the February, March, and May 2011 advertisements were not misleading because they were simply reprinting material that had already been published in Pensions & Investments magazine, and which could not be altered. Resp. Br. 26-28. The OIP, however, charges that ZPRIM inaccurately claimed GIPS compliance in these three advertisements. The OIP does not allege that the performance returns were misleading, and if the material could not be presented without violating GIPS, then ZPRIM should not have claimed GIPS compliance. Similarly, Max Zavanelli maintained that he could not comply with the GIPS advertising guidelines, even if he could alter the tables, because he did not have comparative information for the other firms listed in the tables created by Pensions & Investments. Tr. 1670. Again, the issue is claiming GIPS compliance without actually complying, and if the material could not be presented without violating GIPS, then ZPRIM should not have claimed GIPS compliance.

The investment report newsletters, which are advertisements under GIPS, also made claims of GIPS compliance.[35] Div. Ex. 8-9; Div. Ex. 25 at 42; Div. Ex. 26

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[35] It is clear that the investment report newsletters are advertisements under the definition in the GIPS advertising guidelines, which include materials that attempt to solicit new

at 35. The April 2009 Newsletter included the same GIPS compliance claim that ZPRIM used in its magazine advertisements; this claim came verbatim from the GIPS advertising guidelines. Div. Ex. 8 at 3. The April 2009 Newsletter included returns for ZPRIM's composites for the prior month as well as for certain shorter periods. Div. Ex. 8 at 1-3. The April 2009 Newsletter included neither year-by-year annual, nor annualized one, three, and five-year returns, nor period-to-date returns. Id. The December 2009 Newsletter included one-month, and shorter, period returns for each of ZPRIM's composites, and included some tables that were previously published in Pensions & Investments, showing gross one and five-year returns for its International Equity Composite and gross and net five-year returns for its SCV Composite. Div. Ex. 9. In addition to missing the required returns for all composites for which it provided returns, the tables reprinted from Pensions & Investments omitted comparisons to the composites' benchmarks, as required under GIPS. Div. Ex. 9; Div. Ex. 25 at 42.

Respondents argue that, with respect to the magazine advertisements and investment report newsletters, they never misrepresented the actual performance of the various composites, and that all of the numbers they produced were correct and accurate.

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clients or maintain existing clients. Div. Ex. 25 at 41; Div. Ex. 26 at 35. Even if the materials were not aimed at soliciting new clients, they were unquestionably used to maintain Respondents' existing clients. Indeed, although Max Zavanelli testified that he did not initially believe the newsletters constituted advertising, when asked if he understood that they "could be deemed" advertising, he responded, "I do now." Tr. 1439.

Resp. Br. 43. This argument misconstrues the Division's claims against them: that Respondents falsely claimed GIPS compliance in advertisements without providing GIPS-compliant advertisements. OIP at 3, 5. The OIP did not allege that any of the returns were inaccurate. Moreover, the fact that every word or number in an advertisement is itself accurate and true does not preclude a finding of misrepresentation where the advertisement is "deceptive and misleading in [its] overall effect." SEC v. C.R. Richmond & Co., 565 F.2d 1101, 1106-07 (9th Cir. 1977). ZPRIM's claim of GIPS compliance, without following the GIPS guidelines, made the advertisements and newsletters misleading.

ZPRIM knew that clients and prospective clients would have understood that the GIPS-related statements in ZPRIM's advertisements were claims that the advertisements themselves were GIPS compliant. The language that ZPRIM used to claim such GIPS compliance was the Standardized Claim. See Div. Ex. 25 at 42; Div. Ex. 26 at 35. The Standardized Claim differs from the analogous language suggested for GIPS-Compliant Presentations. See Div. Ex. 25 at 16; Div. Ex. 26 at 18. ZPRIM knew when to use which language, as shown by its use of the appropriate statement in its GIPS-Compliance Presentations, which state, "[ZPRIM] has prepared and presented this report in compliance with [GIPS]." Div. Ex. 19 at 3.

Moreover, a firm cannot be GIPS compliance on an ad hoc basis, but must maintain compliance at all times. Tr. 922, 938. ZPRIM's repeated failure to follow GIPS advertising guidelines calls into question

whether ZPRIM was in a position to claim GIPS compliance as a firm.[36]

ZPRIM's September 30, 2010, and March 31, 2011, Morningstar reports[37] both falsely reported that there was no Commission investigation pending, when in fact there was a pending investigation by August 2010. Div. Exs. 10, 11. ZPRIM's September 30, 2010, Morningstar report also incorrectly stated that the firm's performance returns had been verified by Ashland "through the present." Div. Exs. 10, 11. Ashland had resigned as the firm's verifier on July 9, 2010, and had made clear that its verification extended only through December 31, 2009. Div. Ex. 36. Further, ZPRIM had not yet hired Alpha at the time of the September 30, 2010, Morningstar report. Tr. 398. Thus, not only was the statement that Ashland had verified the returns "through the present" untrue, but also the representation that verification after December 31, 2009, had occurred at all was untrue.

Finally, the Commission is not required to prove reliance in an enforcement action and, therefore,

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[36] ZPRIM cannot point simply to verification reports to substantiate compliance. Verifiers can only base their decision to verify on what the firm discloses to them. If a firm, like ZPRIM, withholds non-compliant advertisements from the verifier, there is no opportunity to judge the firm's full universe of compliance. As Feliz testified, had Ashland been made aware of the non-compliant advertisements earlier, it may have decided to resign earlier than it did. Tr. 973.

[37] Though Morningstar produced the reports, the data used for the reports was submitted by ZPRIM, and Morningstar and its readers could reasonably rely on ZPRIM's representations.

whether customers actually relied on ZPRIM's GIPS compliance is not a defense.[38] See e.g., SEC v. Simpson Capital Mgmt., Inc., 586 F. Supp. 2d 196, 201 (S.D.N.Y. 2008) ("Unlike private litigants, the SEC is not required to prove investor reliance . . . in an action for securities fraud."); SEC v. Rana Research, Inc., 8 F.3d 1358, 1363 & n.4 (9th Cir. 1993); SEC v. Blavin, 760 F.2d 706, 711 (6th Cir. 1985).

3. Scienter

ZPRIM, through Max Zavanelli, acted with scienter. Scienter is defined as a "mental state embracing the intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n. 12 (1976); Aaron v. SEC, 446 U.S. 680, 686 n.5 (1980). A finding of recklessness satisfies the scienter requirement. David Disner, 52 S.E.C. 1217, 1222 & n.20 (1997); Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-9 (9th Cir. 1990), cert. denied, 499 U.S. 976 (1991) (citing eleven circuits holding that recklessness satisfies scienter in Section 10(b) and Rule 10b-5 actions). Recklessness, in the context of securities fraud, is "highly unreasonable" conduct, "which represents 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir. 1977) (quoting Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977)); see also S.W. Hatfield, CPA, Securities

[38] It is undisputed that Respondents received no new clients as a result of the violative advertisements. Tr. 889, 1728.

Exchange Act of 1934 (Exchange Act) Release No. 69930 (Jul. 3, 2013), 2013 WL 3339647 at *21.

"Negligence is the failure to exercise reasonable care or competence." Byron G. Borgardt, 56 S.E.C. 999, 1021 (2003). The standard of care for a registered investment adviser is based on its fiduciary duty. See Transamerica Mortg. Adviser, Inc. v. Lewis, 444 U.S. 11, 17 (1979); Capital Gains Research Bureau, 375 U.S. at 191-92. Investment advisers have an "affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts.'" Capital Gains Research Bureau, 375 U.S. at 194 (citations omitted); Blavin, 760 F.2d at 711-12. Respondents were required to "employ reasonable care to avoid misleading" clients. See Capital Gains Research Bureau, 375 U.S. at 194; SEC v. Moran, 922 F. Supp. 867, 895-96 (S.D.N.Y. 1996). Ultimately, the standard is one of "reasonable prudence, whether it usually is complied with or not." Vernazza v. SEC, 327 F.3d 851, 861 (9th Cir. 2003) (citation omitted). As applicable here, an investment adviser has a "professional duty" to inform investors of risks. Blavin, 760 F.2d at 712; see SEC v. Fife, 311 F.3d 1, 10 (1st Cir. 2002).

i. Magazine Advertisements and Investment Report Newsletters

The evidence clearly establishes that ZPRIM was either intentionally deceptive in its magazine advertisements and newsletters, or departed from the standard of care to an extreme degree by being oblivious to the obvious danger of deception presented by them. Max Zavanelli testified that he was ultimately responsible for the creation and placement of all advertisements and investment report newsletters and

their GIPS compliance claims until October 2011, when his son took over as president and chief compliance officer. Tr. 837, 1483-86; Div. Ex. 89 at 29, 42-46, 59, 81. He also authorized the six magazine advertisements and two investment report newsletters at issue in this case, and he authorized the placement of GIPS compliance claims in those particular advertisements and newsletters. Tr. 1409, 1443-44, 1503-04, 1668; Div. Ex. 89 at 55, 62.

ZPRIM included claims of GIPS compliance in the magazine advertisements and investment report newsletters because it believed it would help attract institutional investors. Bauchle testified that ZPRIM learned from Greg Reed that claiming GIPS was a prerequisite to attracting institutional clients, and that is why ZPRIM began making the claim. Tr. 184-85. Max Zavanelli testified that he was, at the very least, aware that claiming GIPS would help ZPRIM attract institutional investors. Tr. 1391-92.[39]

The format for the October, November, and December 2008 SmartMoney advertisements was modified from the format ZPRIM had used in at least four advertisements earlier in 2008, including two that ran in SmartMoney, which included year-by-year annual returns for the SCV Composite. Div. Ex. 21 at 1-4. The October 2008 advertisement was the first instance, at least in 2008, of ZPRIM excluding year-by-

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[39] I do not credit Max Zavanelli's portrayal of ZPRIM's GIPS compliance as motivated by a desire for "bragging rights." His insistence on including claims of GIPS compliance in advertisements makes it clear that it was about more than self-congratulation.

year returns or period-to-date returns. Compare Div. Ex. 21 at 1-4 with Div. Ex. 21 at 5. As established during the hearing, had ZPRIM followed its previous advertisement format, it would have shown that ZPRIM had negative returns and was underperforming its Russell 2000 Index benchmark. Tr. 379, 478, 1497. According to Bauchle, avoiding disclosure of the negative returns and negative benchmark comparison was the principal reason for changing the format of the advertisements so that they would show only favorable comparisons; which Max Zavanelli insisted was compliant with GIPS because potential investors would receive ZPRIM's GIPS-Compliant Presentation. Tr. 188-89, 225-26. Cabot testified that in 2009, Bauchle told a similar story to her during the examination, providing support for Bauchle's version. Tr. 488.

Max Zavanelli contends that even though he approved use of GIPS compliance in the October, November, and December 2008 advertisements, those advertisements were substantively edited without his input, and that he only learned of the advertisements' lack of GIPS compliance after they had already run. Additionally, he represented that he did not receive sufficient warning from Bauchle or Ashland about those advertisements' lack of compliance in time to do anything about it. As noted supra, I do not credit these portrayals. Instead, I credit Bauchle's testimony, and conclude that Max Zavanelli knew that the fall 2008 SmartMoney advertisements were not GIPS compliant, and intended to run them anyway to avoid revealing negative returns and negative benchmark comparisons.

Max Zavanelli's version of events appears unlikely in any event. It would be uncharacteristic of Max

Zavanelli to grant carte blanche authority to Bauchle and Sappir to reformat the advertisement for three consecutive advertisements without checking the advertisements. He was and continues to be intimately involved in nearly every aspect of what ZPRIM discloses to the public. Bauchle testified that Max Zavanelli controlled the material in the advertisements, and made all final decisions regarding any claims of GIPS compliance in them; he was the "boss man." Tr. 145, 186-87, 429. Max Zavanelli conceded his involvement and final authority on all advertisements. Tr. 837; Div. Ex. 89 at 29, 46. He was also protective of ZPRIM's brand, and reluctant to release information that might cast ZPRIM in an unfavorable light, making it more believable that he directed the reformatting of the advertisements in the fall of 2008. For example, he ordered a portion of the GIPS-Compliance Presentation disclosing ZPRIM's assets under management taken off of the firm's website, because he was concerned that institutional investors would consider the numbers unbefitting of a serious money manager. Tr. 209, 957-60; Div. Ex. 89 at 145. Similarly, he became upset with Bauchle after Bauchle had distributed a copy of the full GIPS-Compliant Presentation, with the assets under management figures, to all recipients of the firm's investment report newsletters, because he did not want those GIPS-Compliant Presentations broadly distributed. Tr. 206-07.

Max Zavanelli's claim that he did not receive timely warning on the lack of GIPS compliance is also unsupported. Bauchle said that he told Max Zavanelli that the format Max Zavanelli insisted upon for the "September through December" 2008 advertisements

was not GIPS compliant, prior to ZPRIM running the fall 2008 advertisements, and specifically that the advertisements were not GIPS compliant because they lacked one, three, and five-year returns, and that they lacked period-to-date returns.[40] Tr. 225-26, 401-03. Bauchle testified that Max Zavanelli told him that one,

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[40] Respondents' criticism of Bauchle's testimony on this point is unpersuasive. See Resp. Br. 22-23. Bauchle testified during the investigation that "if it's not one, three and five year annualized it's not [GIPS] compliant." Div. Ex. 155 at 103. This was under questioning about the January 2008 SmartMoney advertisement, which only showed yearly returns. Id.; Div. Ex. 21 at 1. Bauchle opined that this advertisement was not GIPS compliant, and in fact it was not, although not for the reason Bauchle cited. Div. Ex. 27 at 2-3; Div. Ex. 155 at 103-04; Tr. 938-39. Bauchle then testified that he told Max Zavanelli that the advertisement was not GIPS compliant, but did not suggest to Max Zavanelli that anyone else should review the advertisement for GIPS compliance. Div. Ex. 155 at 104-05. Bauchle also opined during the hearing that the January 2008 advertisement was not GIPS compliant, but only because it used the term "audited." Tr. 402. He further testified that showing annual returns had been ZPRIM's "standard format up to that point," and that he had furnished the (essentially identical) January 2008 Kiplinger advertisement to Ashland. Tr. 402, 419. Bauchle did not explain why his opinion of the January 2008 advertisements changed between 2010 and 2013, but the most reasonable explanation is that he simply became more familiar with the GIPS advertising guidelines. Moreover, that Bauchle provided the January 2008 Kiplinger advertisement to Ashland on his own initiative is not inconsistent with his investigative testimony that he did not suggest doing so to Max Zavanelli. Div. Ex. 155 at 105; Resp. Br. 22-23. Finally, that Bauchle referred to the fall 2008 advertisements as the "September through December" 2008 advertisements in no way suggests that there actually was a September 2008 advertisement. Tr. 401; Resp. Br. 22-23. Overall, I find Bauchle's testimony on this point credible.

three, and five-year returns, in addition to period-to-date returns, were unnecessary because potential investors would eventually receive a GIPS-Compliant Presentation with that information. Tr. 225-26, 402. Although Fay did not recall any such conversation, Bauchle testified that he raised the same issue with her. Tr. 204-05, 1265-67. In any event, Bauchle credibly testified that he had to go along with whatever Max Zavanelli decided. Tr. 205. Bauchle's version of events is bolstered by the fact that it parallels the dispute Max Zavanelli had with Ashland regarding the investment report newsletters. As to those, Max Zavanelli was reluctant to include all of the GIPS-required returns because, he reasoned, potential investors would receive ZPRIM's GIPS-Compliant Presentations. Tr. 226, 402-04.

Max Zavanelli disputed that Bauchle informed him the advertisements were not GIPS compliant prior to running the advertisements, but his version of events is, once again, inconsistent. He testified during the investigation that after the December 2008 advertisement had run, Bauchle told him that the December 2008 advertisement was not GIPS compliant. Div. Ex. 89 at 59. Max Zavanelli said that after Bauchle told him this, he "immediately realized that the other two were not [GIPS] compliant either." Id. At the hearing, however, Max Zavanelli stated that the first time he saw any of the October, November, or December 2008 advertisements was during the 2009 Commission examination, when Cabot showed them to him. Tr. 1415-16. He added that the purpose of Cabot showing the advertisements was limited at that point to figuring out why the two advertisements had conflicting returns for the same dates. Tr. 1417. He

said that Cabot never mentioned that those advertisements were not GIPS compliant, and that he only learned of the Commission's concerns with ZPRIM's advertisements, specifically that there were GIPS issues, when he received the Deficiency Letter in 2010. Tr. 1433, 1446.[41]

As for the 2011 advertisements, Max Zavanelli admitted that he authorized the addition of the claim of GIPS compliance in the advertisements, even though the Pensions & Investments tables could not be altered to comply with the requirements in the GIPS advertising guidelines. Tr. 1504-05, 1662-64. He, and therefore ZPRIM, were unquestionably aware of the GIPS advertising guidelines' requirements for one, three, and five-year returns after having received warnings from Ashland and the Commission. Indeed, by the time of the 2011 advertisements, ZPRIM had represented in a letter to Commission staff that it would take measures to correct these problems in its advertisements. Div. Exs. 77, 78. By that point, Max Zavanelli had heard from Bauchle that the October, November, and December 2008 advertisements lacked required one, three, and five-year returns, and were thus not GIPS compliant. Div. Ex. 89 at 59.

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[41] Additionally, Fay spoke to Max Zavanelli shortly after the completion of the Commission's examination in 2009, to inform him of the examination team's initial findings. Tr. 1254. It seems unlikely that Fay, his chief compliance officer, would have failed to mention significant issues the Commission discovered during the examination, especially when the firm purportedly placed a temporary moratorium on advertising after the exit interview. Tr. 1270-71.

Max Zavanelli created or directed the investment report newsletters' content, and he was responsible for including the claims of GIPS compliance in those investment report newsletters as well.[42] Tr. 1443. Max Zavanelli's chief argument against a finding of scienter in placing the GIPS compliance claims in the investment report newsletters is that he did not believe, and still does not believe, that the investment report newsletters constitute advertisements under the definition provided in GIPS, because, he argues, they were not used for marketing purposes. Tr. 1439. Although he was not generally a believable witness, there is little to discredit his testimony on this point, and I find that he genuinely believed this. Notwithstanding his sincerity, his belief constituted a reckless disregard for the GIPS advertising guidelines, which he testified he was familiar with, and of advice from both Commission staff and Ashland informing him that the investment report newsletters were advertisements.[43]

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[42] Though the December 2009 Newsletter did not use the phrasing required by the GIPS advertising guidelines, claiming that the comparative performance return numbers were GIPS compliant had the same purposeful effect.

[43] Max Zavanelli testified that, had he received the letter from Ashland after his telephone call with them in early 2010, he would have chosen the option Ashland provided to remove all claims of GIPS from the investment newsletters. Tr. 1458. It is unlikely he would have heeded that advice, however, because Ashland had already provided those options to him during the telephone calls in late 2009 and early 2010, and he still refused to accept that they were his only two choices. Tr. 1449-52.

Max Zavanelli familiarized himself with the GIPS guidelines in 2006 when ZPRIM first began claiming GIPS compliance, and he maintained that familiarity going forward. Tr. 1571, 1674; Div. Ex. 89 at 42-43. The 2005 GIPS Guidelines he reviewed include the GIPS advertising guidelines that make abundantly clear that "any written material . . . distributed to maintain existing clients or solicit new clients" is an advertisement. Div. Ex. 25 at 41. Commission staff conveyed similar advice, during its examination, as did Ashland, during its verifications, and Mark Zavanelli, in a series of emails in 2012. Tr. 199-200, 431-32, 476, 991, 1449; Div. Exs. 47, 77, 138. It is true that some of the investment report newsletters' content focused upon various market and financial issues and not necessarily ZPRIM products. See, e.g., Tr. 1439; Div. Exs. 8, 9. But the investment report newsletters also included discussions of ZPRIM's positive performance returns as well as explanations not only of why poor performance returns occurred, but how the firm intended to overcome them. Tr. 1442, Div. Ex. 8 at 1-4; Div. Ex. 9 at 1-3. As Max Zavanelli said, the investment report newsletters conveyed "why we're losing money, why we're making money." Tr. 1442. Similarly, the December 2009 investment report newsletter reprinted tables from Pensions & Investments magazine and boasted of ZPRIM composites as top producers. Div. Ex. 9 at 3. These were undoubtedly efforts by ZPRIM to both attract new investors and to maintain existing clients.

Additionally, Ashland informed ZPRIM through Bauchle numerous times that the investment report newsletters were considered advertisements, but Max Zavanelli simply refused to follow Ashland's advice.

Div. Ex. 47. At one point, Ashland had told Bauchle that if it intended not to include return information required by the GIPS advertising guidelines, he would have to send a GIPS-Compliant Presentation to recipients of the investment report newsletter, advice Bauchle heeded in late 2009. Tr. 206-07. Max Zavanelli disagreed with Bauchle's decision to include the GIPS-Compliant Presentation and ordered him not to do so again. Tr. 207-08. Max Zavanelli wrote about this concern in the December 2009 Newsletter. Div. Ex. 9 at 4. Thus, Max Zavanelli was aware by the December 2009 investment report newsletter that Ashland had an issue with the investment report newsletters' claims of GIPS compliance, but Max Zavanelli recklessly chose to ignore Ashland's advice, despite claiming to rely on them as ZPRIM's GIPS "expert." Tr. 1571-72; Div. Ex. 89 at 59.

Max Zavanelli's claims during the hearing and during his investigative testimony that he did not realize the advertisements had to comply with their own independent guidelines are unpersuasive. See, e.g., Tr. 1661-62; Div. Ex. 89 at 70 (claiming that he was "starting to understand" that representing that the firm was GIPS compliant in its advertisements required the firm to comply with the GIPS advertising guidelines). Max Zavanelli was well versed in GIPS and its requirements, and he knew the rewards and consequences of making a claim of GIPS compliance, casting serious doubt on these representations. Tr. 1674. He testified that he first familiarized himself with GIPS in 2006, when ZPRIM first began claiming GIPS compliance, and he indicated at various times that he was familiar with the standards of AIMR, GIPS' predecessor. Tr. 1674; Div. Ex. 89 at 43-44. He

also testified during his investigative testimony that he was the "closest thing to an expert" in the room, that is, that he believed himself better qualified on GIPS than the Commission's staff. Div. Ex. 89 at 59.[44]

ii. Morningstar Reports

ZPRIM acted only negligently with respect to the September 30, 2010, Morningstar report's claim of having been audited, and the March 31, 2011, Morningstar report's misrepresentation regarding the Commission investigation. See SEC v. Steadman, 967 F.2d 636, 643 n.5, 647 (D.C. Cir. 1992) (a finding of simple negligence is sufficient to find violation of Advisers Act Sections 206(2)). Bauchle was the only one involved with updating the Morningstar database during the relevant period. Tr. 269-71. There was no evidence that Max Zavanelli directed Bauchle on how to answer the questions in the Morningstar database. Bauchle was aware that Ashland had terminated its relationship with ZPRIM by July 2010, well before he updated Morningstar with the information for the September 30, 2010, report. Tr. 208-09. Bauchle testified that he did not intentionally indicate that Ashland continued to verify ZPRIM's GIPS compliance through the periods represented in the Morningstar reports. Tr. 277; Resp. Ex. 27. Instead, he inserted the phrase "through the present" as a way of self-updating, in case he forgot to change the date in that section during his quarterly updates. Tr. 272, 277; Resp. Ex. 27. Bauchle explained to Max Zavanelli shortly after

[44] He also testified that ZPRIM hired Ashland to be its expert on GIPS. Tr. 1571; Div. Ex. 89 at 59. But he refused to listen to Ashland's advice when it contradicted his views.

the OIP that he had inadvertently neglected to update the section disclosing Ashland as ZPRIM's verifier, though he recognized that he should have. Resp. Ex. 27. There is evidence that Bauchle knew as of October 14, 2010, presumably after the publication of the September 30, 2009, Morningstar report, that ZPRIM was under investigation by the Commission. Tr. 437-38. However, the preponderance of the evidence does not establish either that Bauchle knew that before October 14, 2010, or that he knew it in time to correct the September 30, 2009, Morningstar report. Bauchle's mistake was plainly not reasonably prudent—he should have made a point of understanding exactly what it means to have a "pending SEC investigation," so as to act with the utmost good faith expected of an investment adviser—but neither was it an extreme departure from the standard of care, or committed with an intent to defraud.

In contrast, ZPRIM acted with scienter with respect to the March 31, 2011, Morningstar report's misrepresentation regarding the Commission investigation. Bauchle admitted that he knew in October 2010 that a Commission investigation was pending. He initially testified, however, that ZPRIM staff would meet "whenever we would get a new letter from the SEC" and downplay the significance of the investigation; in essence, ZPRIM staff engaged in wishful thinking. Tr. 285-86. Tills was encouraged by Max Zavanelli, who admitted that he would have checked the "no" box under "Pending SEC investigations" if he had been responsible for doing so. I am not convinced that Bauchle's failure to properly update Morningstar in time for the March 31, 2011, report constituted an intentional effort to mislead,

because I credit his explanation that it was the result of willful blindness to the facts. However, it was clearly reckless. I therefore find that ZPRIM, through Bauchle, the one ZPRIM staff member responsible for the Morningstar database, violated sections 206(1), 206(2), and 206(4) with respect to the March 31, 2011, Morningstar report's misrepresentation regarding the Commission investigation, and sections 206(2) and 206(4) with respect to the September 30, 2010, Morningstar report's claim of having been audited.

4. Materiality

The Division proved that ZPRIM's misrepresentations about GIPS compliance in its advertisements were material. The standard of materiality under Section 206 is whether a reasonable investor would have considered the information important in deciding whether to invest. See Basic, Inc. v. Levinson, 485 U.S. 224, 231-32, 240 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). Materiality is proved by showing a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" SEC v. Ginsburg, 362 F.3d 1292, 1302 (11th Cir. 2004) (quoting TSC Indus., 426 U.S. at 449 (1976)). Materiality does not require proof that accurate disclosure would have caused the reasonable investor to change his decision, but only that the omitted fact would have assumed actual significance in the deliberations of the reasonable investor. TSC Indus., 426 U.S. at 449.

As a general matter, "misrepresentations overstating [Respondents'] performance as against

market benchmarks [is] material." Seaboard Investment Advisers, Inc., 54 S.E.C. 1111, 1118 (2001). More specifically, GIPS compliance is a threshold factor for institutional investors considering money managers, as both Bauchle and Max Zavanelli acknowledged. Tr. 185-86, 827-28. Feliz testified, similarly, that institutional investors will not consider money managers that are not GIPS compliant. Tr. 904-05. The court in Riggs Investment Management Corp. v. Columbia Partners, LLC, 966 F. Supp. 1250, 1262 (D.D.C. 1997), which presented a similar situation, explained that "compliance with AIMR [GIPS' predecessor] has importance for a firm's reputation." It stands to reason that firms like ZPRIM include claims of GIPS compliance in their advertisements because, to institutional investors, GIPS compliance is important in deciding whether to invest. Claims of GIPS compliance are voluntary, but investors know that firms that choose to make such claims must undertake additional, mandatory disclosure obligations. Tr. 926; Div. Ex. 25; Div. Ex. 26 at 35. As the court held in Riggs, "Violation of AIMR does not, in and of itself, mean that the [law] is violated. But to advertise oneself as meeting such an important industry standard while knowingly being out of compliance is false advertising." Id. at 1268.

The manner in which ZPRIM failed to comply with GIPS supports this conclusion. ZPRIM failed to disclose underperformance of one of the SCV Composite's indexes, in addition to its negative returns, in its October, November, and December 2008 advertisements. By providing only five, ten, and twenty-year returns, ZPRIM could report strong returns—double and even triple the returns of the SCV

Composite's benchmarks. Div. Ex. 21 at 5-7. Instead, as outlined supra, one-year returns and period-to-date returns for the SCV Composite would have shown returns that were not only negative, but also underperforming one of the SCV Composite's benchmarks, the Russell 2000 index. Tr. 1502; Div. Ex. 18. Investors would want to know that the returns reported created a false impression of the firm's recent performance "because investors routinely consider an adviser's past investment performance and attractiveness to other investors when making investment decisions." Warwick Capital Mgmt., Inc., 92 SEC Docket at 1423. Max Zavanelli conceded that knowledge that a firm's composites did not meet its benchmarks is important to investors. Tr. 1552.

Riggs provides insight into why these claims of GIPS compliance in advertisements that failed to comply with GIPS were material. The defendants in Riggs falsely claimed compliance with AIMR in advertisements in which they linked performance returns with those from an adviser's prior partners, hoping to convince investors that the firm's track record was more substantial than it was. 966 F. Supp. at 1262. The court in Riggs remarked, "a three-to-five year performance record is a prerequisite to an investment manager receiving his recommendation to a client. That such advertising is material in effect cannot be doubted." Id. at 1269. So, too, was ZPRIM's failure to report its composite's underperformance while claiming GIPS compliance.

Feliz testified that claims of GIPS compliance provide comfort to investors, when comparing money managers, "that the presentations they're looking at

are fairly presented," and that claims of GIPS compliance create expectations of uniformity and comparability, in addition to integrity of return presentations. See Tr. 903-904; Div. Ex. 25 at 9, 41; Div. Ex. 26 at 7. Max Zavanelli demonstrated how compliance with GIPS advertising guidelines, or lack thereof, materially affected ZPRIM's portrayal in advertisements, and thus comparability, in an article he authored for ZPRIM's December 2009 investment report.[45] Div. Ex. 9 at 4. In the article, he remarked that asset weighting portfolios, which is required for GIPS reporting, does not reflect ZPRIM's success. Id. He also expressed, referring to the GIPS-Compliant Presentation that Bauchle had distributed against Max Zavanelli's wishes, that "the disclosure tables sent out for us do not reflect our true situation." Id. Prohibiting firms from reporting performance in incomparable terms to reflect the firm in the best light possible, as determined by the firm, is exactly the goal that GIPS reporting strives for, and investors expect that a firm claiming GIPS compliance in an advertisement will abide by GIPS' terms.

The misrepresentations in the Morningstar reports were also material because they provided a false impression about ZPRIM's verification. Just as GIPS compliance is considered an important factor for institutional clients, so is GIPS verification. As Feliz testified, GIPS verification is essentially an industry

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[45] Sappir underscored the importance of GIPS by frequently promoting the firm's GIPS compliance in his marketing. In several emails sent by Sappir to potential clients, Sappir made note of the firm's GIPS compliance and the fact that it was verified. See Tr. 1151, 1153; Div. Exs. 60-62.

requirement. Tr. 904. Indicating that ZPRIM was verified through "the present," meaning September 30, 2010, when it had last been verified as of December 31, 2009, and omitting the fact that the verifier had since resigned, would plainly have been material to investors. Similarly, interested investors would want to know whether an investment adviser was under Commission investigation. See In re Gentiva Sec. Litig., 932 F. Supp. 2d 352, 387 (E.D.N.Y. 2013) (listing cases where stock price drops were triggered by announcements of Commission investigations and inquiries).

Respondents argue that clients' after-the-fact receipt of materials, including ZPRIM's GIPS Compliant Presentations, and the availability of its GIPS Compliant Presentations on its website, mitigated or eliminated any misleading characteristic of the advertisements and newsletters. Resp. Br. 2, 43. This misses the point. The issue is whether the advertisements were materially misleading, not whether anyone was actually misled. Even assuming that follow-up materials would have cleared up any confusion, the advertisements themselves were still materially misleading.

D. Advisers Act Rule 206(4)-1(a)(5)

ZPRIM violated Advisers Act Rule 206(4)-1(a)(5) by providing material misrepresentations in its advertisements. Rule 206(4)-1(a)(5) makes it a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of Section 206(4) for a registered investment adviser to publish, circulate, or distribute any advertisement "[w]hich contains any untrue statement of a material fact, or

which is otherwise false or misleading." 17 C.F.R. § 275.206(4)-1(a)(5). Conduct under this Rule must be measured from the viewpoint of a person unskilled and unsophisticated in investment matters. See SEC v. C.R. Richmond & Co., 565 F.2d 1101, 1104-05 (9th Cir. 1977). Scienter is not an element. See Capital Gains Research Bureau, 375 U.S. at 195.

The term "advertisement" in Rule 206(4)-1(a)(5) includes "written communication[s] addressed to more than one person, or any notice or other announcement in any publication or by radio or television." 17 C.F.R. § 275.206(4)-1(b). The concept of advertisement has been construed liberally, and includes "[i]nvestment advisory material which promotes advisory services for the purpose of inducing potential clients to subscribe to those services." C.R. Richmond, 565 F.2d at 1105.

The magazine advertisements unquestionably constitute advertisements within the meaning set forth above. SmartMoney and Barron's are magazines. Div. Exs. 66, 67. Morningstar compiles the data submitted by money managers and packages it into reports that assign between one and five stars, pursuant to Morningstar's trademarked star rating system, and they are then sold to institutional investors researching money managers. Tr. 249, 1798-99. ZPRIM submitted its performance data to Morningstar for inclusion in its reports, and ZPRIM included Morningstar's star rating for its composites in its advertisements throughout the relevant period, and at least as far back as January 2008. See Div. Ex. 21 at 1. ZPRIM distributed its Morningstar reports to potential clients as well. Tr. 1631-33, 1646; Div. Exs. 152-154.

ZPRIM's argument that Morningstar reports are not advertisements because they are not available to non-subscribers is flawed. There is no requirement that advertisements be widely publicized, or be publicized beyond a specific group. Indeed, multiple courts have found violations of Advisers Act Rule 206(4)-1(a)(5) for misrepresentations by investment advisers in subscription newsletters. SEC v. Fin. News Assoc., No. 84-civ-878, 1985 WL 25023, at *2, * 10 (E.D. Va. Apr. 26, 1985); SEC v. Blavin, 557 F. Supp. 1304, 1308, 1315 (E.D. Mich. 1983); SEC v. Suter, No. 81-civ-3865, 1983 WL 1287, at *14 (N.D. Ill. Feb. 11, 1983).

E. Max Zavanelli's Liability

The OIP charges that both ZPRIM and Max Zavanelli are primarily liable, and that Max Zavanelli is alternatively liable as an aider and abettor and cause of ZPRIM's violations. OIP at 6. As noted, ZPRIM is liable as to all alleged violations, except for violations of section 206(1) of the Advisers Act with respect to the Morningstar reports. To establish a claim of aiding and abetting there must be: (1) a primary violation of the securities laws; (2) knowledge of the primary violation by the aider and abettor; and (3) substantial assistance by the aider and abettor in the commission of the primary violation. SEC v. DiBella, 587 F.3d 553, 566 (2d Cir. 2009). The knowledge or awareness requirement can be satisfied by recklessness when the alleged aider and abettor is a fiduciary or active participant. See Ross v. Bolton, 904 F.2d 819, 824 (2d Cir. 1990). Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. See KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1175 (2001), recon. denied, Exchange Act

Release. No. 44050 (Mar. 8, 2001), 74 SEC Docket 1351, pet. denied, 289 F.3d 109 (D.C. Cir. 2002).

Max Zavanelli acted with scienter as to those violations which involved scienter, and provided much more than substantial assistance. He was not only the controlling sole shareholder of ZPRIM, he was the creator of the magazine advertisements and the investment report newsletters, and he admitted enrolling ZPRIM in the Pensions and Investments/Morningstar service. The finding that ZPRIM violated Sections 206(1), 206(2), and 206(4) of the Advisers Act, and Rule 206(4)-1(a)(5) thereunder, inescapably leads to a finding that Max Zavanelli aided and abetted and caused those violations. See Sharon M. Graham, 53 S.E.C. 1072, 1085 n.35 (1998) (finding of aiding and abetting necessarily implies that respondent caused the primary violations), aff'd, 222 F.3d 994, 1000 (D.C. Cir. 2000).

An associated person may be charged as a primary violator, where, as here, the associated person controlled the investment adviser. See John J. Kenny, 56 S.E.C. 448, 485 n.54 (2003); Alexander V. Stein, 52 S.E.C. 296, 299 & n.10 (1995) ("Our authority . . . does not rest on whether or not an entity or individual has registered . . . [but] on whether or not an entity or individual in fact acted as an investment advisor."). Accordingly, Max Zavanelli is primarily liable for the charged violations with respect to the magazine advertisements and newsletters. However, because he was not directly involved in ZPRIM's relationship with Morningstar, the preponderance of the evidence does not establish primary liability with respect to the

Morningstar violations. Thus, I find that he only caused those.

F. Affirmative Defenses

Respondents raised six affirmative defenses in their Answer: (i) full and fair disclosure, (ii) lack of materiality, (iii) lack of scienter, (iv) good faith, (v) lack of causation, and (vi) statute of limitations. They did not discuss any of them in their briefs, and they are in any event meritless. Defenses (i)-(v) are not actionable affirmative defenses; rather, they are arguments aimed at refuting the core bases for the Commission's alleged violations. All of these issues are addressed in the legal discussion, supra. Respondents offered no facts or arguments as to how this proceeding or any potential sanctions would run afoul of the five-year statute of limitations set forth by 28 U.S.C. §2462. This case was instituted on April 9, 2013, and the earliest violation alleged in the OIP was the October 2008 SmartMoney advertisement, which was published fewer than five years before the OIP. I have taken into account pre-April 9, 2008, conduct for various purposes, but I have not found any violations based on such conduct. See Terry T. Steen, 53 S.E.C. 618, 623-25 (1998) (conduct outside the limitations period may be used to establish motive, intent, and knowledge). Accordingly, I deny all of Respondents' affirmative defenses.

V. SANCTIONS

The Division requests, as to ZPRIM, a cease-and-desist order, civil penalties, and censure, and as to Max Zavanelli, a cease-and-desist order, civil penalties, and permanent direct and collateral bars. Div. Br. at 70-78. As to the civil penalties, the Division urges a single

second-tier penalty of $375,000 against ZPRIM and eleven second-tier penalties (i.e., one per alleged violation) totaling $795,000 against Max Zavanelli. Div. Br. at 77.

A. Willfulness and the Public Interest

Some of the requested sanctions are only appropriate if Respondents' violations were willful. See 15 U.S.C. § 80b-3(e)(5), (f). A finding of willfulness does not require intent to violate the law, but merely intent to do the act which constitutes a violation of the law. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976). Respondents' actions were plainly willful: Max Zavanelli designed ZPRIM's advertisements, wrote ZPRIM's newsletters, and personally made the decisions to not follow GIPS. As to the Morningstar reports, Bauchle affirmatively determined how to enter the false information.

When considering whether an administrative sanction serves the public interest, the Commission considers the factors identified in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981): the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations (Steadman factors). See Altman v. SEC, 666 F.3d 1322, 1329 (D.C. Cir. 2011); Gary M. Kornman, Advisers Act Release No. 2840 (Feb. 13, 2009), 95 SEC Docket 14246, 14255, pet. denied, 592

F.3d 173 (D.C. Cir. 2010). Other factors the Commission has considered include the age of the violation (Marshall E. Melton, 56 S.E.C. 695, 698 (2003)), the degree of harm to investors and the marketplace resulting from the violation (id.), the extent to which the sanction will have a deterrent effect (see Schield Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46), whether there is a reasonable likelihood of violations in the future (KPMG, 54 S.E.C. at 1185), and the combination of sanctions against the respondent (id. at 1192). See also WHX Corp. v. SEC, 362 F.3d 854, 859-61 (D.C. Cir. 2004). The Commission weighs these factors in light of the entire record, and no one factor is dispositive. KPMG, 54 S.E.C. at 1192; see Gary M. Kornman, 95 SEC Docket at 14255.

Respondents' eleven violations between October 2008 and March 2011 were obviously recurrent. Respondents' degree of scienter for each violation varied. As to the magazine advertisements, the scienter was relatively high, because Zavanelli intended to conceal his poor performance from investors. As to the newsletters and the March 31, 2011, Morningstar report, the scienter was relatively low, because Zavanelli sincerely, but recklessly, believed that the newsletters were not advertisements, and because Bauchle was willfully blind to the fact of the Commission's investigation. As to the September 30, 2010, Morningstar report, there was no scienter because the violation involved only negligence.

As to egregiousness, a comparison to Seaboard is instructive. In Seaboard, the respondents had been the subject of a 1994 cease-and-desist order relating to,

among other things, advertising erroneously high performance figures. 54 S.E.C. at 1112-13. Thereafter, Seaboard issued individual client letters, which erroneously reported either high performance figures or low benchmark figures. Id. at 1113-14. After Seaboard settled a district court action involving post-1994 misconduct, a follow-on proceeding was instituted pursuant to Sections 203(e) and 203(f) of the Advisers Act. Id. at 1112. On appeal from the administrative law judge's initial decision, the Commission held that Seaboard's conduct was egregious, because "Respondents overstated the performance of client portfolios by making inaccurate and false comparisons to market indices," in an attempt to avoid losing customers as a result of the 1994 proceeding. Id. at 1117-18. Most of Respondents' misconduct was comparable to that of the respondents in Seaboard, because both the present Respondents and the Seaboard respondents overstated the performance of client portfolios by making inaccurate and false comparisons to market indices.[46] The Morningstar reports' false statements were similarly serious. On balance, I find that Respondents' misconduct was egregious.

As for the other Steadman factors, Respondents' occupations present opportunities for future violations. However, Respondents differ in the degree to which they have provided assurances against future

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[46] Granted, the Seaboard respondents did so while under a previous cease-and-desist order, and Respondents did not, but the Seaboard respondents' advertising was directed at individual clients, while Respondents' was made available to the entire industry.

violations and recognized the wrongful nature of their conduct. ZPRIM is now owned by, and operated at least in part by, Mark Zavanelli. Although his inability to recognize the existence of a Commission investigation is troubling, he otherwise credibly testified that ZPRIM is making, and has made, considerable progress in improving its compliance practices. Tr. 1764-68. Respondents' Answer, submitted jointly, is unusually forthright in admitting that, for example, the October, November, and December 2008 SmartMoney advertisements "did not comply with GIPS Advertising Guidelines." Answer at 3. Overall, I find that ZPRIM has provided sincere assurances against future violations and recognized the wrongful nature of its conduct.

Max Zavanelli, however, has not provided sincere assurances or recognized the wrongfulness of his conduct. He repeatedly provided incredible testimony, concocted post-hoc rationalizations for his misdeeds, and evaded responding to the Division's questions. He repeatedly refused to accept direction from myself and from his own counsel, even with repeated reminders and sanction warnings. He endeavored—unfortunately, with some success—to evade the Commission's oversight by routing some ZPRIM communications through the ZPR Portal, and then gave false investigative testimony to keep the Division from inquiring further. The evidence is overwhelming that, like the respondents in Seaboard, Max Zavanelli "do[es] not understand the regulatory and fiduciary responsibilities of an investment adviser." Seaboard, 54 S.E.C. at 1120.

B. Cease-and-Desist

Advisers Act Section 203(k) authorizes the Commission to impose cease-and-desist orders for violations of the Advisers Act. See 15 U.S.C. §§ 80b-3(k). The Commission requires some likelihood of future violation before imposing such an order. KPMG, 54 S.E.C. at 1185. However, "a finding of [a past] violation raises a sufficient risk of future violation," because "evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease-and-desist." Id. at 1185. In evaluating the propriety of a cease-and-desist order, the Commission considers the Steadman factors, as well as the recency of the violation, the resulting harm to investors in the marketplace, and the effect of other sanctions. Id. at 1192.

As for ZPRIM, the Steadman factors are mixed, the violations were as recent as 2011, no investors were harmed, and the other sanctions (i.e., a censure and one-time civil penalty) are relatively mild. The public interest factors are not in equipoise, however, because I place more weight on the unusually recurrent nature of the violations, the fact that ZPRIM's misconduct was sufficient to justify registration revocation rather than merely a censure, and the fact that Max Zavanelli remains intimately involved in ZPRIM's operations, all of which weigh in favor of a heavy sanction. E.g., Piper Capital Mgmt., Inc., 56 S.E.C. 1033, 1082, 1085 (2003) (revoking investment adviser's registration, among other sanctions, for "fraudulent and deceitful conduct"). Accordingly, a cease-and-desist order against ZPRIM is appropriate.

As for Max Zavanelli, the Steadman factors all weigh heavily in favor of a severe sanction, except for scienter, which varied, and the violations were recent. Although no investors were harmed and the other sanctions are severe, these two factors are insufficient to avoid imposition of a cease-and-desist order.

C. Censure and Associational Bar

Section 203(e) of the Advisers Act authorizes the Commission to revoke an investment adviser's registration if: (1) it, or any person associated with it, has willfully violated, or willfully aided and abetted the violation of, any provision of the Advisers Act; and (2) revocation is in the public interest. 15 U.S.C. § 80b-3(e). As discussed above, the Steadman factors are mixed as to ZPRIM, demonstrating that a sanction less severe than revocation or suspension is appropriate. I find that censure is appropriate to vindicate the public interest.

Section 203(f) of the Advisers Act authorizes the Commission to bar or suspend a person from association with an investment adviser for willful violations of the Advisers Act, if it is in the public interest. 15 U.S.C. § 80b-3(f); see John W. Lawton, Advisers Act Release No. 3513 (Dec. 13, 2012), 105 SEC Docket 61722, 61732 n.30, 61737 (collateral bars may be imposed based on conduct predating July 22, 2010). Again, all Steadman factors except scienter weigh heavily in favor of a permanent associational bar; scienter weighs in favor of it, also, but less heavily. Furthermore, it is in the Commission's interest to deter others from behaving like Max Zavanelli. In addition to intentionally misleading clients and prospective clients, he refused to accept responsibility for the abdication of

his fiduciary duty to his clients. Therefore, it is in the public interest to permanently bar him from association with investment advisers, brokers, dealers, municipal securities dealers, municipal advisors, transfer agents, and nationally recognized statistical rating organizations.

D. Civil Penalties

Under Section 203(i) of the Advisers Act, the Commission may impose a civil money penalty if a respondent willfully violated any provision of the Advisers Act, and if such penalty is in the public interest. 15 U.S.C. §§ 80b-3(i) (2006). A three-tier system establishes the maximum civil money penalty that may be imposed for each violation found. Id. Where a respondent's misconduct involved fraud, deceit, or deliberate or reckless disregard of a regulatory requirement, the Commission may impose a "Second-Tier" penalty of up to $65,000 for each act or omission by an individual and $325,000 for an entity, for violations occurring between February 15, 2005, and March 3, 2009, and $75,000 and $375,000, respectively, for violations occurring between March 4, 2009, and March 5, 2013. Id.; 17 C.F.R. §§ 201.1003, .1004 (adjusting the statutory amounts for inflation). Where an individual respondent's misconduct did not involve fraud, deceit, or deliberate or reckless disregard of a regulatory requirement, the Commission may impose a "First-Tier" penalty of up to $6,500 or $7,500, respectively. 15 U.S.C. §§ 80b-3(i); 17 C.F.R. §§ 201.1003, .1004. Within any particular tier, the Commission has the discretion to set the amount of the penalty. See Brendan E. Murray, Advisers Act Release No. 2809 (Nov. 21, 2008), 94 SEC Docket 11961, 11978;

The Rockies Fund, Inc., Exchange Act Release No. 54892 (Dec. 7, 2006), 89 SEC Docket 1517, 1528.

In determining whether a penalty is in the public interest, six factors may be considered: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, (2) the resulting harm to other persons, (3) any unjust enrichment and prior restitution, (4) the respondent's prior regulatory record, (5) the need to deter the respondent and other persons, and (6) such other matters as justice may require. 15 U.S.C. § 80b-3(i); Brendan E. Murray, 94 SEC Docket at 11978.

I find that sanctioning both Respondents with second-tier penalties is warranted and in the public interest, as the Division has presented no evidence that ZPRIM and Max Zavanelli's violations actually harmed investors (or other persons) or caused them unjust enrichment. On the other hand, Respondents acted deceitfully and floured the Commission's authority. Max Zavanelli has been sanctioned before, for similar misconduct. The need to deter Respondents is strong, given Max Zavanelli's continued employment in the securities industry, continued involvement with ZPRIM, and failure to acknowledge the wrongfulness of his conduct. See Brendan E. Murray, 94 SEC Docket at 11978. Sanctions imposed on Respondents will also deter others from engaging in similar misconduct. Id.

Nonetheless, the Division's requested penalty is excessive. Although the tier determines the maximum penalty, "each case has its own particular facts and circumstances which determine the appropriate penalty to be imposed" within the tier. SEC v. Murray, No. OS-CV-4643 (MKB), 2013 WL 839840, at *3

(E.D.N.Y. Mar. 6, 2013) (quotation omitted); see also SEC v. Kern, 425 F.3d 143, 153 (2d Cir. 2005). In assessing the public interest of imposing civil penalties, these factors—in addition to the statutorily defined factors cited above—may be considered:

> (1) the egregiousness of the violations at issue, (2) defendants' scienter, (3) the repeated nature of the violations, (4) defendants' failure to admit to their wrongdoing; (5) whether defendants' conduct created substantial losses or the risk of substantial losses to other persons; (6) defendants' lack of cooperation and honesty with authorities, if any; and (7) whether the penalty that would otherwise be appropriate should be reduced due to [respondents'] demonstrated current and future financial condition.

SEC v. Lybrand, 281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003), aff'd on other grounds, 425 F.3d 143 (2d Cir. 2005) (Lybrand factors).

Most of the Lybrand factors—namely, egregiousness, recurrence, lack of cooperation, and financial condition—weigh in favor of a severe sanction. Although the "dissemination of false and misleading financial information by its nature causes serious harm to investors and the marketplace," in this case there is no evidence of actual losses, and the evidence of a risk of substantial losses is at best equivocal. See The Rockies Fund, 89 SEC Docket at 1527. ZPRIM's remedial efforts reflect, and portions of the Answer and Mark Zavanelli's testimony constitute, admissions of wrongdoing; Max Zavanelli's testimony, by contrast, demonstrates a denial of wrongdoing. Also,

the degree of scienter varied: the six magazine advertisements involved high scienter, the two newsletters and one Morningstar report involved a lesser degree of scienter, and two Morningstar reports involved no scienter at all. Accordingly, the requested civil penalties are too high.

As to ZPRIM, the Division requests that the maximum second-tier civil penalty of $375,000 be imposed one-time. Div. Br. at 77. While the statute provides that a penalty may be imposed for "each act or omission," it leaves the precise unit of violation undefined. See Colin S. Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Colum. L. Rev. 1435, 1440-41 (1979). Although ZPRIM violated the statute eleven times, a one-time penalty prejudices them the least. In view of the totality of the evidence, a one-time, second-tier $250,000 penalty for ZPRIM, or two-thirds of the maximum, is appropriate.

As to Max Zavanelli, the Division requests the maximum second-tier penalty for each of his eleven violations. Because two of the Morningstar reports did not involve fraud, deceit, or deliberate or reckless disregard of a regulatory requirement, only a first-tier penalty may be imposed for those. However, the maximum penalty within each tier is appropriate. Thus, as to each alleged violation, the following amounts will be imposed, for a total penalty of $660,000:

October 2008 SmartMoney advertisement	$65,000
November 2008 SmartMoney advertisement	$65,000
December 2008 SmartMoney advertisement	$65,000
February 2011 SmartMoney advertisement	$75,000
May 2011 SmartMoney advertisement	$75,000
March 2011 Barron's advertisement	$75,000
April 2009 newsletter	$75,000
December 2009 newsletter	$75,000
September 2010 Morningstar report (audited)	$7,500
September 2010 Morningstar report (investigation)	$7,500
March 2011 Morningstar report	$75,000

VI. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I certify that the record includes the items set forth in the Record Index issued by the Secretary of the Commission on May 5, 2014.

VII. ORDER

IT IS ORDERED that, pursuant to Section 203(e) of the Advisers Act, ZPR Investment Management, Inc., is CENSURED.

IT IS FURTHER ORDERED that, pursuant to Section 203(f) of the Advisers Act, Max E. Zavanelli is permanently BARRED from association with any

investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization.

IT IS FURTHER ORDERED that, pursuant to Section 203(k) of the Advisers Act, ZPR Investment Management, Inc., shall CEASE AND DESIST from committing, and Max E. Zavanelli shall CEASE AND DESIST from committing, aiding and abetting, or causing the commission of, any violations or future violations of Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 203(i) of the Advisers Act, ZPR Investment Management, Inc., shall PAY A CIVIL MONEY PENALTY in the amount of $250,000.

IT IS FURTHER ORDERED that, pursuant to Section 203(i) of the Advisers Act, Max E. Zavanelli shall PAY A CIVIL MONEY PENALTY in the amount of $660,000.

Payment of penalties shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying the Respondent(s) and Administrative Proceeding No. 3-15263, shall be delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Bld., Oklahoma City, Oklahoma 73169. A copy of the cover letter and

instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

/s/Cameron Elliot
Cameron Elliot
Administrative Law Judge

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 16-15322-GG

[Filed September 14, 2017]

ZPR INVESTMENT MANAGEMENT INC., MAX E. ZAVANELLI,	)
Petitioners,	)
versus	)
SECURITIES AND EXCHANGE COMMISSION,	)
Respondent.	)

Petition for Review of a Decision of the Securities and Exchange Commission

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN, JILL PRYOR and MELLOY,* Circuit Judges.

* Honorable Michael J. Melloy, United States Circuit Judge for the Eighth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/Beverly B. Martin
UNITED STATES CIRCUIT JUDGE

ORD-42

APPENDIX G

15 U.S.C. § 80b-6. Prohibited transactions by investment advisers

It shall be unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly--

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction; or

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably

designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

17 C.F.R. § 275.206(4)-1 Advertisements by investment advisers.

(a) It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b–6(4)) for any investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b–3), directly or indirectly, to publish, circulate, or distribute any advertisement:

(1) Which refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser; or

(2) Which refers, directly or indirectly, to past specific recommendations of such investment adviser which were or would have been profitable to any person: Provided, however, That this shall not prohibit an advertisement which sets out or offers to furnish a list of all recommendations made by such investment adviser within the immediately preceding period of not less than one year if such advertisement, and such list if it is furnished separately: (i) State the name of each such security recommended, the date and nature of each such recommendation (e.g., whether to buy, sell or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the

market price of each such security as of the most recent practicable date, and (ii) contain the following cautionary legend on the first page thereof in print or type as large as the largest print or type used in the body or text thereof: "it should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list"; or

(3) Which represents, directly or indirectly, that any graph, chart, formula or other device being offered can in and of itself be used to determine which securities to buy or sell, or when to buy or sell them; or which represents directly or indirectly, that any graph, chart, formula or other device being offered will assist any person in making his own decisions as to which securities to buy, sell, or when to buy or sell them, without prominently disclosing in such advertisement the limitations thereof and the difficulties with respect to its use; or

(4) Which contains any statement to the effect that any report, analysis, or other service will be furnished free or without charge, unless such report, analysis or other service actually is or will be furnished entirely free and without any condition or obligation, directly or indirectly; or

(5) Which contains any untrue statement of a material fact, or which is otherwise false or misleading.

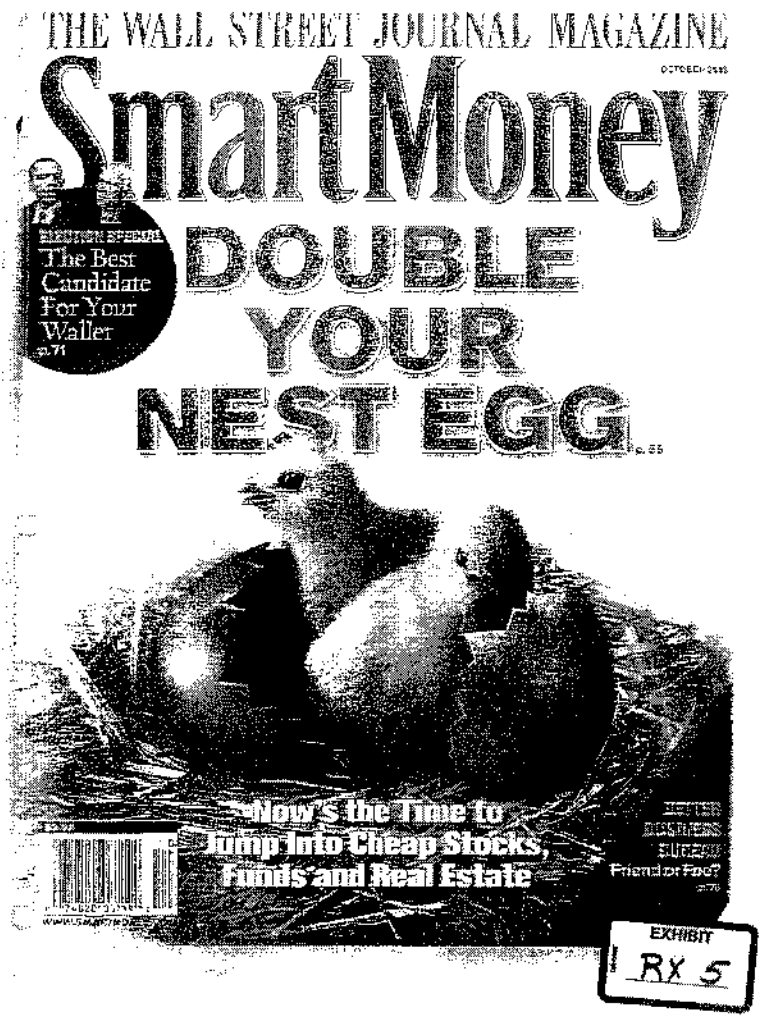
(b) For the purposes of this section the term advertisement shall include any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement

in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (2) any graph, chart, formula, or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities.

APPENDIX H

RESPONDENTS'

EXHIBIT 5 [Doc. No. 261]



ZPR INVESTMENT MANAGEMENT

FINDING OPPORTUNITY IN A TOUGH MARKET

Portfolio Manager
MAX ZAVANELLI

Morningstar ★★★★★ 5 Star Rating

Thru 6/30/08	ZPR Small Cap Value Accounts*	Russell 2000 Index	S&P 500 Index
COMPOUNDED 10 YR. RETURN	277.60%	71.21%	32.87%
ANNUALIZED	14.21%	5.52%	2.88%

To Learn More Call: 646-596-7767

www.zprim.com

Separately Managed Accounts
$200,000 Account Minimum

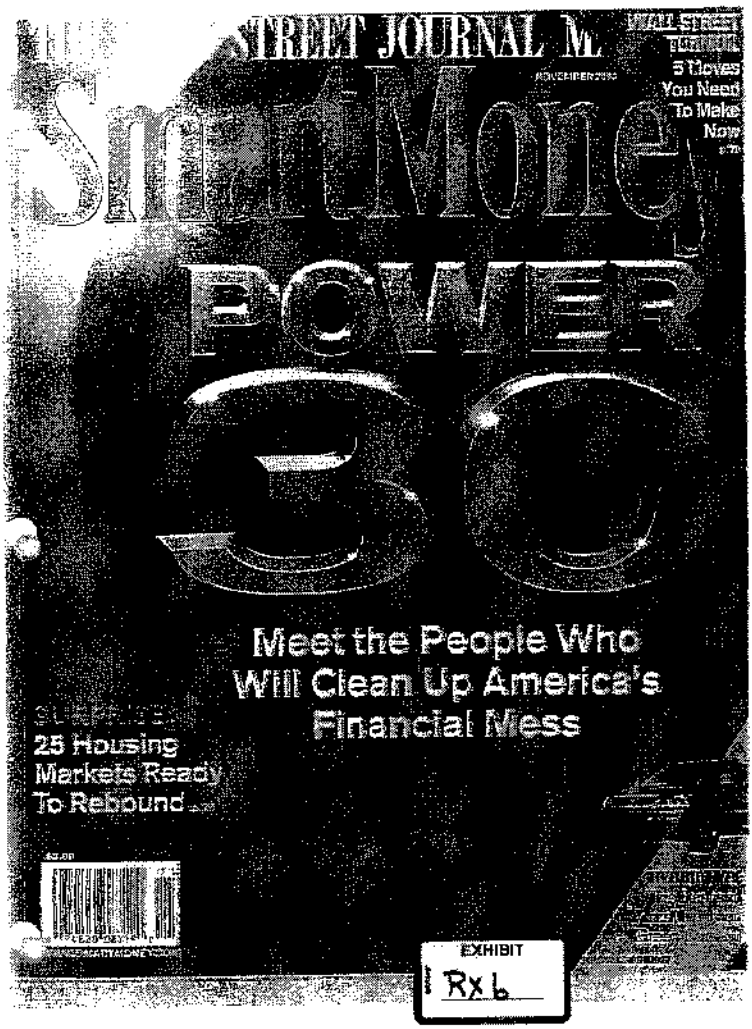
* Results are based on fully discretionary accounts categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each

month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through March 31, 2008. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000. ZPR Investment Management, Inc. is a registered investment advisor managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®). Complete description of the policies and procedures for this composite and a list and description of all firm composites are available upon request.

APPENDIX I

RESPONDENTS'

EXHIBIT 6 [Doc. No. 262]



ZPR INVESTMENT MANAGEMENT

FINDING OPPORTUNITY IN A TOUGH MARKET

Portfolio Manager
MAX ZAVANELLI

Morningstar ★★★★★ 5 Star Rating

PERFORMANCE Thru 8/31/08	ZPR Small Cap Value Accounts*	Russell 2000 Index	S&P 500 Index
COMPOUNDED 10 YR. RETURN	415.14%	148.39%	57.93%
ANNUALIZED	17.81%	9.53%	4.68%

To Learn More Call: 646-596-7767

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Separately Managed Accounts
$200,000 Account Minimum

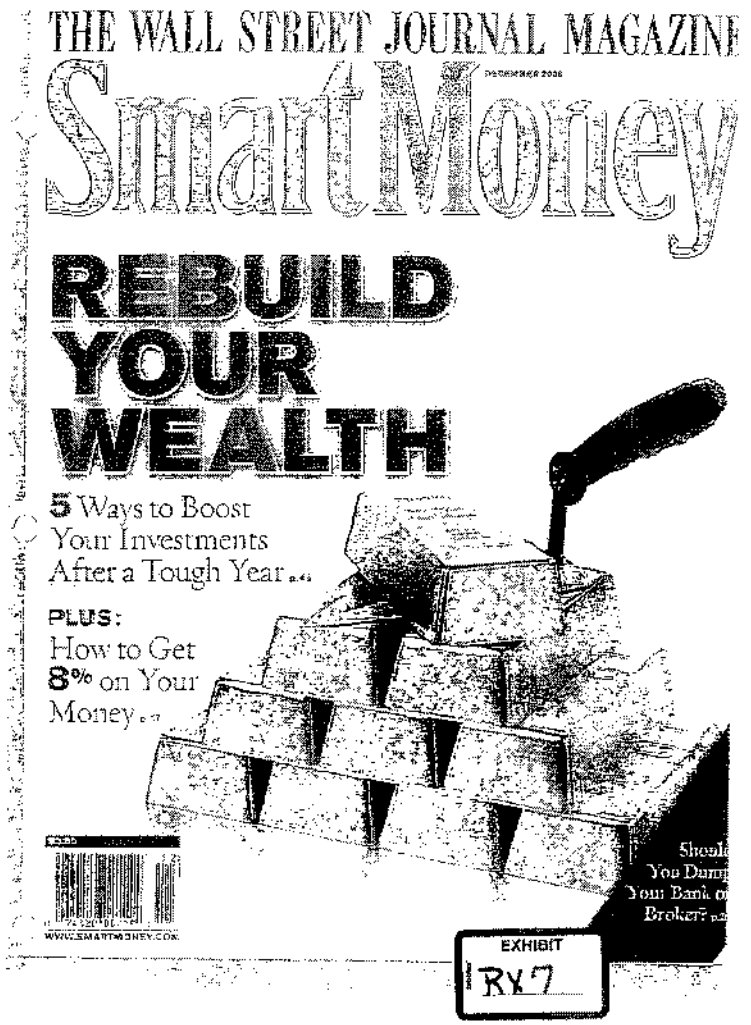
* Results are based on fully discretionary accounts categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each

month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through March 31, 2008. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000. ZPR Investment Management, Inc. is a registered investment advisor managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®). Complete description of the policies and procedures for this composite and a list and description of all firm composites are available upon request.

APPENDIX J

RESPONDENTS'

EXHIBIT 7 [Doc. No. 263]



ZPR INVESTMENT MANAGEMENT

THINK LONG TERM

Portfolio Manager
MAX ZAVANELLI

Morningstar ★★★★★ 5 Star Rating

PERFORMANCE Thru 8/31/08	ZPR Small Cap Value Accounts*	Russell 2000 Index	S&P 500 Index
COMPOUNDED 20 YR. RETURN	1187.05%	509.76%	565.18%
COMPOUNDED 10 YR. RETURN	357.82%	111.99%	35.20%
COMPOUNDED 5 YR. RETURN	75.45%	47.92%	28.65%

To Learn More Call: 646-596-7767

www.zprim.com

Separately Managed Accounts
$200,000 Account Minimum

* Results are based on fully discretionary accounts categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used

for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through June 30, 2008. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000. ZPR Investment Management, Inc. is a registered investment advisor managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®). Complete description of the policies and procedures for this composite and a list and description of all firm composites are available upon request.

APPENDIX K

RESPONDENTS'

EXHIBIT 8 [Doc. No. 264]

http://www.zprim.com/index.php?Id=312&ing=EN

ZPR Investment Management, Inc.

Performance

[*see table next page*]

ZPR Investment Management, Inc.

Fundamental Small Cap Value Composite

	Ending June 30, 2010						
Results shown in US $ Net of Fees	1 Year	3 Years Annualized	5 Years Annualized	10 Years Annualized	20 Years Annualized	Since Inception (1/1/88) Annualized	Since Inception (1/1/88) Compounded
ZPR Small Cap Value Accounts*	19.47%	-8.25%	4.38%	14.45%	13.28%	13.51%	1631.10%
Russell 2000 Index	21.48%	-8.60%	0.36%	3.00%	8.15%	9.08%	806.29%
S&P 500 Index	14.41%	-9.82%	-0.80%	-1.59%	7.67%	8.98%	592.98%

* Results are based on fully discretionary accounts categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through March 31, 2010. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000.

ZPR Investment Management, Inc. is a registered investment advisor managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®). Complete description of the policies and procedures for this composite and a list and description of all firm composites are available upon request.

	***ZPR Fundamental Small Cap Value**	**Russell 2000**	**S&P 500**
1st Quarter 2001	13.97%	-6.50%	-11.85%
2nd Quarter 2001	14.37%	14.28%	5.85%
3rd Quarter 2001	-12.22%	-20.79%	-14.68%
4th Quarter 2001	11.89%	21.09%	10.69%
1st Quarter 2002	17.00%	3.99%	0.28%
2nd Quarter 2002	15.90%	-8.35%	-13.40%
3rd Quarter 2002	-10.80%	-21.40%	-17.28%
4th Quarter 2002	10.51%	8.15%	8.44%
1st Quarter 2003	-3.75%	-4.49%	-3.15%
2nd Quarter 2003	28.22%	23.42%	15.39%
3rd Quarter 2003	7.35%	8.07%	2.65%
4th Quarter 2003	17.28%	14.53%	12.18%
1st Quarter 2004	6.25%	8.26%	1.69%
2nd Quarter 2004	-1.25%	0.47%	1.72%
3rd Quarter 2004	-1.42%	-2.85%	-1.87%
4th Quarter 2004	13.42%	14.09%	9.23%
1st Quarter 2005	-1.28%	-5.34%	-2.15%
2nd Quarter 2005	10.75%	4.32%	1.37%
3rd Quarter 2005	4.98%	4.70%	3.61%
4th Quarter 2005	1.47%	1.12%	2.09%
1st Quarter 2006	10.11%	13.94%	4.21%

2nd Quarter 2006	6.06%	-5.03%	-1.44%
3rd Quarter 2006	2.58%	0.44%	5.67%
4th Quarter 2006	8.41%	8.90%	6.70%
1st Quarter 2007	8.85%	1.95%	0.64%
2nd Quarter 2007	8.53%	4.41%	6.28%
3rd Quarter 2007	-3.56%	-3.09%	2.02%
4th Quarter 2007	-7.58%	-4.58%	-3.33%
1st Quarter 2008	-19.44%	-9.90%	-9.45%
2nd Quarter 2008	3.01%	0.58%	-2.73%
3rd Quarter 2008	-1.69%	-1.12%	-8.37%
4th Quarter 2008	-26.59%	-26.12%	-21.94%
1st Quarter 2009	-13.23%	-14.95%	-11.01%
2nd Quarter 2009	39.59%	20.65%	15.93%
3rd Quarter 2009	15.12%	19.13%	15.43%
4th Quarter 2009	3.11%	3.68%	6.03%
1st Quarter 2010	12.87%	8.85%	5.38%
2nd Quarter 2010	-10.83%	-9.93%	-11.42%
Compounded	322.60%	42.58%	-6.79%

>Download ZPR SCV Monthly Performance

>Download ZPR Global Equity Performance

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7/19/10

Performance

ZPR Investment Management, Inc.

Fundamental Small Cap Value Composite

	Ending March 31, 2009					
Results shown in US $ Net of Fees	1 Year	3 Years Annualized	5 Years Annualized	10 Years Annualized	20 Years Annualized	Since Inception (1/1/88) Annualized
ZPR Small Cap Value Accounts*	-35.49%	-14.12%	-2.15%	11.01%	10.47%	10.99%
Russell 2000 Index	-37.50%	-16.81%	-5.25%	1.93%	6.59%	6.80%
S&P 500 Index	-38.09%	-13.06%	-4.77%	-3.00%	7.42%	7.81%

* Results are based on fully discretionary accounts categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through December 31, 2008. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000.

ZPR Investment Management, Inc. is a registered investment advisor managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®). Complete description of the policies and procedures for this composite and a list and description of all firm composites are available upon request.

	***ZPR Funda-mental Small Cap Value**	**Russell 2000**	**S&P 500**
1st Quarter 2001	13.97%	-6.50%	-11.85%
2nd Quarter 2001	14.37%	14.28%	5.85%
3rd Quarter 2001	-12.22%	-20.79%	-14.68%
4th Quarter 2001	11.89%	21.09%	10.69%
1st Quarter 2002	17.00%	3.99%	0.28%
2nd Quarter 2002	15.90%	-8.35%	-13.40%
3rd Quarter 2002	-10.80%	-21.40%	-17.28%
4th Quarter 2002	10.51%	6.15%	8.44%
1st Quarter 2003	-3.75%	-4.49%	-3.15%
2nd Quarter 2003	28.22%	23.42%	15.39%
3rd Quarter 2003	7.35%	9.07%	2.65%
4th Quarter 2003	17.26%	14.53%	12.18%
1st Quarter 2004	6.25%	6.26%	1.69%
2nd Quarter 2004	-1.25%	0.47%	1.72%
3rd Quarter 2004	-1.42%	-2.85%	-1.87%
4th Quarter 2004	13.42%	14.09%	9.23%
1st Quarter 2005	-1.28%	-5.34%	-2.15%
2nd Quarter 2005	10.75%	4.32%	1.37%
3rd Quarter 2005	4.98%	4.70%	3.61%
4th Quarter 2005	1.47%	1.12%	2.09%
1st Quarter 2006	10.11%	13.94%	4.21%

2nd Quarter 2006	6.08%	-5.03%	-1.44%
3rd Quarter 2006	2.58%	0.44%	5.67%
4th Quarter 2006	8.41%	8.90%	6.70%
1st Quarter 2007	6.85%	1.95%	0.64%
2nd Quarter 2007	8.53%	4.42%	6.28%
3rd Quarter 2007	-3.56%	-3.09%	2.02%
4th Quarter 2007	-7.58%	-4.58%	-3.33%
1st Quarter 2008	-19.44%	-9.90%	-9.45%
2nd Quarter 2008	3.01%	0.58%	-2.73%
3rd Quarter 2008	-1.69%	-1.12%	-8.37%
4th Quarter 2008	-26.59%	-26.12%	-21.94%
1st Quarter 2009	-13.23%	-14.95%	-11.01%
Compounded	153.41%	-2.62%	-29.63%

Results are based on fully discretionary accounts categorized as domestic small cap value equity, including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the

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Performance

ZPR Investment Management, Inc.

Fundamental Small Cap Value Composite

	Ending December 31, 2008					
Results shown in US $ Net of Fees	1 Year	3 Years Annualized	5 Years Annualized	10 Years Annualized	20 Years Annualized	Since Inception (1/1/88) Annualized
ZPR Small Cap Value Accounts*	-40.11%	-7.02%	1.89%	11.76%	11.98%	12.54%
Russell 2000 Index	-33.79%	-8.29%	-0.93%	3.02%	7.85%	8.61%
S&P 500 Index	-37.00%	-8.36%	-2.19%	-1.38%	8.42%	8.76%

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	***ZPR Funda-mental Small Cap Value**	**Russell 2000**	**S&P 500**
1st Quarter 2001	13.97%	-6.50%	-11.85%
2nd Quarter 2001	14.37%	14.28%	5.85%
3rd Quarter 2001	-12.22%	-20.79%	-14.68%
4th Quarter 2001	11.89%	21.09%	10.69%
1st Quarter 2002	17.00%	3.99%	0.28%
2nd Quarter 2002	15.90%	-8.35%	-13.40%
3rd Quarter 2002	-10.80%	-21.40%	-17.28%
4th Quarter 2002	10.51%	6.15%	8.44%
1st Quarter 2003	-3.75%	-4.49%	-3.15%
2nd Quarter 2003	28.22%	23.42%	15.39%
3rd Quarter 2003	7.35%	9.07%	2.65%
4th Quarter 2003	17.26%	14.53%	12.18%
1st Quarter 2004	6.25%	6.26%	1.69%
2nd Quarter 2004	-1.25%	0.47%	1.72%
3rd Quarter 2004	-1.42%	-2.85%	-1.87%
4th Quarter 2004	13.42%	14.09%	9.23%
1st Quarter 2005	-1.26%	-5.34%	-2.15%
2nd Quarter 2005	10.75%	4.32%	1.37%
3rd Quarter 2005	4.96%	4.70%	3.61%
4th Quarter 2005	1.47%	1.12%	2.09%
1st Quarter 2006	10.11%	13.94%	4.21%

2nd Quarter 2006	6.06%	-5.03%	-1.44%
3rd Quarter 2006	2.58%	0.44%	5.67%
4th Quarter 2006	8.41%	8.90%	6.70%
1st Quarter 2007	6.85%	1.95%	0.64%
2nd Quarter 2007	8.53%	4.42%	6.28%
3rd Quarter 2007	-3.56%	-3.09%	2.02%
4th Quarter 2007	-7.58%	-4.58%	-3.33%
1st Quarter 2008	-19.44%	-9.90%	-9.45%
2nd Quarter 2008	3.01%	0.58%	-2.73%
3rd Quarter 2008	-1.69%	-1.12%	-8.37%
4th Quarter 2008	-26.59%	-26.12%	-21.94%
Compounded	192.05%	14.49%	-20.92%

Results are based on fully discretionary accounts categorized as domestic small cap value equity, including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included

in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the GIPS® has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through September 30, 2008. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000.

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ZPR Investment Management, Inc.

ZPR SCV Monthly Performance

Year	Month	*ZPR Fundamental Small Cap Value
1988	January	3.64%
1988	February	6.12%
1988	March	2.96%
1988	April	-1.17%
1988	May	-3.67%
1988	June	12.61%
1988	July	1.83%
1988	August	-1.16%
1988	September	3.63%
1988	October	-1.63%
1988	November	-3.96%
1988	December	4.12%
1989	January	8.89%
1989	February	2.08%
1989	March	2.40%
1989	April	4.02%
1989	May	-1.39%
1989	June	-3.11%
1989	July	0.74%
1989	August	2.34%
1989	September	0.74%

1989	October	-4.42%
1989	November	-0.98%
1989	December	2.57%
1990	January	-10.66%
1990	February	0.89%
1990	March	9.66%
1990	April	-1.01%
1990	May	1.91%
1990	June	0.93%
1990	July	-8.33%
1990	August	-14.36%
1990	September	-7.82%
1990	October	1.66%
1990	November	11.41%
1990	December	8.79%
1991	January	14.15%
1991	February	11.35%
1991	March	2.72%
1991	April	-1.45%
1991	May	-0.66%
1991	June	-6.40%
1991	July	5.36%
1991	August	6.97%
1991	September	3.08%
1991	October	0.05%
1991	November	-0.23%
1991	December	0.23%
1992	January	9.66%

1992	February	4.21%
1992	March	-4.33%
1992	April	-6.56%
1992	May	3.11%
1992	June	-5.98%
1992	July	3.02%
1992	August	-4.02%
1992	September	1.66%
1992	October	4.05%
1992	November	8.90%
1992	December	13.39%
1993	January	3.36%
1993	February	-2.61%
1993	March	-0.13%
1993	April	-4.13%
1993	May	1.43%
1993	June	0.55%
1993	July	-0.53%
1993	August	3.74%
1993	September	-1.57%
1993	October	1.17%
1993	November	0.33%
1993	December	15.99%
1994	January	-0.49%
1994	February	1.30%
1994	March	-3.40%
1994	April	-3.87%
1994	May	-1.13%

1994	June	-2.31%
1994	July	2.99%
1994	August	2.07%
1994	September	-0.66%
1994	October	4.33%
1994	November	-3.13%
1994	December	0.85%
1995	January	2.18%
1995	February	2.39%
1995	March	3.28%
1995	April	1.50%
1995	May	-0.52%
1995	June	5.27%
1995	July	5.44%
1995	August	3.81%
1995	September	1.89%
1995	October	-3.17%
1995	November	3.81%
1995	December	0.03%
1996	January	0.03%
1996	February	0.78%
1996	March	4.40%
1996	April	3.61%
1996	May	3.66%
1996	June	-4.76%
1996	July	-2.42%
1996	August	3.69%
1996	September	3.30%

1996	October	1.42%
1996	November	7.05%
1996	December	3.23%
1997	January	5.00%
1997	February	0.80%
1997	March	-0.70%
1997	April	-4.85%
1997	May	7.82%
1997	June	5.14%
1997	July	0.21%
1997	August	4.23%
1997	September	2.56%
1997	October	-2.24%
1997	November	1.83%
1997	December	-4.97%
1998	January	-1.00%
1998	February	3.43%
1998	March	-0.87%
1998	April	0.00%
1998	May	-5.89%
1998	June	-3.98%
1998	July	-8.30%
1998	August	-15.90%
1998	September	5.15%
1998	October	7.85%
1998	November	3.88%
1998	December	-1.33%
1999	January	1.76%

1999	February	-4.09%
1999	March	-4.90%
1999	April	10.55%
1999	May	3.83%
1999	June	5.05%
1999	July	4.79%
1999	August	-4.11%
1999	September	-3.71%
1999	October	-7.01%
1999	November	12.42%
1999	December	3.49%
2000	January	0.45%
2000	February	1.85%
2000	March	3.54%
2000	April	0.31%
2000	May	-4.34%
2000	June	-4.24%
2000	July	6.90%
2000	August	3.74%
2000	September	-4.79%
2000	October	-4.03%
2000	November	-5.61%
2000	December	-4.55%
2001	January	19.74%
2001	February	-0.57%
2001	March	-4.27%
2001	April	3.31%
2001	May	7.59%

2001	June	2.90%
2001	July	1.09%
2001	August	-2.80%
2001	September	-10.67%
2001	October	2.21%
2001	November	2.75%
2001	December	6.54%
2002	January	7.57%
2002	February	0.20%
2002	March	8.55%
2002	April	10.07%
2002	May	2.96%
2002	June	2.27%
2002	July	-9.02%
2002	August	1.51%
2002	September	-3.42%
2002	October	1.13%
2002	November	5.85%
2002	December	3.24%
2003	January	-2.25%
2003	February	-3.12%
2003	March	1.64%
2003	April	1.86%
2003	May	8.91%
2003	June	6.20%
2003	July	-0.34%
2003	August	5.66%
2003	September	1.95%

2003	October	7.81%
2003	November	3.99%
2003	December	4.59%
2004	January	0.18%
2004	February	4.46%
2004	March	1.53%
2004	April	-4.44%
2004	May	0.65%
2004	June	2.67%
2004	July	-2.20%
2004	August	-4.76%
2004	September	5.84%
2004	October	1.07%
2004	November	11.02%
2004	December	1.08%
2005	January	-1.72%
2005	February	3.94%
2005	March	-3.34%
2005	April	-4.63%
2005	May	8.89%
2005	June	6.65%
2005	July	6.25%
2005	August	-2.31%
2005	September	1.12%
2005	October	-4.30%
2005	November	3.87%
2005	December	2.08%
2006	January	5.46%

2006	February	-0.30%
2006	March	4.72%
2006	April	4.25%
2006	May	-2.95%
2006	June	4.83%
2006	July	-2.98%
2006	August	2.72%
2006	September	2.95%
2006	October	4.08%
2006	November	6.58%
2006	December	-2.27%
2007	January	0.56%
2007	February	1.57%
2007	March	4.61%
2007	April	3.36%
2007	May	4.04%
2007	June	0.92%
2007	July	-4.57%
2007	August	-1.95%
2007	September	3.07%
2007	October	0.86%
2007	November	-7.52%
2007	December	-0.92%
2008	January	-5.16%
2008	February	-4.39%
2008	March	-11.16%
2008	April	6.51%
2008	May	5.23%

2008	June	-8.09%
2008	July	1.25%
2008	August	3.90%
2008	September	-6.55%
2008	October	-22.36%
2008	November	-11.45%
2008	December	6.78%
2009	January	-5.30%
2009	February	-20.45%
2009	March	15.18%
2009	April	30.53%
2009	May	7.50%
2009	June	-0.52%
2009	July	3.44%
2009	August	2.82%
2009	September	8.24%
2009	October	-5.50%
2009	November	2.52%
2009	December	6.43%
2010	January	-0.95%
2010	February	3.54%
2010	March	10.06%
2010	April	-1.10%
2010	May	-2.57%
2010	June	-7.46%
2010	July	3.45%

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ZPR Global Equity Performance

ZPR Investment Management, Inc.

International Equity Global Composite

	Ending June 30, 2010				
Results shown in US $ Net of Fees	1 Year	3 Years Annualized	5 Years Annualized	Since Inception (1/1/01) Annualized	Since Inception (1/1/01) Compounded
ZPR International Equity Global Accounts*	57.03%	1.76%	11.34%	17.69%	369.75%
MSCI EAFE Index	6.37%	-12.94%	1.35%	1.79%	18.35%

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	Global Equity	****EAFE**	**Russell 2000**
1st Quarter 2001	8.44%	-13.66%	-6.50%
2nd Quarter 2001	12.59%	-0.86%	14.28%
3rd Quarter 2001	-13.89%	-13.95%	-20.79%
4th Quarter 2001	12.82%	6.98%	21.09%
1st Quarter 2002	16.83%	0.57%	3.99%
2nd Quarter 2002	9.89%	-1.93%	-8.35%
3rd Quarter 2002	-9.18%	-19.69%	-21.40%
4th Quarter 2002	10.17%	6.48%	6.15%
1st Quarter 2003	-3.88%	-8.13%	-4.49%
2nd Quarter 2003	28.68%	19.57%	23.42%
3rd Quarter 2003	7.10%	8.18%	9.07%
4th Quarter 2003	17.27%	17.11%	14.53%
1st Quarter 2004	3.49%	4.40%	6.26%
2nd Quarter 2004	-3.11%	0.44%	0.47%
3rd Quarter 2004	-1.66%	-0.23%	-2.65%
4th Quarter 2004	13.35%	15.36%	14.09%
1st Quarter 2005	-1.24%	-0.10%	-5.34%
2nd Quarter 2005	5.09%	-0.75%	4.23%
3rd Quarter 2005	3.98%	10.44%	4.70%
4th Quarter 2005	1.45%	4.12%	1.12%
1st Quarter 2006	10.98%	9.47%	13.94%
2nd Quarter 2006	1.09%	0.94%	-5.03%
3rd Quarter 2006	2.61%	3.99%	0.44%

4th Quarter 2006	10.92%	10.40%	8.90%
1st Quarter 2007	8.50%	4.15%	1.95%
2nd Quarter 2007	10.98%	8.67%	4.41%
3rd Quarter 2007	-4.52%	2.23%	-3.09%
4th Quarter 2007	-5.02%	-1.71%	-4.58%
1st Quarter 2008	-11.17%	-8.83%	-9.90%
2nd Quarter 2008	-2.70%	-1.93%	0.58%
3rd Quarter 2008	-9.88%	-20.50%	-1.12%
4th Quarter 2008	-26.86%	-19.90%	-26.12%
1st Quarter 2009	-8.88%	-13.85%	-14.95%
2nd Quarter 2009	42.59%	25.84%	20.88%
3rd Quarter 2009	27.44%	19.52%	19.13%
4th Quarter 2009	8.09%	2.23%	3.88%
1st Quarter 2010	15.07%	0.94%	8.85%
2nd Quarter 2010	-0.93%	-18.75%	-9.93%
Compounded	369.76%	18.35%	42.58%

** MSCI EAFE Gross Index (Europe, Australasia and the Far East) is recognized as the pre-eminent benchmark in the United States to measure international equity performance.

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ZPR Global Equity Performance

ZPR Investment Management, Inc.

International Equity Global Composite

	Ending March 31, 2009			
Results shown in US $ Net of Fees	1 Year	3 Years Annualized	5 Years Annualized	8 Years Annualized
ZPR International Equity Global Accounts*	-41.42%	-13.26%	-3.05%	5.32%
MSCI EAFE Index	-46.20%	-14.07%	-1.75%	1.38%

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	Global Equity	****EAFE**	**Russell 2000**
1st Quarter 2001	8.44%	-13.66%	6.50%
2nd Quarter 2001	12.59%	-0.86%	14.28%
3rd Quarter 2001	-13.89%	-13.95%	-20.79%
4th Quarter 2001	12.82%	6.98%	21.09%
1st Quarter 2002	16.83%	0.57%	3.99%
2nd Quarter 2002	9.89%	-1.93%	-8.35%
3rd Quarter 2002	-9.18%	-19.69%	-21.40%
4th Quarter 2002	10.17%	6.48%	6.15%
1st Quarter 2003	-3.88%	-8.13%	-4.49%
2nd Quarter 2003	28.68%	19.57%	23.42%
3rd Quarter 2003	7.10%	8.18%	9.07%
4th Quarter 2003	17.27%	17.11%	14.53%
1st Quarter 2004	3.49%	4.40%	6.26%
2nd Quarter 2004	-3.11%	0.44%	0.47%
3rd Quarter 2004	-1.66%	-0.23%	-2.85%
4th Quarter 2004	13.35%	15.36%	14.09%
1st Quarter 2005	-1.24%	-0.10%	-5.34%
2nd Quarter 2005	5.09%	-0.75%	4.23%
3rd Quarter 2005	3.98%	10.44%	4.70%
4th Quarter 2005	1.45%	4.12%	1.12%
1st Quarter 2006	10.98%	9.47%	13.94%
2nd Quarter 2006	1.09%	0.94%	-5.03%
3rd Quarter 2006	2.61%	3.99%	0.44%

4th Quarter 2006	10.92%	10.40%	8.90%
1st Quarter 2007	8.60%	4.15%	1.95%
2nd Quarter 2007	10.99%	6.67%	4.41%
3rd Quarter 2007	-4.52%	2.23%	-3.09%
4th Quarter 2007	-5.02%	-1.71%	-4.58%
1st Quarter 2008	-11.32%	-8.83%	-9.90%
2nd Quarter 2008	-2.70%	-1.93%	0.58%
3rd Quarter 2008	-9.84%	-20.50%	-1.12%
4th Quarter 2008	-26.86%	-19.90%	-26.12%
1st Quarter 2009	-8.69%	-13.85%	-14.95%
Compounded	109.98%	-11.60%	-2.62%

* Results are based on fully discretionary accounts categorized as global equity, including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Thai securities are valued at the free market spot rate (NYSE close). Dividends and interest are reported with a one month lag. Incurred commission costs are

included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through December 31, 2008. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000.

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** MSCI EAFE Gross Index (Europe, Australasia and the Far East) is recognized as the pre-eminent benchmark in the United States to measure international equity performance.

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ZPR Global Equity Performance

ZPR Investment Management, Inc.

International Equity Global Composite

	Ending March 31, 2009			
Results shown in US $ Net of Fees	1 Year	3 Years Annualized	5 Years Annualized	8 Years Annualized
ZPR International Equity Global Accounts*	-41.42%	-13.26%	-3.05%	5.32%
MSCI EAFE Index	-46.20%	-14.07%	-1.75%	1.38%

* Results are based on fully discretionary accounts categorized as international equity global including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through December 31, 2008. In addition, a performance examination was conducted on the International Equity Global Composite beginning 12/31/2000.

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	Global Equity	****EAFE**	**Russell 2000**
1st Quarter 2001	8.44%	-13.66%	-6.50%
2nd Quarter 2001	12.59%	-0.86%	14.28%
3rd Quarter 2001	-13.89%	-13.95%	-20.79%
4th Quarter 2001	12.82%	6.98%	21.09%
1st Quarter 2002	16.83%	0.57%	3.99%
2nd Quarter 2002	9.89%	-1.93%	-8.35%
3rd Quarter 2002	-9.18%	-19.69%	-21.40%
4th Quarter 2002	10.17%	6.48%	6.15%
1st Quarter 2003	-3.88%	-8.13%	-4.49%
2nd Quarter 2003	28.68%	19.57%	23.42%
3rd Quarter 2003	7.10%	8.18%	9.07%
4th Quarter 2003	17.27%	17.11%	14.53%
1st Quarter 2004	3.49%	4.40%	6.26%
2nd Quarter 2004	-3.11%	0.44%	0.47%
3rd Quarter 2004	-1.66%	-0.23%	-2.85%
4th Quarter 2004	13.35%	15.36%	14.09%
1st Quarter 2005	-1.24%	-0.10%	-5.34%
2nd Quarter 2005	5.09%	-0.75%	4.23%
3rd Quarter 2005	3.98%	10.44%	4.70%
4th Quarter 2005	1.45%	4.12%	1.12%
1st Quarter 2006	10.98%	9.47%	13.94%
2nd Quarter 2006	1.09%	0.94%	-5.03%
3rd Quarter 2006	2.61%	3.99%	0.44%

4th Quarter 2006	10.92%	10.40%	8.90%
1st Quarter 2007	8.60%	4.15%	1.95%
2nd Quarter 2007	10.99%	6.67%	4.41%
3rd Quarter 2007	-4.52%	2.23%	-3.09%
4th Quarter 2007	-5.02%	-1.71%	-4.58%
1st Quarter 2008	-11.32%	-8.83%	-9.90%
2nd Quarter 2008	-2.70%	-1.93%	0.58%
3rd Quarter 2008	-9.84%	-20.50%	-1.12%
4th Quarter 2008	-26.86%	-19.90%	-26.12%
1st Quarter 2009	-8.69%	-13.85%	-14.95%
Compounded	109.98%	-11.60%	-2.62%

* Results are based on fully discretionary accounts categorized as global equity, including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Thai securities are valued at the free market spot rate (NYSE close). Dividends and interest are reported with a one month lag. Incurred commission costs are

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ZPR Global Equity Performance

ZPR Investment Management, Inc.

International Equity Global Composite

	Ending December 31, 2008			
Results shown in US $ Net of Fees	1 Year	3 Years Annualized	5 Years Annualized	8 Years Annualized
ZPR International Equity Global Accounts*	-43,10%	-7,40%	-0.57%	10,97%
MSCI EAFE Index	-43,06%	-6,93%	2,18%	0,32%

* Results are based on fully discretionary accounts categorized as international equity global including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through September 30, 2008. In addition, a performance examination was conducted on the International Equity Global Composite beginning 12/31/2000.

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	Global Equity	**EAFE	Russell 2000
1st Quarter 2001	8.44%	-13.66%	-6.50%
2nd Quarter 2001	12.59%	-0.86%	14.28%
3rd Quarter 2001	-13.89%	-13.95%	-20.79%
4th Quarter 2001	12.82%	6.98%	21.09%
1st Quarter 2002	16.83%	0.57%	3.99%
2nd Quarter 2002	9.89%	-1.93%	-8.35%
3rd Quarter 2002	-9.18%	-19.69%	-21.40%
4th Quarter 2002	10.17%	6.48%	6.15%
1st Quarter 2003	-3.88%	-8.13%	-4.49%
2nd Quarter 2003	28.68%	19.57%	23.42%
3rd Quarter 2003	7.10%	8.18%	9.07%
4th Quarter 2003	17.27%	17.11%	14.53%
1st Quarter 2004	3.49%	4.40%	6.26%
2nd Quarter 2004	-3.11%	0.44%	0.47%
3rd Quarter 2004	-1.66%	-0.23%	-2.85%
4th Quarter 2004	13.35%	15.36%	14.09%
1st Quarter 2005	-1.24%	-0.10%	-5.34%
2nd Quarter 2005	5.09%	-0.75%	4.23%
3rd Quarter 2005	3.98%	10.44%	4.70%
4th Quarter 2005	1.45%	4.12%	1.12%
1st Quarter 2006	10.98%	9.47%	13.94%
2nd Quarter 2006	1.09%	0.94%	-5.03%
3rd Quarter 2006	2.61%	3.99%	0.44%

4th Quarter 2006	10.92%	10.40%	8.90%
1st Quarter 2007	8.60%	4.15%	1.95%
2nd Quarter 2007	10.99%	6.67%	4.19%
3rd Quarter 2007	-4.52%	2.23%	-3.09%
4th Quarter 2007	-5.02%	-1.71%	-4.58%
1st Quarter 2008	-11.32%	-8.83%	-9.90%
2nd Quarter 2008	-2.70%	-1.93%	0.58%
3rd Quarter 2008	-9.84%	-20.50%	-1.12%
4th Quarter 2008	-26.86%	-19.90%	-26.12%
Compounded	130.01%	2.62%	14.49%

* Results are based on fully discretionary accounts categorized as international equity, global including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Thai securities are valued at the free market spot rate (NYSE close). Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains.

ZPR Investment Management, Inc.'s compliance with the (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through September 30, 2008. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000.

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All Asian Performance

ZPR Investment Management, Inc.

All Asian Composite

	Ending June 30, 2010			
Results shown in US $ Net of Fees	1 Year	2 Years Annualized	Since Inception (1/1/07) Annualized	Since Inception (1/1/07) Compounded
ZPR All Asian Accounts*	101.21%	26.71%	18.50%	81.13%
MSCI EAFE Index	6.37%	-14.30%	-8.49%	-26.70%

* Results are based on fully discretionary accounts categorized as International Equity All Asian including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through March 31, 2010.

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	All Asian	**EAFE	Russell 2000
1st Quarter 2007	10.80%	4.15%	1.95%
2nd Quarter 2007	13.20%	6.87%	4.41%
3rd Quarter 2007	-7.15%	2.23%	-3.09%
4th Quarter 2007	0.79%	-1.71%	-4.58%
1st Quarter 2008	3.78%	-8.83%	-9.90%
2nd Quarter 2008	-7.24%	-1.93%	0.68%
3rd Quarter 2008	-20.01%	-20.50%	-1.12%
4th Quarter 2008	-29.56%	-19.90%	-26.12%
1st Quarter 2009	-1.62%	-13.85%	-14.95%
2nd Quarter 2009	43.95%	26.84%	20.68%
3rd Quarter 2009	40.41%	19.52%	19.13%
4th Quarter 2009	12.42%	2.23%	3.98%
1st Quarter 2010	17.12%	0.94%	8.85%
2nd Quarter 2010	6.84%	-13.76%	-9.93%
Compounded	81.13%	-26.70%	-18.85%

** MSCI EAFE Gross Index (Europe, Australasia and the Far East) is recognized as the pre-eminent benchmark in the United States to measure international equity performance.

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ZPR INVESTMENT MANAGEMENT, INC.
FUNDAMENTAL SMALL CAP VALUE COMPOSITE
ANNUAL DISCLOSURE PRESENTATION

Year End	Total Firm Assets (millions)	Composite Assets		Annual Performance Results		
		USD (millions)	Number of Accounts	Composite Net	Russell 2000	Composite Dispersion
2009	74	54	77	43.77%	27.19%	2.30%
2008	45	35	92	-40.11%	-33.79%	0.71%
2007	81	57	98	3.35%	-1.57%	1.7%
2006	42	32	16	29.87%	18.37%	1.5%
2005	23	18	8	16.47%	4.55%	1.9%
2004	19	14	6	17.32%	18.32%	N.A.
2003	6	3	Five or Fewer	55.36%	47.25%	N.A.
2002	4	<1	Five or Fewer	33.67%	(20.48%)	N.A.
2001	13	<1	Five or Fewer	28.02%	2.49%	N.A.

N.A. - information is not statistically meaningful due to an insufficient number of portfolios in the composite for the entire year.

Fundamental Small Cap Value Composite *consists of fully discretionary accounts categorized as domestic small cap equity. These accounts hold U.S. Small Cap Stocks that are selected by using ZPR Fundamental Analysis. For comparison purposes the composite is measured against the Russell 2000 Index. Prior to December 1, 2001 the minimum account size for this composite was $100 thousand.*

ZPR Investment Management, Inc. has prepared and presented this report in compliance with the Global Investment Performance Standards (GIPS®).

ZPR Investment Management, Inc. is an SEC registered investment adviser managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. maintains a complete list and description of composites, which is available upon request.

Results are based on fully discretionary accounts under management, including those accounts no longer with the firm. Past performance is not indicative of future results.

The U.S. Dollar is the currency used to express performance. Returns are presented net of management fees and include the reinvestment of all income. Net of fee performance was calculated using actual management fees. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay the initial management fee in advance which could be in another month. The annual composite dispersion is the equal-weighted standard deviation of the individual annual returns for the accounts in the composite the entire

year. Additional information regarding policies for calculating and reporting returns is available upon request.

The annual management fee schedule for accounts that have assets up to $1 million pay 2.00%, from $1 million to $5 million pay 1.60%, and over $5 million pay 1.00% on all assets under management. Actual investment advisory fees incurred by clients may vary.

The Fundamental Small Cap Value Composite was created January 1, 1988. Compliance with the GIPS has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through December 31, 2008. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning December 31, 2000.

ZPR INVESTMENT MANAGEMENT, INC.
INTERNATIONAL EQUITY GLOBAL COMPOSITE
ANNUAL DISCLOSURE PRESENTATION

Year End	Total Firm Assets (millions)	Composite Assets			Annual Performance Results		
		USD (millions)	% of Non-Fee-Paying	Number of Accounts	Composite Net	MSCI EAFE	Composite Dispersion
2009	74	13	25%	16	79.36%	32.45%	3.15%
2008	45	7	35%	15	-43.16%	-43.06%	1.57%
2007	81	13	36%	19	9.29%	11.62%	0.87%
2006	42	7	62%	6	27.69%	26.86%	N.A.
2005	23	5	64%	Five or Fewer	9.48%	14.02%	N.A.
2004	19	4	67%	Five or Fewer	11.78%	20.70%	N.A.
2003	6	3	82%	Five or Fewer	55.34%	39.17%	N.A.
2002	4	2	33%	6	28.46%	(15.66%)	2.2%
2001	13	1	26%	6	18.62%	(21.21%)	N.A.

N.A. - information is not statistically meaningful due to an insufficient number of portfolios in the composite for the entire year.

International Equity Global Composite *contains fully discretionary management fee-paying and non-management fee-paying accounts categorized as global equity. These accounts hold both U.S. Stocks and International Stocks that are selected by using ZPR Fundamental Analysis. For comparison purposes, the composite is measured against MSCI EAFE (Gross) Index. Returns include the effect of foreign currency exchange rates.*

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Results are based on fully discretionary accounts under management, including those accounts no longer with the firm. Past performance is not indicative of future results.

Composite performance is presented net of foreign withholding taxes on dividends, interest income, and capital gains. The index grosses-up dividends, where this is appropriate, to reflect the position of an international investor with the benefit of double taxation agreements, if any. Withholding taxes may vary according to the investor's domicile. The composite includes the performance of accounts that may occasionally use margin; however, the use of margin is not part of the overall strategy of the composite.

The U.S. Dollar is the currency used to express performance. Returns are presented net of management fees and include the reinvestment of all income. Net of fee performance was calculated using actual management fees. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay the initial management fee in advance which could be in another month. The annual composite dispersion is the equal-weighted standard deviation of the individual annual returns for the accounts in the composite the entire year. Additional information regarding policies for calculating and reporting returns is available upon request.

The investment management fee schedule for the composite is 2% on the first $1,000,000, 1.60% from $1,000,000 to $5,000,000, and 1.00% on assets over $5,000,000. Actual investment advisory fees incurred by clients may vary.

The International Equity Global Composite was created January 1, 1993. Compliance with the GIPS has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through December 31, 2008. In addition, a performance examination was conducted on the International Equity Global Composite beginning December 31, 2000.

ZPR INVESTMENT MANAGEMENT, INC.
FUNDAMENTAL SMALL CAP VALUE COMPOSITE
ANNUAL DISCLOSURE PRESENTATION

Year End	Total Firm Assets (millions)	Composite Assets		Annual Performance Results		
		USD (millions)	Number of Accounts	Composite Net	Russell 2000	Composite Dispersion
2008	45	35	92	-40.11%	-33.00%	0.71%
2007	81	57	98	3.35%	-1.57%	1.7%
2006	42	32	16	29.87%	18.37%	1.5%
2005	23	18	8	16.47%	4.55%	1.9%
2004	19	14	6	17.32%	18.32%	N.A.
2003	6	3	Five or Fewer	55.36%	47.25%	N.A.
2002	4	<1	Five or Fewer	33.67%	(20.48%)	N.A.
2001	13	<1	Five or Fewer	28.02%	2.49%	N.A.

N.A. - information is not statistically meaningful due to an insufficient number of portfolios in the composite for the entire year.

Fundamental Small Cap Value Composite *consists of fully discretionary accounts categorized as domestic small cap equity. These accounts hold U.S. Small Cap Stocks that are selected by using ZPR Fundamental Analysis. For comparison purposes the composite is measured against the Russell 2000 Index. Prior to December 1, 2001 the minimum account size for this composite was $100 thousand.*

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The Fundamental Small Cap Value Composite was created January 1, 1988. Compliance with the GIPS has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through December 31, 2007. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning December 31, 2000.

ZPR INVESTMENT MANAGEMENT, INC.
INTERNATIONAL EQUITY GLOBAL COMPOSITE
ANNUAL DISCLOSURE PRESENTATION

Year End	Total Firm Assets (millions)	Composite Assets			Annual Performance Results		
		USD (millions)	% of Non-Fee-Paying	Number of Accounts	Composite Net	MSCI EAFE	Composite Dispersion
2008	45	7	33%	16	-43.10%	-41.97%	1.65%
2007	81	13	36%	19	9.29%	11.62%	0.87%
2006	42	7	62%	6	27.69%	26.86%	N.A.
2005	23	5	64%	Five or Fewer	9.48%	14.02%	N.A.
2004	19	4	67%	Five or Fewer	11.78%	20.70%	N.A.
2003	6	3	82%	Five or Fewer	55.34%	39.17%	N.A.
2002	4	2	33%	6	28.46%	(15.66%)	2.2%
2001	13	1	26%	6	18.62%	(21.21%)	N.A.

N.A. - information is not statistically meaningful due to an insufficient number of portfolios in the composite for the entire year.

International Equity Global Composite *consists of fully discretionary management fee-paying and non-management fee-paying accounts categorized as global equity. These accounts hold both U.S. Stocks and International Stocks that selected by using ZPR Fundamental Analysis. For comparison purposes, the composite is measured against MSCI EAFE (Gross) Index. Returns include the effect of foreign currency exchange rates.*

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ZPR Investment Management, Inc. is an SEC registered investment adviser. The firm maintains a complete list and description of composites, which is available upon request.

Results are based on fully discretionary accounts under management, including those accounts no longer with the firm. Past performance is not indicative of future results.

Composite performance is presented net of foreign withholding taxes on dividends, interest income, and capital gains. The index grosses-up dividends, where this is appropriate, to reflect the position of an international investor with the benefit of double taxation agreements, if any. Withholding taxes may vary according to the investor's domicile. The composite includes the performance of accounts that may occasionally use margin; however, the use of margin is not part of the overall strategy of the composite.

The U.S. Dollar is the currency used to express performance. Returns are presented net of

management fees and include the reinvestment of all income. Net of fee performance was calculated using actual management fees. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay the initial management fee in advance which could be in another month. The annual composite dispersion is the equal-weighted standard deviation of the individual annual returns for the accounts in the composite the entire year. Additional information regarding policies for calculating and reporting returns is available upon request.

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Performance

Small Cap Value Portfolios

As of August 31, 2008	ZPR Small Cap Value	Russell 2000	S&P 500
5 Year Compounded Annualized	91.41% 13.87%	57.75% 9.95%	39.74% 6.92%
10 Year Compounded Annualized	415.14% 17.81%	148.39% 9.53%	57.93% 4.68%
Since Inception (1/1/87) Annualized	1643.94% 14.83%	733.01% 10.80%	725.74% 10.76%

		*ZPR Small Cap Value	Russell 2000	S&P 500
1st	Quarter 2001	13.97%	-6.50%	-11.85%
2nd	Quarter 2001	14.37%	14.28%	5.85%
3rd	Quarter 2001	-12.22%	-20.79%	-14.68%
4th	Quarter 2001	11.89%	21.09%	10.69%
1st	Quarter 2002	17.00%	3.99%	0.28%
2nd	Quarter 2002	15.90%	-8.35%	-13.40%
3rd	Quarter 2002	-10.80%	-21.40%	-17.28%
4th	Quarter 2002	10.51%	6.15%	8.44%
1st	Quarter 2003	-3.75%	-4.49%	-3.15%
2nd	Quarter 2003	28.22%	23.42%	15.39%

3rd	Quarter 2003	7.35%	9.07%	2.65%
4th	Quarter 2003	17.26%	14.53%	12.18%
1st	Quarter 2004	6.25%	6.26%	1.69%
2nd	Quarter 2004	-1.25%	0.47%	1.72%
3rd	Quarter 2004	-1.42%	-2.85%	-1.87%
4th	Quarter 2004	13.42%	14.09%	9.23%
1st	Quarter 2005	-1.26%	-5.34%	-2.15%
2nd	Quarter 2005	10.75%	4.32%	1.37%
3rd	Quarter 2005	4.96%	4.70%	3.61%
4th	Quarter 2005	1.47%	1.12%	2.09%
1st	Quarter 2006	10.11%	13.94%	4.21%
2nd	Quarter 2006	6.06%	-5.03%	-1.44%
3rd	Quarter 2006	2.58%	0.44%	5.67%
4th	Quarter 2006	8.41%	8.90%	6.70%
1st	Quarter 2007	6.85%	1.95%	0.64%
2nd	Quarter 2007	8.53%	4.42%	6.28%
3rd	Quarter 2007	-3.56%	-3.09%	2.02%
4th	Quarter 2007	-7.58%	-4.58%	-3.33%
1st	Quarter 2008	-19.44%	-9.90%	-9.45%
2nd	Quarter 2008	3.01%	0.58%	-2.73%
3rd	Quarter 2008*	5.21%	7.44%	0.59%
Compounded		**325.75%**	**68.39%**	**11.21%**

* As of August 31, 2008

Results are based on fully discretionary accounts categorized as domestic small cap value equity, including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance, which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards GIPS® has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through March 31, 2008. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000.

ZPR Investment Management, Inc. is a registered investment advisor managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®). Complete description of the policies and procedures for this composite and a list and description of all firm composites are available upon request.

ZPR Investment Management
Fundamental Small Cap Value
Performance Analysis

	*ZPR Funda-mental Small Cap Value	Russell 2000	S&P 500
1st Quarter 2001	13.97%	-6.50%	-11.85%
2nd Quarter 2001	14.87%	14.28%	5.85%
3rd Quarter 2001	-12.22%	-20.79%	-14.68%
4th Quarter 2001	11.89%	21.09%	10.69%
1st Quarter 2002	17.00%	3.99%	0.28%
2nd Quarter 2002	15.90%	-8.35%	-13.40%
3rd Quarter 2002	-10.80%	-21.40%	-17.28%
4th Quarter 2002	10.51%	0.15%	8.44%
1st Quarter 2003	-3.75%	-4.49%	-3.15%
2nd Quarter 2003	28.22%	23.42%	15.39%
3rd Quarter 2003	7.35%	9.07%	2.65%
4th Quarter 2003	17.26%	14.53%	12.18%
1st Quarter 2004	6.25%	6.26%	1.69%
2nd Quarter 2004	-1.25%	0.47%	1.72%
3rd Quarter 2004	-1.42%	-2.85%	-1.87%
4th Quarter 2004	13.42%	14.09%	9.23%
1st Quarter 2005	-1.26%	-5.34%	-2.15%
2nd Quarter 2005	10.75%	4.32%	1.37%

3rd Quarter 2005	4.96%	4.70%	3.61%
4th Quarter 2005	1.47%	1.12%	2.09%
1st Quarter 2006	10.11%	13.94%	4.21%
2nd Quarter 2006	6.06%	-5.03%	-1.44%
3rd Quarter 2006	2.58%	0.44%	5.67%
4th Quarter 2006	8.41%	8.90%	6.70%
1st Quarter 2007	6.85%	1.95%	0.04%
2nd Quarter 2007	8.53%	4.42%	6.28%
3rd Quarter 2007	-3.56%	-3.09%	2.02%
4th Quarter 2007	-7.58%	-4.58%	-3.33%
1st Quarter 2008	-19.44%	-9.90%	-9.45%
2nd Quarter 2008	3.01%	0.58%	-2.73%
3rd Quarter 2008	-1.69%	-1.12%	-8.37%
Compounded	**297.83%**	**54.97%**	**1.31%**

*Results are based on fully discretionary accounts categorized as domestic small cap value equity, including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance, which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each

month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through March 31, 2008. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000.

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APPENDIX L

RESPONDENTS'

EXHIBIT 9 [Doc. No. 265]

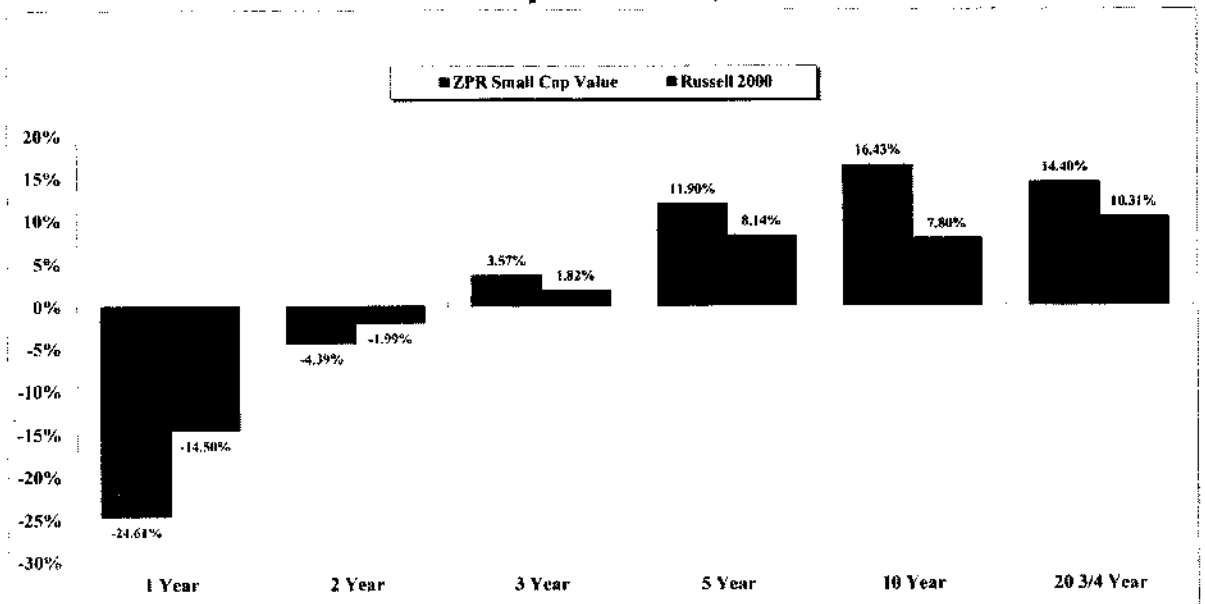
To: Mark Zavanelli/zpr@zpr
From: Ted Bauchle/zpr
Date: 04/09/2013 10:03AM
Subject: 2008 Website Annualized Table

(See attached file: LT_Performance_09_30_2008.xls)

Ok, good news. I found the performance website files that I updated every quarter. We did do annualized tables for the Fundamental Small Cap Value strategy during 2008. Sample Format with September 2008 is attached. We had this table on our website all they way back to 2004.

Ted

ZPR FUNDAMENTAL SMALL CAP VALUE PERFORMANCE
vs. Russell 2000*
Annualized
As of September 30, 2008



* Results are based on fully discretionary accounts categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through June 30, 2008. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000.

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APPENDIX M

RESPONDENTS'

EXHIBIT 10 [Doc. No. 266]

To: Mark Zavanelli/zpr@zpr, Max Zavanelli/zpr@zpr, Ruth Ann Fay/zpr@zpr
From: Ted Bauchle/zpr
Date: 04/11/2013 09:31AM
Subject: Information Sent out to prospective clients

(See attached file: Performance_Global_06_30_2008.xls)
(See attached file: LT_Performance_06_30_2008.xls)
(See attached file: Performance_06_30_2008.xls)

Mark,

Amy and I were talking last nite about the information we sent out during 2008. She remembers that we would send out the attached quarterly returns, small cap annualized table, along with the GIPS annual disclosure presentation when the client decided they wanted to open an account and sign a management agreement.

The attached tables where sent out to those clients deciding to open an account during the period July 1, 2008 to September 30, 2008.

Likewise we have tables updated as of 9/30/2008 that would have beend sent out during the 4th quarter 2008.

We didn't start producing an annualized table for Global until March 31, 2009.

Ted

ZPR Investment Management
Global Equity
Performance Analysis

	*Global Equity	**EAFE	Russell 2000
1st Quarter 2001	8.44%	-13.66%	-6.50%
2nd Quarter 2001	12.59%	-0.86%	14.28%
3rd Quarter 2001	-13.89%	-13.95%	-20.79%
4th Quarter 2001	12.82%	6.98%	21.09%
1st Quarter 2002	16.83%	0.57%	3.99%
2nd Quarter 2002	9.89%	-1.93%	-8.35%
3rd Quarter 2002	-9.18%	-19.69%	-21.40%
4th Quarter 2002	10.17%	6.48%	6.15%
1st Quarter 2003	-3.88%	-8.13%	-4.49%
2nd Quarter 2003	28.68%	19.57%	23.42%
3rd Quarter 2003	7.10%	8.18%	9.07%
4th Quarter 2003	17.27%	17.11%	14.53%
1st Quarter 2004	3.49%	4.40%	6.26%
2nd Quarter 2004	-3.11%	0.44%	0.47%
3rd Quarter 2004	-1.66%	-0.23%	-2.85%
4th Quarter 2004	13.35%	15.36%	14.09%
1st Quarter 2005	-1.24%	-0.10%	-5.34%
2nd Quarter 2005	5.09%	-0.75%	4.32%
3rd Quarter 2005	3.98%	10.44%	4.70%
4th Quarter 2005	1.45%	4.12%	1.12%

1st Quarter 2006	10.98%	9.47%	13.94%
2nd Quarter 2006	1.09%	0.94%	-5.03%
3rd Quarter 2006	2.61%	3.99%	0.44%
4th Quarter 2006	10.92%	10.40%	8.90%
1st Quarter 2007	8.60%	4.15%	1.95%
2nd Quarter 2007	10.98%	6.67%	4.41%
3rd Quarter 2007	-4.52%	2.23%	-3.09%
4th Quarter 2007	-5.02%	-1.71%	-4.58%
1st Quarter 2008	-11.32%	-8.83%	-9.90%
2nd Quarter 2008	-2.70%	-1.93%	0.58%
Compounded	248.80%	61.14%	56.73%

* Results are based on fully discretionary accounts categorized as global equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance

Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through March 31, 2008. In addition, a performance examination was conducted on the International Equity Global Composite beginning 12/31/2000.

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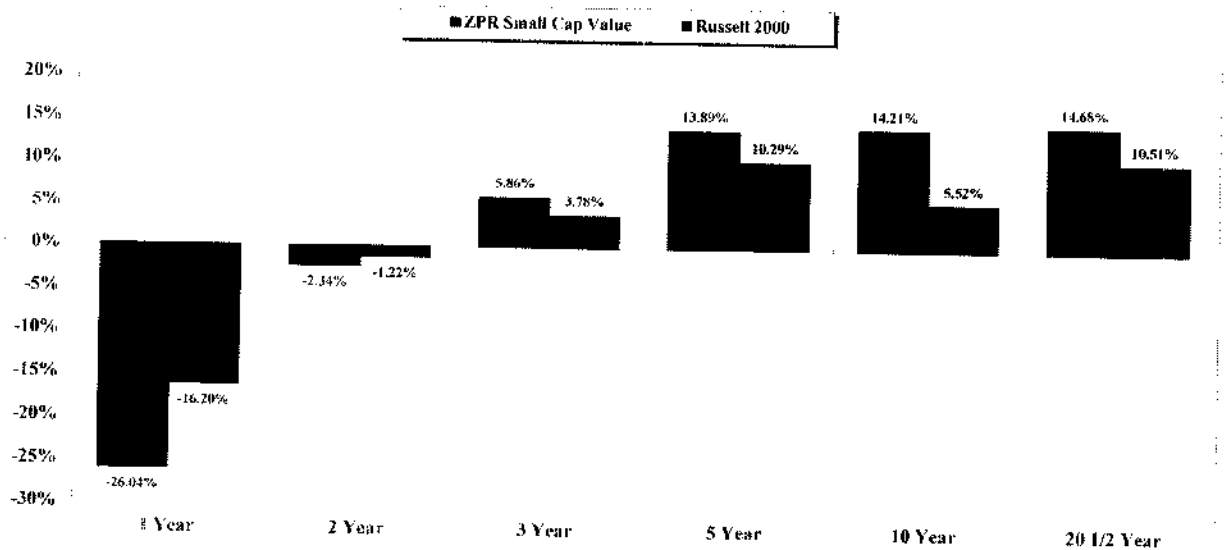
**MSCI EAFE Gross Index (Europe, Australasia and the Far East) is recognized as the pre-eminent benchmark in the United States to measure international equity performance.

ZPR FUNDAMENTAL SMALL CAP VALUE PERFORMANCE
vs. Russell 2000*
Annualized
As of June 30, 2008



* Results are based on fully discretionary accounts categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through March 31, 2008. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000.

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ZPR Investment Management
Fundamental Small Cap Value
Performance Analysis

	***ZPR Funda-mental Small Cap Value**	**Russell 2000**	**S&P 500**
1st Quarter 2001	13.97%	-6.50%	-11.85%
2nd Quarter 2001	14.37%	14.28%	5.85%
3rd Quarter 2001	-12.22%	-20.79%	-14.68%
4th Quarter 2001	11.89%	21.09%	10.69%
1st Quarter 2002	17.00%	3.99%	0.28%
2nd Quarter 2002	15.90%	-8.35%	-13.40%
3rd Quarter 2002	-10.80%	-21.40%	-17.28%
4th Quarter 2002	10.51%	6.15%	8.44%
1st Quarter 2003	-3.75%	-4.49%	-3.15%
2nd Quarter 2003	28.22%	23.42%	15.39%
3rd Quarter 2003	7.35%	9.07%	2.65%
4th Quarter 2003	17.26%	14.53%	12.18%
1st Quarter 2004	6.25%	6.26%	1.69%
2nd Quarter 2004	-1.25%	0.47%	1.72%
3rd Quarter 2004	-1.42%	-2.85%	-1.87%
4th Quarter 2004	13.42%	14.09%	9.23%
1st Quarter 2005	-1.26%	-5.34%	-2.15%

2nd Quarter 2005	10.75%	4.32%	1.37%
3rd Quarter 2005	4.96%	4.70%	3.61%
4th Quarter 2005	1.47%	1.12%	2.09%
1st Quarter 2006	10.11%	13.94%	4.21%
2nd Quarter 2006	6.06%	-5.03%	-1.44%
3rd Quarter 2006	2.58%	0.44%	5.67%
4th Quarter 2006	8.41%	8.90%	6.70%
1st Quarter 2007	6.85%	1.95%	0.64%
2nd Quarter 2007	8.53%	4.41%	6.28%
3rd Quarter 2007	-3.56%	-3.09%	2.02%
4th Quarter 2007	-7.58%	-4.58%	-3.33%
1st Quarter 2008	-19.44%	-9.90%	-9.45%
2nd Quarter 2008	3.01%	0.58%	-2.73%
Compounded	304.67%	56.73%	10.56%

* Results are based on fully discretionary accounts categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks

are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through March 31, 2008. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000.

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APPENDIX N

RESPONDENTS'

EXHIBIT 11 [Doc. No. 267]

----- Original Message -----
From: XPRPortAdmin
To: scalhoun@primacapital.com
Cc: David Sappir ; Ted Bauchle
Sent: Tuesday, August 12, 2008 2:51 PM
Subject: ZPR Small Cap Value

Good day Mr. Calhoun. Our Client manager Mr. David Sappir requested that I send you the attached documents. Have a wonderful day. If you have any questions please feel free to contact Mr. Sappir directly at 212.596.7767.

Kind Regards,
Amy

Amy Bauchle
ZPR Investment Management, Inc.
Operations Assistant
zpr@cfi.rr.com
386.775.1177

ZPR INVESTMENT MANAGEMENT, INC.
www.zprim.com Tel. +1-386-775 1177
Email: zprim@mpinet.net
"No Short Term Pain, No Long Term Gain"

US SMALL CAP VALUE STOCKS

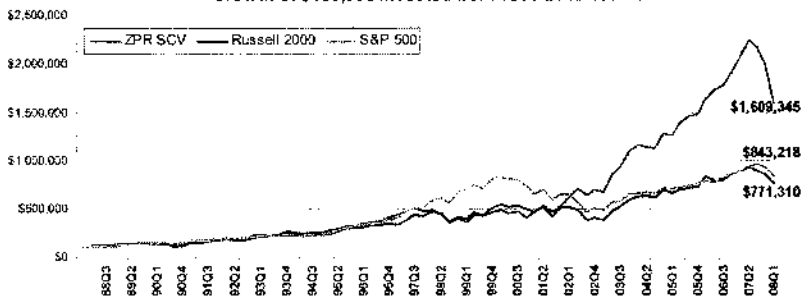
(★★★★★ 5 Star Morningstar Rating)

ZPR Investment Management, Inc. founded its fundamental Small Cap Value product (and swore off growth) on January 1, 1988. Since then, ZPR has the best performance compared to every manager and mutual fund for which we can find measurements for the last 20 1/4 years. ZPR clients are invested in stable Small Cap Value companies that have a unique product niche, substantial positive retained earnings, little debt, strong cash flow, and are traded at a fair price determined by our proprietary GRAPES Model. ZPR prides itself in finding deep value companies in overlooked industries.

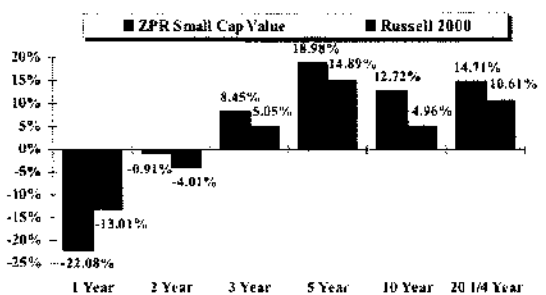
The ZPR "Group" is a family of companies investing for clients and providing research to institutions worldwide. ZPR Investment Management, Inc. is the US SEC registered adviser. ZPR Investment Research, Inc. is the research arm. ZPR International, Inc. is the non-US research and management company. Over $21 billion of US mutual fund money uses ZPR's successful quantitative models and discoveries. IPV is the Lithuanian registered management company that also has two mutual funds. ZPR also has successful S&P 500, multicap, and global products.

PERFORMANCE

Growth of $100,000 invested from 1988Q1 to 2008Q1



ZPR Fundamental Small Cap Value Performance vs. Russell 2000 *



	ZPR SCV	Russell 2000	S&P 500
Year-To-Date:	-19.44%	-9.90%	-9.45%
One Year Return:	-22.07	-13.01	-5.08
Three Year Return:	27.85	15.95	18.61
Five Year Return:	138.49	100.21	70.99
Seven Year Return:	244.68	66.68	28.96
Ten Year Return:	231.28	62.25	41.06
From Inception*:	1509.35%	671.31%	743.22%
Annualized Return:	14.71%	10.61%	11.10%

* 1988 Quarter 1 – 2008 Quarter 1

Equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performances does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one a month lag. Incurred commission costs are included in all unrealized gains. Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through December 31, 2007. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000.

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MANAGEMENT TEAM

Max Zavanelli: President, Chief Investment Officer, Founder, former Distinguished Professor of Applied Investments and Research, Investment Strategist, Senior Financial Analyst.

Ted Bauchle: Operations Manager and Trader, Investment Analyst.

Ruth Ann Fay: Vice President, Legal Counsel, J.D. John Marshall Law School, Former head of major bank's Trust Tax Department and Vice President.

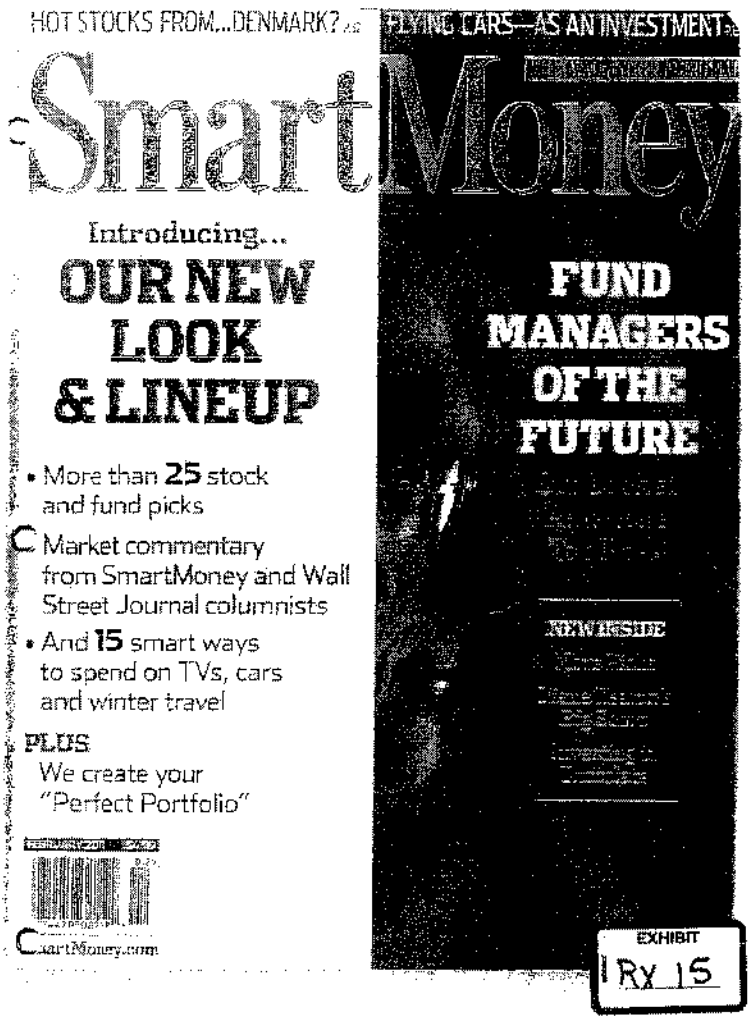
ZPR USA Staff: Heidi, Amy, Countess, Joe, David, Evan

ZPR Intl. Staff: Vaidas, Daiva, Sandra, Rasa, Dainius, Mindaugas, Alex, Rimas, Richard, Irena, Margarita

APPENDIX O

RESPONDENTS'

EXHIBIT 15 [Doc. No. 271]



ZPR IS THE #1 MANAGER

28 Years of Portfolio Management by

MAX ZAVANELLI

TOP 10 MANAGERS

(Periods ended September 30, 2010)

* * *

[*Fold-Out Exhibit, see next page*]

Fold-Out Footnote Text:

* Results are based on fully discretionary accounts categorized as ZPR Global Equities or All Asian (depending on table) including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in the table above are gross of fees. ZPR net of fees performance and details are available on our website (www.zprim.com). Past performance does not guarantee future results. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Alpha Performance Verification Services from December 31, 2009 through December 31, 2010 and by a previous verifier from December 31, 2000 through December 31, 2009. ZPR Investment Management, Inc. is a registered investment advisor managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®). Complete description of the policies and procedures for this composite and a list and description of all firm composites are available upon request.

And the more money farmers have, the more they can afford to pay for fertilizer. I've just returned from a visit to the U.S. farm belt, which seems to be thriving. Global demand for agricultural goods is soaring, and in November the USDA raised its agricultural export estimates. This is consistent with my thesis that a priority for consumers in developing economies is a higher-quality diet, which will drive demand for agricultural products for years. (China now accounts for about 70 percent of U.S. soybean exports, and Morgan Stanley reported that Indian potash imports were up 57 percent this year.)

As a limited natural resource, potash has the added benefit of being an inflation hedge. With the Federal Reserve pledging to hold down interest rates for the foreseeable future, such insurance seems prudent. All that liquidity has to go somewhere, and while more bubbles aren't in anyone's long-term interest, agricultural commodities seem as likely a destination as anywhere.

With these trends in mind, I've been beefing up my agricultural-sector holdings and own shares in Deere (agricultural equipment) and Monsanto (seeds and pesticides). I've discussed both companies in previous columns on SmartMoney.com. A fertilizer producer would round out my portfolio; I plan to buy stock in one or two fairly soon.

To oversimplify, you could call Potash a growth stock, Agrium a value play (by fertilizer standards) and Mosaic somewhere in between. In the third quarter of 2010, Potash's operating margins were 30 percent, suggesting its quasi-monopoly pricing power. But its forward price-earnings ratio is a reasonable 16. Agrium is the smallest of the potash-centric stocks, and its forward P/E is just 12. Mosaic has a more diversified product mix, so its profit margins are lower than Potash's. But all three stocks should benefit from the trends I highlighted.

One thing these stocks are not, however, is a takeover play. Agrium is based in Alberta, and having just blocked a takeover of Potash, Canada seems unlikely to lose another of its national-resource champions. And Mosaic is a subsidiary of Cargill, the Minneapolis-based agricultural commodities conglomerate that ranks as the world's largest privately held company by revenue. Cargill owns two-thirds of Mosaic's shares and doesn't seem likely to give up its grip anytime soon. ■

ZPR IS THE #1 MANAGER

28 Years of Portfolio Management by

MAX ZAVANELLI

MORNINGSTAR RATINGS ALL 5 STARS	
ZPR Global Equity	★★★★★
3 Year	★★★★★
5 Year	★★★★★
10 Year	★★★★★
Overall	★★★★★

TOP 10 MANAGERS *(Periods ended September 30, 2010)*

GLOBAL EQUITY COMPOSITES 1 Year Return	Gross Return	GLOBAL EQUITY COMPOSITES 5 Yrs Annualized Return	Gross Return	INTERNATIONAL EQUITY COMPOSITES 1 Year Return	Gross Return
ZPR Global Equity*	44.79%	ZPR Global Equity*	15.75%	ZPR All Asian*	77.26%
Brandes Global Small Cap Equity	43.58	MFC Global Opportunities	15.60	Wasatch Int'l Small Cap Growth	36.94
SAM Sustainable Water	41.36	Alavo International-ADR	12.79	Vontobel Asset Far East Equity	36.72
MFC Global Opportunities	31.18	Tradewinds Small/Mid Cap Val. Eq	12.63	Franklin India Equity	35.51
Loomis Sayles Glbl. Eq. Opps.	26.17	John Hsu Glbl.Top-Down Eq	11.85	T.Rowe Price Asia ex-Japan Eq. Comp	32.81
Delaware-focus Global Growth	24.21	WHV International Equity	8.92	Financial Trust Asia ValueMomentum	31.73
Vaikea Dividend Value	23.79	UBS Global Canada Equity	8.90	Absolute Greater China Eq. Comp.	31.03
Calamos Global Growth Comp.	23.58	JP Morgan Global Focus	8.86	Oberweis Int'l Opportunities	29.89
Stewardship Ptnrs. Glbl Conc. BRI	22.47	First Eagle Global Value Equity	8.68	UBS Global Canadian Eq. Small Cap	29.59
Marathon Asset Active Glbl Eq	21.68	Morgan Stanley Glbl Franchise	8.11	Denver Inv. Int'l Small Cap	27.87

Sources: Morningstar Inc. Pensions & Investments November 15, 2010

*Results are based on fully discretionary accounts, reflect the reinvestment of dividends and other earnings and are shown net of management fees and brokerage commissions and other expenses. Past performance does not guarantee future results. ZPR Investment Management, Inc. is registered with the Securities and Exchange Commission (SEC). Further information regarding ZPR's investment strategies, objectives, fees and a complete description of its services are available upon request.

Separately Managed Accounts
Account Minimum: $350,000 - Global Equity; $200,000 - All Asian
ZPR Investment Management, Inc.

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To Learn More Call: 646-596-7767
www.zprim.com

SEC-DJC-0000031

APPENDIX P

RESPONDENTS'

EXHIBIT 16 [Doc. No. 272]

----- Original Message -----
From: ZPRPortAdmin
To: Dan Cash
Sent: Tuesday, January 18, 2011 2:02 PM
Subject: Re: New report request

Good afternoon Mr. Cash:

Thank you for your request. You will find ZPR Investment Management Inc.'s January 2011 Monthly Report attached per your request. You will receive electronic delivery of future monthly reports on the first day of the new month. Information in regards to ZPR Investment Management Inc. has been attached to this email per your request and hard copies mailed to the address you provided us. If you have any further questions please feel free to contact our Client Manager Mr. David Sappir at 646 596 7767.

Regards,
Amy Bauchle

Amy Bauchle
ZPR Investment Management, Inc
Operations Assistant
zpr@cfl.rr.com

----- Original Message -----
From: Dan Cash
To: zpr@ipv.lt; dsappir@zprcm.com; zpr@cfl.rr.com
Sent: Saturday, January 15, 2011 4:29 PM
Subject: New report request

New monthly investment report request was sent by Dan Cash

Sender's data:

First Name	Dan
Last Name	Cash
Address	[redacted]
City	[redacted]
State	[redacted]
Zip Code	[redacted]
Phone number	[redacted]
Email address	[redacted]

ZPR Investment Management, Inc.

Fundamental Small Cap Value Composite

	Ending December 31, 2010						
Results shown in US $ Net of Fees	1 Year	3 Years Annualized	5 Years Annualized	10 Years Annualized	20 Years Annualized	Since Inception (1/1/88) Annualized	Since Inception (1/1/88) Compounded
ZPR Small Cap Value Accounts*	20.42%	1.21%	6.83%	17.59%	14.96%	14.08%	1971.07%
Russell 2000 Index	26.85%	2.22%	4.47%	6.33%	10.83%	10.10%	813.80%
S&P 500 Index	15.06%	-2.86%	2.29%	1.41%	9.14%	9.77%	754.20%

* Results are based on fully discretionary accounts categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through December 31, 2009. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000.

ZPR Investment Management, Inc. is a registered investment advisor managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®). Complete description of the policies and procedures for this composite and a list and description of all firm composites are available upon request.

ZPR Investment Management, Inc.

International Equity Global Composite

	Ending December 31, 2010				
Results shown in US $ Net of Fees	1 Year	3 Years Annualized	5 Years Annualized	Since Inception (1/1/01) Annualized	Since Inception (1/1/01) Compounded
ZPR International Equity Global Accounts*	46.50%	14.30%	15.82%	19.70%	503.83%
MSCI EAFE Index	8.21%	-6.56%	2.94%	3.93%	47.09%

* Results are based on fully discretionary accounts categorized as international equity global including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through December 31, 2009. In addition, a performance examination was conducted on the International Equity Global Composite beginning 12/31/2000.

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ZPR Investment Management, Inc.

All Asian Composite

	Ending December 31, 2010				
Results shown in US $ Net of Fees	1 Year	2 Years Annualized	3 Years Annualized	Since Inception (1/1/07) Annualized	Since Inception (1/1/07) Compounded
ZPR All Asian Accounts*	71.53%	95.81%	27.65%	24.95%	143.73%
MSCI EAFE Index	8.21%	19.72%	-6.56%	-2.30%	-8.90%

* Results are based on fully discretionary accounts categorized as International Equity All Asian including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through December 31, 2009.

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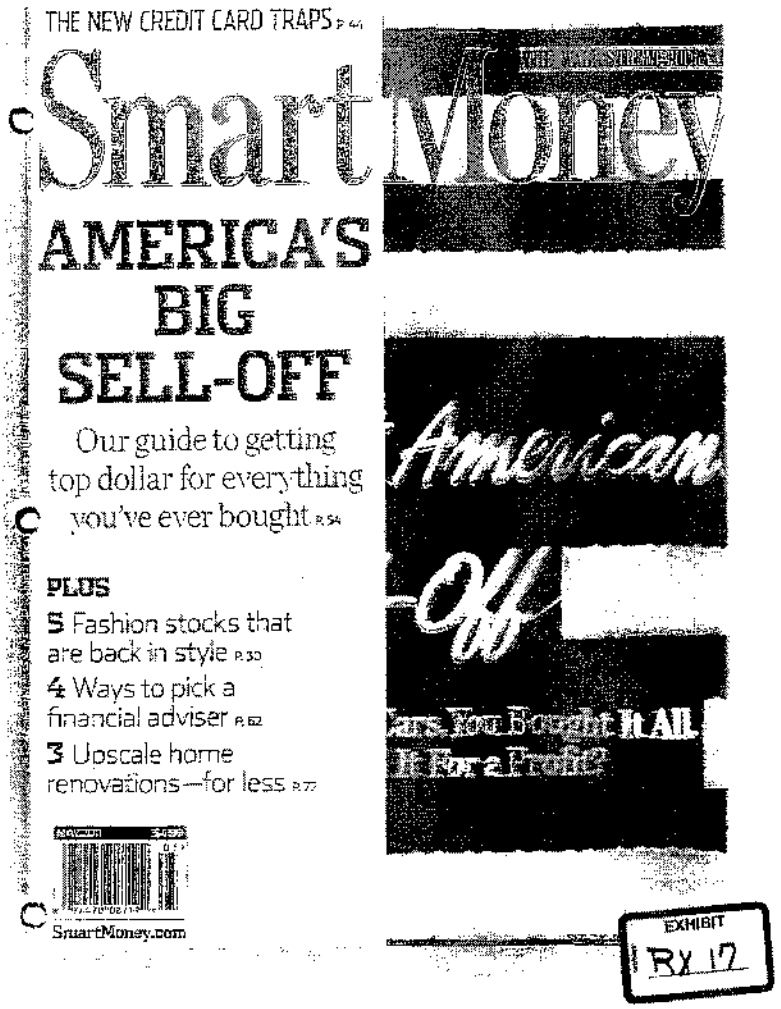
APPENDIX Q

RESPONDENTS'

EXHIBIT 17 [Doc. No. 273]



FOR THE 3rd TIME ZPR IS TRIPLE #1

28 Years of Portfolio Management by

MAX ZAVANELLI

TOP 10 MANAGERS

(Periods ended December 31, 2010)

* * *

[*Fold-Out Exhibit, see next page*]

Fold-Out Footnote Text:

* Results are based on fully discretionary accounts categorized as ZPR Global Equities or All Asian (depending on table) including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in the table above are gross of fees. ZPR net of fees performance and details are available on our website (www.zprim.com). Past performance does not guarantee future results. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Alpha Performance Verification Services from December 31, 2009 through December 31, 2010 and by a previous verifier from December 31, 2000 through December 31, 2009. ZPR Investment Management, Inc. is a registered investment advisor managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®). Complete description of the policies and procedures for this composite and a list and description of all firm composites are available upon request.

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28 Years of Portfolio Management by
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MORNINGSTAR RATINGS ALL 5 STARS	
ZPR Global Equity	★★★★★
3 Year	★★★★★
5 Year	★★★★★
10 Year	★★★★★
Overall	★★★★★

TOP 10 MANAGERS *(Periods ended December 31, 2010)*

WORLD STOCK COMPOSITES 1 Year Return	Gross Return	WORLD STOCK COMPOSITES 5 Yrs Annualized Return	Gross Return	INTERNATIONAL EQUITY COMPOSITES 1 Year Return	Gross Return
ZPR Global Equity*	**49.02%**	**ZPR Global Equity***	**17.91%**	**ZPR All Asian***	**74.27%**
Tradewinds Small/Mid Cap Value Eq.	31.71	BCM AlphaSector Glou. Pnem. IDX	16.81	Denver Inv. Int'l Small Cap	39.47
Loomis Sayles Glob. Equity Opps	28.41	Tradewinds Global All Cap	16.14	UBS Global Canadian Eq. Small Cap	37.15
Epoch Global Small Cap	28.40	Tradewinds Small/Mid Cap Val. Eq.	14.72	Wasatch Int'l Small Cap Growth	36.75
Stamberg Asset Mgmt. Sm. Cap Val	27.89	John Hsu Capital Glob.Top-Down Eq.	12.72	Weiss-Berkeley Int'l Small Cap Eq.	36.70
Acadian Global Small Cap Equity	27.25	WHV Global Equity	12.02	Oberweis Int'l Opportunities	33.35
Tradewinds All Cap	27.02	UBS Global Canada Equity	11.10	Brandes International Small Cap Eq.	33.16
Calamos Global Growth Composite	26.62	Crescat Large Cap Composite	10.73	Brandes Global Small Cap Eq.	31.53
Crescat Large Cap Composite	25.98	DLS Global Equity	10.08	UBS Global ex US Small Cap Growth	31.16
Tradewinds Global ADR	25.76	First Eagle Global Value Equity	9.82	Principal Global Int'l Small Cap Eq.	30.91

Sources: Morningstar, Inc., Pensions & Investments February 21, 2011 (reprinted with the permission of Pension & Investments)

* Results are based on fully discretionary accounts categorized as ZPR Global Equity or All Asian (depending on table) including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in the table above are gross of fees. ZPR net of fees performance and details are available on our website www.zprim.com. Past performance does not guarantee future results. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified for 4 years by Ashruf Performance Verification Services from December 31, 2009 through December 31, 2010 and by a previous verifier from December 31, 2008 through December 31, 2009. ZPR Investment Management, Inc. is a registered investment adviser managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®). Complete descriptions of the policies and procedures for this composite and a list and description of all firm composites are available upon request.

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Account Minimum: $350,000 - Global Equity; $200,000 - All Asian
ZPR Investment Management, Inc.

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To Learn More Call: 646-596-7767
www.zprim.com

APPENDIX R

RESPONDENTS'

EXHIBIT 18 [Doc. No. 274]

----- Original Message -----
From: ZPRPortAdmin
To: David Pressman
Sent: Thursday, April 21, 2011 9:33AM
Subject: Re: New report request

Good morning Mr. Pressman:

Thank you for your request. You will find ZPR Investment Management Inc.'s April 2011 Monthly Report attached per your request. You will receive electronic delivery of future monthly reports on the first day of the new month. Information in regards to ZPR Investment Management Inc. has been attached to this email per your request and hard copies mailed to the address you provided us. If you have any further questions please feel free to contact our Client Manager Mr. David Sappir at 646 596 7767.

Regards,
Amy Bauchle

Amy Bauchle
ZPR Investment Management, Inc
Operations Assistant
zpr@cfl.rr.com

----- Original Message -----
From: David Pressman

To: info@zpr.lt ; dsappir@zprcm.com ; zpr@cfl.rr.com ; zprmail@cfl.rr.com
Sent: Wednesday, April 20, 2011 6:53 PM
Subject: New report request

A new monthly Investment report request was sent by David Pressman

Sender's data:

First Name	David
Last Name	Pressman
Address	[redacted]
City	[redacted]
State	[redacted]
Zip Code	[redacted]
Phone number	[redacted]
Email address	[redacted]

ZPR Investment Management, Inc.
1642 North Volusia Avenue, Orange City, Florida 32763
Tel. (386) 775-1177 Fax. (386) 775-7749 Website: zprim.com
Portfolio Manager: Max Zavanelli

FUNDAMENTAL SMALL CAP VALUE

Who We Are

At ZPR we believe in hard data and the conclusions that can be drawn from it.

We also believe that normal investor behavior, such as greed and fear caused by misinformation or lack of information, creates market inefficiencies where quality companies sometimes trade at unjustly low valuations. At ZPR, we view these situations as potential opportunities that can be exploited for significant profit, but only after careful, extensive analysis are we able to discern the real winners from the losers.

To maintain our competitive and disciplined advantage, ZPR has performed many intensive research studies on corporate practices and investor behavior. These, used in conjunction with our proprietary computer-based statistical models, allow us unique insight into the companies we consider for our various portfolios.

Our goal is to greatly reduce the risks of investing by using accurate data and stringent selection criteria while giving our clients the best possible rate of

return.

ZPR's origins can be dated back to 1979 when Max Zavanelli founded Zavanelli Portfolio Research (ZPR) to provide research data and quantitative models for professional money managers at major financial institutions. In 1982 Mr. Zavanelli began to directly manage individual discretionary accounts.

Investment Style
ZPR uses several proprietary quantitative evaluation models for assessing the real value of companies and identifying stock related trends in their earliest stages. Two of our principal models are:

GRAPES (Growth Rate Arbitrage Price Equilibrium System)
Identifies the efficient theoretical price of a stock and what value the company is worth as a private business.

Fundamental Analysis
We invest in companies with little or no debt and strong cash flow. They typically are low PE, low price to book, and have substantial retained earnings and tangible assets as well as a high level of profitability and a unique business niche.

When a company is under consideration, our analysts examine every 10K, 10Q, 8K, and proxy statement as well as the accounting footnotes. We then apply risk/reward ratio analysis to further identify those opportunities most likely to lead to superior returns. At this point we ask ourselves three questions:

1. Would I want to own this company and run it as my

own private business?
2. What price would I pay for it if it weren't a public business?
3. And finally, is our potential gain at least three times our potential loss?

Fundamental Small Cap Value **Morningstar ★★★★★ 5 Star Rating (10-Year Period)**

Annualized	**Fundamental Small Cap Value Composite** (Ending March 31, 2011)						
Results shown in US $ Net of Fees	1 Year	3 Years Annual-ized	5 Years Annual-ized	10 Years Annualized	20 Years Annualized	Since Inception (1/1/88) Annualized	Since Inception (1/1/88) Compounded
ZPR Small Cap Value Accounts*	15.69%	11.75%	6.51%	17.01%	13.90%	14.32%	2145.86%
Russell 2000 Index	25.78%	8.56%	3.35%	7.87%	9.82%	10.34%	886.27%
S&P 500 Index	15.65%	2.35%	2.62%	3.29%	8.76%	9.94%	804.79%

ZPR's Fundamental Small Cap Value is our flagship portfolio with a 20+ year track record. During its history, it has normally earned our clients higher returns than the relevant major indices.

Fundamental Small Cap Value Strategy

Our strategy is to find and invest in deep value companies with a market capitalization ranging from approximately $500 million to $2 billion. These companies are generally found in overlooked or out-of-favor industries and have:

- an unique product niche
- substantial positive retained earnings
- little to no debt
- strong cash flow
- little to no analyst coverage
- and are trailing at an inefficient price as determined by our GRAPES Model

Once we identify a group of stocks using GRAPES and further narrow the selection through fundamental analysis, we run a risk/reward model (based over a two-year time horizon) to measures each stock's potential loss against its estimated possible gain. In order to be included in he portfolio, this needs to be at least three times greater to the upside.

Investments are weighted in the portfolio according to their probability of success, their risk, and their potential return.

We exercise a stringent selling discipline based upon price appreciation because as a stock's price rises, the risk/reward ratio changes. The risk for more appreciation may now be greater. If so, we sell and reinvest in new opportunities. We also sell if the company's fundamentals have for some reason

deteriorated.

Max Zavanelli

Prior to founding ZPR, Mr. Zavanelli was a Senior Financial Analyst at Mellon Bank and an Investment Strategist at American National Bank and Trust Company of Chicago, Inc. From 1990 - 1994 he held the position of Distinguished George Professor, Chair of Applied Investments and Research at Stetson University in DeLand, Florida. Over the years he has written numerous acclaimed studies on stock market anomalies and investment behavior.

Mr. Zavanelli has a distinguished military record as the commander of a nuclear weapons battery in the US Army and has received considerable recognition as a chess master and correspondence chess administrator.

Contact Us

For questions regarding fees and expenses, risks, or other investment related questions, please visit our website at zprim.com or contact our office directly and we will be happy to assist you.

ZPR Client Management, Inc.

400 East 89th Street, Suite 15K
New York City, NY 10128
Tel. (646) 596-7767

Client Services Manager - David Sappir
E-mail: dsappir@zprcm.com

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composites are available upon request.

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1642 North Volusia Avenue, Orange City, Florida 32763
Tel. (386) 775-1177 Fax. (386) 775-7749 Website: zprim.com
Portfolio Manager: Max Zavanelli

GLOBAL EQUITY

Who We Are

At ZPR we believe in hard data and the conclusions that can be drawn from it.

We also believe that normal investor behavior, such as greed and fear caused by misinformation or lack of information, creates market inefficiencies where quality companies sometimes trade at unjustly low valuations. At ZPR, we view these situations as potential opportunities that can be exploited for significant profit, but only after careful, extensive analysis are we able to discern the real winners from the losers.

To maintain our competitive and disciplined advantage, ZPR has performed many intensive research studies on corporate practices and investor behavior. These, used in conjunction with our proprietary computer-based statistical models, allow us unique insight into the companies we consider for our various portfolios.

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while giving our clients the best possible rate of return.

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GRAPES (Growth Rate Arbitrage Price Equilibrium System)
Identifies the efficient theoretical price of a stock and what value the company is worth as a private business.

Fundamental Analysis
We invest in companies with little or no debt and strong cash flow. They typically are low PE, low price to book, and have substantial retained earnings and tangible assets as well as a high level of profitability and a unique business niche.

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1. Would I want to own this company and run it as my own private business?
2. What price would I pay for it if it weren't a public business?
3. And finally, is our potential gain at least three times our potential loss?

Global Equity **Morningstar ★★★★★ 5 Star Rating**

Annualized	**Global Equity Composite** (Ending March 31, 2011)					
Results shown in US $ **Net of Fees**	1 Year	3 Years Annualized	5 Years Annualized	10 Years Annualized	Since Inception (1/1/01) Annualized	Since Inception (1/1/01) Compounded
ZPR Global Equity Accounts*	33.76%	20.99%	14.56%	19.32%	19.75%	534.26%
MSCI EAFE Index	10.89%	-2.53%	1.78%	5.83%	4.18%	52.15%

The ZPR Global Equity Portfolio focuses on maximizing the inefficiencies found in select foreign markets (presently Thailand, Singapore and, since the second quarter of 2010, Japan) and identifying undervalued companies there by applying the same methodology that we use in managing our Small Cap Value strategy. Our Global Equity Portfolio is a mix of 50-60% in US Small Cap Value stocks and 40-50% in Thai, Singapore and Japanese small cap value stocks.

Global Equity Strategy

The valuation gap between small cap stocks and large cap stocks in Thailand und Singapore is huge. Foreign investors tend to buy only the largest companies in order to match index weights. However, most of these companies are government or agency owned and hence poorly run with agendas that frequently clash with the objectives of their stockholders. Among small cap growth stocks there tends to be a casino-like attitude, speculators attempting to make a quick buck. On the other hand, value stocks have been ignored even though they often pay huge dividends.

The Thai market has the lowest valuation in Asia and possibly the world. Singapore is the gateway to Asia and many Singapore companies are multi-nationals. The profitability of Chinese companies has been on a meteoric rise over the past several years and many Singapore companies have been and will continue to benefit through their subsidiaries, exports, shipping and investments. The speculative markets of China with two classes of shares and little transparency are no place for a practical investor while Singapore, with it's British based law, American accounting firms, full transparency and excellent exchange watchdogs, is a far safer way to participate in the Wild East.

Recently we added Japan to the Global Equity portfolio. Here we buy only equities listed in what's known as the Second Section of the Tokyo Stock Exchange. Consisting of small to mid-sized companies, the index is currently down about 60% from 2007 with many companies trading at less than book value or net current assets. Plus, unlike the First Section (Large Cap Companies), foreign investors and world

events have less affect on the Second Section.

When choosing stocks for our Global Equity Portfolio, we look for companies with solid businesses that have good prospects for growth and:

- a very low PE (3-6)
- little to no debt
- sell for less than book value
- a substantial dividend yield (as high as 18%)
- high return on equity
- and of course an excellent GRAPES price relative to the current price.

Our Global Equity product has greatly reduced risk because the markets in Thailand and Singapore are often uncorrelated with the US market. Plus, the income from dividends (which exceeds that generated from US stocks by 3 to 4 times) helps to stabilize the portfolio during market downturns. In Japan, we benefit from the yen as whenever there is any trouble in the world it tends to goes up, especially against the dollar.

Max Zavanelli

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Mr. Zavanelli has a distinguished military record as the commander of a nuclear weapons battery in the US Army and has received considerable recognition as a chess master and correspondence chess administrator.

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ZPR Client Management, Inc.

400 East 89th Street, Suite 15K
New York City, NY 10128
Tel. (646) 596-7767

Client Services Manager - David Sappir
E-mail: dsappir@zprcm.com

*Results are based on fully discretionary accounts categorized as global equity including those accounts no longer with the firm. The composite return is calculated on a size-adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance, which could be in a different month. Past performance does not guarantee future results, there is always a possibility of loss. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market

issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm wide by Alpha Performance Verification Services from December 31, 2009 through December 31, 2010 and buy a previous verifier from December 31, 2000 through December 31, 2009. In addition, a performance examination was conducted on the Global Equity Composite beginning 12/31/2000.

ZPR Investment Management, Inc. is a registered investment adviser managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®). Complete description of the policies and procedures for this composite and a list and description of all firm composites are available upon request.

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ZPR Investment Management, Inc.
1642 North Volusia Avenue, Orange City, Florida 32763
Tel. (386) 775-1177 Fax. (386) 775-7749 Website: zprim.com
Portfolio Manager: Max Zavanelli

ALL ASIAN

Who We Are

At ZPR we believe in hard data and the conclusions that can be drawn from it.

We also believe that normal investor behavior, such as greed and fear caused by misinformation or lack of information, creates market inefficiencies where quality companies sometimes trade at unjustly low valuations. At ZPR, we view these situations as potential opportunities that can be exploited for significant profit, but only after careful, extensive analysis are we able to discern the real winners from the losers.

To maintain our competitive and disciplined advantage, ZPR has performed many intensive research studies on corporate practices and investor behavior. These, used in conjunction with our proprietary computer-based statistical models, allow us unique insight into the companies we consider for our various portfolios.

Our goal is to greatly reduce the risks of investing by using accurate data and stringent selection criteria

while giving our clients the best possible rate of return.

ZPR's origins can be dated back to 1979 when Max Zavanelli founded Zavanelli Portfolio Research (ZPR) to provide research data and quantitative models for professional money managers at major financial institutions. In 1982 Mr. Zavanelli began to directly manage individual discretionary accounts.

Investment Style

ZPR uses several proprietary quantitative evaluation models for assessing the real value of companies and identifying stock related trends in their earliest stages. Two of our principal models are:

GRAPES (Growth Rate Arbitrage Price Equilibrium System)

Identifies the efficient theoretical price of a stock and what value the company is worth as a private business.

Fundamental Analysis

We invest in companies with little or no debt and strong cash flow. They typically are low PE, low price to book, and have substantial retained earnings and tangible assets as well as a high level of profitability and a unique business niche.

When a company is under consideration, our analysts examine every 10K, 10Q, 8K, and proxy statement as well as the accounting footnotes. We then apply risk/reward ratio analysis to further identify those opportunities most likely to lead to superior returns. At this point we ask ourselves three questions:

1. Would I want to own this company and run it as my own private business?
2. What price would I pay for it if it weren't a public business?
3. And finally, is our potential gain at least three times our potential loss?

All Asian **Morningstar ★★★★★ 5 Star Rating**

Annualized	**All Asian Composite** (Ending March 31, 2011)				
Results shown in US $ Net of Fees	1 Year	2 Years Annualized	3 Years Annualized	Since Inception (1/1/07) Annualized	Since Inception (1/1/07) Compounded
ZPR All Asian Accounts*	49.43%	99.42%	26.93%	23.91%	148.68%
MSCI EAFE Index	10.89%	31.19%	-2.53%	-1.39%	-5.77%

The ZPR All Asian Portfolio focuses on maximizing the inefficiencies found in select foreign markets (presently Thailand, Singapore and, since the second quarter of 2010, Japan) and identifying undervalued companies there by applying the same methodology that we use in managing our Small Cap Value strategy.

All Asian Strategy

For those clients who wish to invest in Asia exclusively, we also maintain an All Asian Portfolio as a stand-alone product. *It contains only the Japan, Thailand and Singapore stocks* that form the international component of the Global Equity Portfolio. The valuation gap between small cap stocks and large cap stocks in Thailand and Singapore is huge. Foreign investors tend to buy only the largest companies in order to match index weights. However, most of these companies are government or agency owned and hence poorly run with agendas that frequently clash with the objectives of their stockholders. Among small cap growth stocks there tends to be a casino-like attitude, speculators attempting to make a quick buck. On the other hand, value stocks have been ignored even though they often pay huge dividends.

The Thai market. has the lowest valuation in Asia and possibly the world. Singapore is the gateway to Asia and many Singapore companies are multi-nationals. The profitability of Chinese companies has been on a meteoric rise over the past several years and many Singapore companies have been and will continue to benefit through their subsidiaries, exports, shipping and investments. The speculative markets of China with two classes of shares and little transparency are no place for a practical investor while Singapore, with it's British based law, American accounting firms, full transparency and excellent exchange watchdogs, is a far safer way to participate in the Wild East.

Recently we added Japan to the All Asian Portfolio.

Here we buy only equities listed in what's known as the Second Section of the Tokyo Stock Exchange. Consisting of small to mid-sized companies, the index is currently down about 60% from 2007 with many companies trading at less than book value or net current assets. Plus, unlike the First Section (Large Cap Companies), foreign investors and world events have less affect on the Second Section.

When choosing stocks for our All Asian Portfolio, we look for companies with solid businesses that have good prospects for growth and:

- a very low PE (3-6)
- little to no debt.
- sell for less than book value
- a substantial dividend yield (as high as 18%)
- high return on equity
- and of course an excellent GRAPES price relative to the current price.

Our All Asian product has greatly reduced risk because the markets in Thailand and Singapore are often uncorrelated with the US market. Plus, the income from dividends (which exceeds that generated from US stocks by 3 to 4 times) helps to stabilize the portfolio during market downturns. In Japan, we benefit from the yen as whenever there is any trouble in the world it tends to goes up, especially against the dollar.

Max Zavanelli

Prior to founding ZPR, Mr. Zavanelli was a Senior Financial Analyst at Mellon Bank and an Investment Strategist at American National Bank and Trust

Company of Chicago, Inc. From 1990 - 1994 he held the position of Distinguished George Professor, Chair of Applied Investments and Research at Stetson University in DeLand, Florida. Over the years he has written numerous acclaimed studies on stock market anomalies and investment behavior.

Mr. Zavanelli has a distinguished military record as the commander of a nuclear weapons battery in the US Army and has received considerable recognition as a chess master and correspondence chess administrator.

Contact Us
For questions regarding fees and expenses, risks, or other investment related questions, please visit our website at zprim.com or contact our office directly and we will be happy to assist you.

ZPR Client Management, Inc.

400 East 89th Street, Suite 15K
New York City, NY 10128
Tel. (646) 596-7767

Client Services Manager - David Sappir
E-mail: dsappir@zprcm.com

*Results are based on fully discretionary accounts categorized as International Equity All Asian including those accounts no longer with the firm. The composite return is calculated on a size-adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of

each quarter when they are paid. New accounts will pay initial management fee in advance, which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm wide by Alpha Performance Verification Services from December 31, 2009 through December 31, 2010 and buy a previous verifier from December 31, 2000 through December 31, 2009. In addition, a performance examination was conducted on the All-Asian Composite beginning December 31, 2009.

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ZPR Investment Management, Inc.

Fundamental Small Cap Value Composite

	Ending March 31, 2011						
Results shown in US $ Net of Fees	1 Year	3 Years Annualized	5 Years Annualized	10 Years Annualized	20 Years Annualized	Since Inception (1/1/88) Annualized	Since Inception (1/1/88) Compounded
ZPR Small Cap Value Accounts*	15.69%	11.75%	6.51%	17.01%	13.90%	14.32%	2145.86%
Russell 2000 Index	25.78%	8.56%	3.35%	7.87%	9.82%	10.34%	886.27%
S&P 500 Index	15.65%	2.35%	2.62%	3.29%	8.76%	9.94%	804.79%

* Results are based on fully discretionary accounts categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Alpha Performance Verification Services from December 31, 2009 through December 31, 2010 and by a previous verifier from December 31, 2000 through December 31, 2009. In addition, a performance examination was con

* Results are based on fully discretionary categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net fees.

ZPR Investment Management, Inc.

Global Equity Composite

	Ending March 31, 2011					
Results shown in US $ Net of Fees	1 Year	3 Years Annualized	5 Years Annualized	10 Years Annualized	Since Inception (1/1/01) Annualized	Since Inception (1/1/01)
ZPR International Equity Global Accounts*	33.76%	20.99%	14.56%	19.32%	19.75%	534.26%
MSCI EAFE Index	10.89%	-2.53%	1.78%	5.83%	4.18%	52.15%

* Results are based on fully discretionary accounts categorized as global equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Alpha Performance Verification Services from December 31, 2009 through December 31, 2010 and by a previous verifier from December 31, 2000 through December 31, 2009.

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ZPR Investment Management, Inc.

All Asian Composite

Results shown in US $ Net of Fees	Ending March 31, 2011				
	1 Year	2 Years Annualized	3 Years Annualized	Since Inception (1/1/07) Annualized	Since Inception (1/1/07) Compounded
ZPR All Asian Accounts*	49.43%	99.42%	26.93%	23.91%	148.68%
MSCI EAFE Index	10.89%	31.19%	-2.53%	-1.39%	-5.77%

* Results are based on fully discretionary accounts categorized as International Equity All Asian including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Alpha Performance Verification Services from December 31, 2009 through December 31, 2010 and by a previous verifier from December 31, 2000 through December 31, 2009.

In addition, a performance examination was conducted on the All Asian Composite beginning December 31, 2009.

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APPENDIX S

RESPONDENTS'

EXHIBIT 19 [Doc. No. 275]

FOR THE 3rd TIME ZPR IS TRIPLE #1

28 Years of Portfolio Management by
MAX ZAVANELLI

TOP 10 MANAGERS

(Periods ended December 31, 2010)

* * *

[*Fold-Out Exhibit, see next page*]

Fold-Out Footnote Text:

* Results are based on fully discretionary accounts categorized as ZPR Global Equities or All Asian (depending on table) including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in the table above are gross of fees. ZPR net of fees performance and details are available on our website (www.zprim.com). Past performance does not guarantee future results. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Alpha Performance Verification Services from December 31, 2009 through December 31, 2010 and by a previous verifier from December 31, 2000 through December 31, 2009. ZPR Investment Management, Inc. is a registered

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Tumult at Renault Hits Shares

by Jonathan Buck

RENAULT'S SHARES HAVE SKIDDED IN RECENT WEEKS, HOUNDED BY UNFOUNDED ALLEGATIONS of industrial espionage and other intrigues that exposed management shortcomings. The stock's decline has made it more attractive, but only for those with a taste for risk.

In an embarrassing U-turn last week, the French auto maker (ticker: RNO.France) apologized and offered to rehire three senior managers it fired following a months-long investigation into accusations that they had negotiated bribes in exchange for company secrets. The company is keen to put the episode behind it, but the French government, which owns 15% of Renault, has pledged "further consequences," though it is unclear what those will be. "It feels like the French government is waiting to see what the French prosecutor comes up with, and where public opinion sits," says Mike Tyndall, European autos analyst at Barclays Capital in London.

The government has reason for concern, following allegations in the French media that a Chinese firm put money into foreign bank accounts opened by two of the managers—accusations the Chinese foreign ministry sternly denied. However, the French government has two directors on Renault's board, which raises questions about when the government learned of the problems, and whether it helped shape the company's response.

Renault's highly respected chief operating officer, Patrick Pelata, offered his resignation, but CEO Carlos Ghosn rejected it.

As prosecutors probe whether Renault and the managers were both victims of a more elaborate fraud, Ghosn's leadership is under the microscope. He is admired in Japan for reviving Renault's partner, Nissan Motor (NSANY), where he remains CEO. But Renault investors haven't been won over. "He hasn't yet delivered on all of what he set out to achieve," says Tyndall. Ghosn's biggest challenge remains improving the performance of Renault's core brand. The company swung from a year-earlier loss to a net profit in 2010 of 3.42 billion euros (US$4.79 billion), but that included a capital gain from the sale of part of its stake in truck maker AB Volvo (VOLV-B.Sweden) and €1.29 billion in dividends from affiliates. Its margin was just 2.8%. In a new six-year plan, Ghosn had reduced Renault's margin target to 5% from 6%, which it failed to achieve due to the economic downturn.

European Markets, page M34

Renault isn't helped by overcapacity in its key European car market, which means competition is intense and pricing power weak. Renault's efforts to trim capacity have been stymied by the government, which is keen to protect French jobs. This year is shaping up to be tough for Renault.

The earthquake and tsunami in Japan March 11 and the impact on manufacturing at Nissan may distract Ghosn from his focus on cash generation at Renault. If Nissan's manufacturing is seriously affected, Renault could see a lower dividend in 2011 from its 44% stake.

Renault's shares, which closed Friday at €38.14, have lost 12% in value in the past three months. It has a track record of failing to live up to expectations. The stock has been one of the biggest market underperformers in Europe in the past month among companies with market capitalizations above €5 billion, according to UBS.

Barclays Capital has an Overweight rating and €58 price target. "It is exceptionally cheap," says Tyndall, but he concedes it has been cheap before. ■

JONATHAN BUCK is a news editor with Dow Jones Newswires in London.

FOR THE 3rd TIME ZPR IS TRIPLE #1

25 Years of Portfolio Management by

MAX ZAVANELLI

MORNINGSTAR RATINGS ALL 5 STARS	
ZPR Global Equity	★★★★★
3 Year	★★★★★
5 Year	★★★★★
10 Year	★★★★★
Overall	★★★★★

TOP 10 MANAGERS *(Periods ended December 31, 2010)*

WORLD STOCK COMPOSITES 1 Year Return	Gross Return	WORLD STOCK COMPOSITES 5 Yrs Annualized Return	Gross Return	INTERNATIONAL EQUITY COMPOSITES 1 Year Return	Gross Return
ZPR Global Equity*	**49.02%**	**ZPR Global Equity***	**17.91%**	**ZPR All Asian***	**24.27%**
Tradewinds Small/Mid Cap Value Eq.	31.71	BCM AlphaSector Glob. Prem. IDX	16.81	Denver Inv. Int'l Small Cap	39.47
Loomis Sayles Glob. Equity Opps	28.41	Tradewinds Global All Cap	16.14	UBS Global Canadian Eq. Small Cap	37.15
Epoch Global Small Cap	28.40	Tradewinds Small/Mid Cap Val. Eq.	14.72	Wasatch Int'l Small Cap Growth	36.75
Steinberg Asset Mgmt. Sm.-Cap Val.	27.89	John Hsu Capital Glob. Top-Down Eq	12.72	Wells-Berkeley Int'l Small Cap Eq	36.70
Acadian Global Small Cap Equity	27.25	WHV Global Equity	12.02	Oberweis Int'l Opportunities	33.35
Tradewinds All Cap	27.02	UBS Global Canada Equity	11.10	Brandes International Small Cap Eq	33.15
Calamos Global Growth Composite	26.62	Crescat Large Cap Composite	10.73	Brandes Global Small Cap Eq.	31.83
Crescat Large Cap Composite	25.98	DLS Global Equity	10.06	UBS Global ex US Small Cap Growth	31.16
Tradewinds Global ADR	25.76	First Eagle Global Value Equity	9.82	Principal Global Int'l Small Cap Eq	30.91

Sources: Morningstar, Inc., Pensions & Investments February 21, 2011 (reprinted with the permission of Pensions & Investments;

* Results are based on fully discretionary accounts categorized as ZPR Global Equity or All Asian (comprising on taxed) standing index accounts no longer with the firm. The composite return is calculated on a size-adjusted basis. The returns in the table above are gross of fees. ZPR net of fees performance and details are available on our website (www.zprim.com). Past performance does not guarantee future results. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified for the Services from December 31, 2008 through December 31, 2010 and for a previous verification period December 31, 2008 through December 31, 2009. ZPR Investment Management, Inc. is a registered investment adviser managing separate accounts that are fully discretionary. ZPR Investment Management, Inc. claims compliance with the Global Investment Performance Standards (GIPS®). Complete description of the policies and procedures for the composite and a list and description of all firm composites are available upon request.

Separately Managed Accounts
Account Minimum: $350,000 - Global Equity; $200,000 - All Asian
ZPR Investment Management, Inc.

Also see our other spectacular products for US investing.
To Learn More Call 646-596-7767
www.zprim.com

SEC DJC-0000035

APPENDIX T

RESPONDENTS'

EXHIBIT 20 [Doc. No. 276]

----- Original Message -----
From: ZPRPortAdmin
To: Hayden Guant
Sent: Monday, March 21, 2011 10:38 AM
Subject: Re: New report request

Good morning Mr. Gaunt:

Thank you for your request. You will find ZPR Investment Management Inc.'s March 2011 Monthly Report attached per your request. You will receive electronic delivery of future monthly reports on the first day of the new month. Information in regards to ZPR Investment Management Inc. has been attached to this email per your request. If you have any further questions please feel free to contact our Client Manager Mr. David Sappir at 646 596 7767.

Regards,
Amy Bauchle

Amy Bauchle
ZPR Investment Management, Inc
Operations Assistant
zpr@cfl.rr.com

----- Original Message -----
From: Hayden Gaunt

To: zpr@ipv.lt ; dsappir@zprcm.com ; zpr@cfl.rr.com
Sent: Saturday, March 19, 2011 3:18 PM
Subject: New report request

A new monthly investment report request was sent by Hayden Gaunt

Sender's data:

First Name	Hayden
Last Name	Gaunt
Address	[redacted]
City	[redacted]
State	[redacted]
Zip Code	[redacted]
Phone number	[redacted]
Email address	[redacted]

ZPR Investment Management, Inc.

Fundamental Small Cap Value Composite

	Ending December 31, 2010						
Results shown in US $ Net of Fees	1 Year	3 Years Annualized	5 Years Annualized	10 Years Annualized	20 Years Annualized	Since Inception (1/1/88) Annualized	Since Inception (1/1/88) Compounded
ZPR Small Cap Value Accounts*	20.42%	1.21%	6.83%	17.59%	14.96%	14.08%	1971.07%
Russell 2000 Index	26.85%	2.22%	4.47%	6.33%	10.83%	10.10%	813.80%
S&P 500 Index	15.06%	-2.86%	2.29%	1.41%	9.14%	9.77%	754.20%

* Results are based on fully discretionary accounts categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Alpha Performance Verification Services from December 31, 2009 through December 31, 2010 and by a previous verifier from December 31, 2000 through December 31, 2009. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000.

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ZPR Investment Management, Inc.

Global Equity Composite

	Ending December 31, 2010				
Results shown in US $ Net of Fees	1 Year	3 Years Annualized	5 Years Annualized	Since Inception (1/1/01) Annualized	Since Inception (1/1/01) Compounded
ZPR International Equity Global Accounts*	46.50%	14.30%	15.82%	19.70%	503.83%
MSCI EAFE Index	8.219%	-6.56%%	2.94%	3.93%	47.09%

* Results are based on fully discretionary accounts categorized as global equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Alpha Performance Verification Services from December 31, 2009 through December 31, 2010 and by a previous verifier from December 31, 2000 through December 31, 2009.

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ZPR Investment Management, Inc.

All Asian Composite

	Ending December 31, 2010				
Results shown in US $ Net of Fees	1 Year	2 Years Annualized	3 Years Annualized	Since Inception (1/1/07) Annualized	Since Inception (1/1/07) Compounded
ZPR All Asian Accounts*	71.53%	95.81%	27.65%	24.95%	143.73%
MSCI EAFE Index	8.21%	19.72%	-6.56%	-2.30%	-8.90%

* Results are based on fully discretionary accounts categorized as International Equity All Asian including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Alpha Performance Verification Services from December 31, 2009 through December 31, 2010 and by a previous verifier from December 31, 2000 through December 31, 2009.

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APPENDIX U

RESPONDENTS'

EXHIBIT 23 [Doc. No. 279]

ZPR INVESTMENT REPORT

Volume 15 No. 4 **April 2009**
"No Short Term Pain, No Long Term Gain"

A NEWSLETTER FOR ZPR CLIENTS

The information on this page and any following pages does not purport to be a complete description of the securities, markets, or developments referred to in the material. All expressions of opinion reflect the judgment of the firm on this date and are subject to change. The information has been obtained from sources considered reliable, but we do not guarantee that the foregoing materials are accurate or complete. ZPR Investment Management, Inc. typically has a long position in the securities mentioned and buys or sells for itself and Max Zavanelli the same securities that it trades for its clients in the course of our regular business. Performance numbers are estimated, equal weighted rather than size weighted, as it is our policy to send this report out with customers' monthly statements on the first day of the next month. Past performance does not guarantee future results. ZPR is located at 1642 N. Volusia Ave., Orange City, FL

32763. Tel. +1-386-775 1177 Fax: +1-386-775 7749
Email: zprim@mpinet.net

OVERVIEW OF THE MARKETS

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SHORT TERM MOVES

The fluctuations have been remarkable. The fear index (VIX - CBOE volatility index) has climbed to once again record levels. The stock prices of our little guys suffer the worst.

We started out this month opposite of January and February; instead of being up 10% or 8%, we were a ghastly 18% down with the Russell off 12%. It is very important to not worry about these plunges, but continue to make investments at absurd prices even if they will get cheaper.

We have proved many times that we are one of the first to soar back. Over and over again we have seen articles saying during these swoons that it will take years to recover losses. (This has certainly been the longest negative streak we have encountered.) Nonsense. Markets often recover even faster and for us it has always been but a few months after the market stabilizes. Real economics (and not jabberwocky) took a frightening plunge in the 4th quarter which worsened in January and February for exports and world trade so now it is serious. But we are far away from the economics abysses of the past. And there is nothing permanent in nature. Savings will increase as consumer spending sobers up and overleverage will get deleveraged. All good things. Everything will adjust. Our biggest fear is that temporary economic setbacks will be a political excuse for meddling in free markets by the government which can do very serious permanent damage to our economic freedom, capitalism, and full recovery.

The Wild Come Back

Good news began rolling in concerning restoration of the uptick rule and a curtailment to "mark to market". All systems in reverse. By Monday March 16, we were already in the black and caught the Russell 2000 after being behind 6%. We were closing fast on the S&P 500. On March 17, we were up more than 5% and had caught the S&P 500. On March 18, we blew past the S&P 500 and were up 11% for the month - a 30% turnaround in 8 days. On March 19, the market slid back, but we didn't as we were up nearly 3%. We were up 14% and almost 8% ahead of both indices.

By end of day Thursday, March 26, we were up 26% and 12% ahead of both indices. (That's a 44% swing in case you lost count. Sad to say we had one account give up and liquidate at the bottom.) Friday March 27, the market went down with the Russell 2000 off 4% and the S&P 500 down 2%. Monday March 30 was bad as weekend comments by Geithner that some banks would need more money created a sharp downturn. Banks and financial companies fell 14%. (Geithner still doesn't understand his comments to the press can plunge the market. He needs to shut up and do the job.) Also the government forced the resignation of the head of GM and rejected their restructing plan. Once again a panic set in with small caps especially taking a hit. Two bad days in a row send the little investors running for the bunker. KTRON, a company that has nothing to do with banks or a bankruptcy of GM, fell 9% showing the "get me out" panic mode of selling of all stocks across the board. We lost 4.5% and more which was worse than the Russell as our winners backtracked sharply. On the last day of the month, there was a strong rally in bank and technology stocks which we don't have. Our huge lead over the indices got sliced quite a bit in the final week. For the overall results for the month, see below.

We have said many times we can fly back when the market bottoms and light it up like no one else. And so we have done so again. This month we get a taste of what is to follow. We know that we can do. Never give up when the losses are bad if the manager's style, skill, and experience can deliver in the recovery from such awful scenarios.

There is a lot of backrent to pay.

When we get back to even, we are going to throw one heck of a party for our recovery from the biggest decline since 1932.

RESULTS FOR THE MONTH

We have never had a month like this. First we were down 18% in the first week and well behind the indices. Then at the end of the second week we were even. By the end of the third week, we were 26% ahead and double the indices. And this when we are holding low beta stocks! (That measure I could write a book on.) For a brief intraday moment, we were almost back to even for the year!

And we have never started a year like this. First we started January 10% ahead of the indices and to see the market plunge. We still hung on to a 5% edge by losing less. Again we had a good start in February, which turned into a total panic by individual stock holders as the decline accelerated. We fell 20.57% and probably had our worst month against the indices. For the quarter, we finish ahead of the Russell and close to the S&P 500.

Our small cap value accounts were up an average 16.27% in March. This was almost double the S&P 500 which was up 8.54%. That was the best month for the S&P 500 since October 2002. The Russell 2000 was up 8.67% so we nearly doubled that too.

Quantitative Portfolios

Our EQTP S&P 500 portfolio continued its good relative performance. It was up 11.58%. For the year it is down only 3.12% versus -11.19% for the S&P 500. Since we have a theoretical target of beating the S&P 500 with only S&P 500 stocks of 5 to 7% a year, we

have already made the target. Our EQTP Midcap 500 portfolio was up 8.75% for the month and for the quarter down 5.77%. Since smaller stocks did progressively worse, the Russell lost 15.15%, this was also a good relative result. The S&P 400 Midcap lost 9.16%.

Our Super Mocon portfolio had a very bad relative month; not helped at all by a quarter end rollover. It was up only 1.25%. The 100 stock MOCON portfolio was up 6.93% although it also lost ground on the last day and its new rollover for the second quarter. The stocks with the best earnings momentum, actual and forecast, have been doing very poorly in this crazy market. These are also the highest rated analyst stocks and with the most favorable earnings revisions and actual earnings. Those things don't matter in the recent investor psychology. Strange times not seen before.

Asian and Global

This month our Thai stocks went ex-dividend so we have large incoming receivables. There is a 6 week gap between the ex date and the pay date and then more time to actually get the money in the account. In just March, this is 2.5% to 2.8% of our values. There will be more in April and May. For the month, the Thai Set was flat (0.00% which is not a typo!) In local currency we were off a fraction, but we picked up a percent on the currency. Singapore saw a huge difference between the large cap index and the small cap index. The FTSE All Share index was up 5.50% while the FTSE Small Cap Index was down -2.41%! Our Singapore small cap stocks managed a 2.25% gain anyway and we added almost a percent more for the currency. Overall, our

Asian stocks were up almost a percent in dollars. Therefore our global accounts were up about 9.44%.

GOOD NEWS

Barney Frank promised to restore the uptick rule within a month. I am not a fan of Mr. Frank, but I am cheering loudly over that. The big critic on the internet news against the uptick rule turns out to be a lawyer for the hedge funds. I immediately challenged him to refute our evidence of the train wreck that happened to small caps. There was no reply.

In last month's investment report, I said Mary Shapiro was the wrong person for Assistant Treasury Secretary. Now she is the appointed SEC Chairwoman, a far better suited position. Steve Forbes launched an attack on her in Forbes magazine for not supporting the reinstatement of the uptick rule, but in the appointment hearings in Congress, she said she now supported it. Hurray! This has a huge impact on us in terms of volatility and removing 40% pre-open drops on news.

Take a look at our performance with the uptick rule in place and then when it was removed in May of 2007.

	Size Weighted ZPR Fundamental* Small Cap Value	S&P 500	Russell 2000
Compounded Returns			
4 Months (Jan 07 -Apr 07)	10.44%	5.10%	3.78%

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* Results are based on fully discretionary accounts categorized as domestic small cap value equity including those accounts no longer with the firm. The composite return is calculated on a size adjusted basis. The returns in this composite are net of fees. Fees are described in the firm's ADV part II. Management fees are deducted in the first month of each quarter when they are paid. New accounts will pay initial management fee in advance which could be in a different month. Past performance does not guarantee future results. Trade date, not settlement date, is used for all valuations. Exchange & NASDAQ listed stocks are valued at the closing (last trade) price for each month. Non-national market issues are valued at the closing bid. Dividends and interest are reported with a one month lag. Incurred commission costs are included in all unrealized gains. ZPR Investment Management, Inc.'s compliance with the Global Investment Performance Standards (GIPS®) has been verified firm-wide by Ashland Partners & Company LLP from December 31, 2000 through September 30, 2008. In addition, a performance examination was conducted on the Fundamental Small Cap Value Composite beginning 12/31/2000.

ZPR Investment Management, Inc. is a registered investment advisor managing separate accounts that are fully discretionary. Complete description of the policies and procedures for this composite and a list and description of all firm composites are available upon request.

END OF UPTICK RULE

8 Months (May 07 - Dec 07)	-6.42%	0.37%	-5.15%
2008 (Jan 08 - Dec 06)	-40.11%	-37.00%	-33.79%

Our marketing guy says we missed a lot of forecasts. We always miss a lot of forecasts, but this has been a turbulent time of reversals of fortune for companies in all industries; oil, steel, retail, etc. What we have not seen is a complete collapse in prices on the smallest bit of news. Healthsprings hit 5 after falling from 19. As a friend pointed out, this was all over a smaller increase in the payment rates for Medicare payments for 2010 (half a percent instead of 3-4%) by the government. There was no loss of business! Enormous overreaction when the company had done nothing wrong, in fact everything was done right.

The biggest problem we have encountered in the last 9 years is about to be removed. Our last big problem (1999-2000) was the internet bubble which nearly put us out of business. Small Cap Value was down 10%; small cap internet stocks with no earnings up 90%. That problem corrected itself.

Anatomy of Shortselling and Overreaction

Healthsprings had just reported record earnings of $2.13, up from $1.52, and it always had a stable stock price. We watched it fall to $5 before it rebounded to almost $8. Short sellers have a license to destroy. This is not investing. This stock drops 75% when there is no bad news released by the company and only a downgrade by an outside analyst for the entire medical group. This is nothing I want to be a part of.

This is what we have been up against. There were 3 components of the drop. First, the good earnings report, but because guidance was cautious and 4th quarter growth was lower than the previous quarter because of one-time adjustments, they whacked it 4.5 points (19.5 to 15) on the open. The first gang of shortsellers arrives when a company reports. They look for any weakness. Companies are all very conservative now, required legally to say forecasts are uncertain and sales may be lower in the current economic environment. Nine out of ten companies in small caps plunge when they report earnings as the sharks start feeding. You have to really scratch your head and look hard to see anything in the record earnings report of Healthsprings - but on principle in a weak stock market, the shortsellers are automatically shorting all reporting companies since they are powerful enough to crater the price. So 19+ to 15 in a flash on what anyone would consider a very good earnings report and year. There is no way a rational investor would sell on good earnings a stock with a PE of 10 with a solid history and outlook. Then came the analyst who downgraded the entire medical group and shortsellers swooped in, hitting it from 15 to 9 pre-open wiping out all bids. Then the third part was more shortsellers piling on and investors capitulating in fear - dropping it to $5. It rebounded this month to $8. The company had reported a 44% increase in revenue and a 40% increase in earnings for the year - far higher than their expectations and guidance at the beginning of the year, and the company believes they benefit from current economic conditions because they are a cost savings alternative to "fee for service" Medicare. The shortsellers successfully broke the morale of investors in the stock as they have so many other small caps.

Uptick

Unfortunately, we have had this happen to all too many of our stocks in this financial implosion and apocalypse that has been turned loose by the suspension of the short sell uptick rule. Yes, I am very bitter about it and ask what in the world was the SEC thinking? They forgot completely about small caps and listened to the academic sirens of market efficiency ignoring that values and investing is all about confidence and trust and any gamester and gangster can break the back of a small stock with waves of leveraged short selling overwhelming the normally few buyers and few sellers. We buy value stocks that are supposed to have value and not do this. Healthsprings should not have become 2.5 PE and $5 when book value is $13.28.

We did not multiply our money 19 times by being lucky. It was a long hard road. Restoration of the uptick rule is critical for the restoration of rational markets and ending this evil.

THAI DIVIDENDS AND BUYBACKS

We need for American corporations to go back to paying dividends. In previous U.S. stock plunges, companies would quickly announce buyback programs to shore up their stock price. In the 1987 crash, nearly every big cap company did this to reassure investors that the one-day stock implosion had nothing to do with their real business, earnings, and cash flow. Our companies today have been so frightened by the extreme stock panic that they have frozen up, cancelled expansion plans, and are hoarding cash. Buyback announcements are rare as corporate executives are in shock. Buybacks will come later.

In Thailand, not only are the best companies announcing buyback programs and tender offers by insiders, but also they are paying huge dividends. The average listed stock has a remarkable 6.65% dividend yield. Here is a March 10 article from the Stock Exchange (SET). Can you imagine that the entire industrial materials and machinery sector has an average dividend yield of 14.41%? There's a big catch in all this. Are. earnings sustainable? Dividends for 2009 are paid off a stated dividend policy for 2008 earnings. As everyone should know, oil companies and steel commodities which were rolling in clover in 2008 are now knee deep in red ink. ZPR International's team and much of my own analysis is for the selection of the companies that can not only maintain and grow their earnings and dividends, but to also find the new big winners and big dividend payers. Since economic conditions have had dramatic turnabouts recently, we are on our toes alert to any necessary adjustments. You can see from the SET news below that with careful work we can construct a high quality High Dividend portfolio that is now yielding 13%+. In November, it was 16% but now prices are up. (Almost all of the high dividend portfolio stocks are also in our global portfolios. The global portfolios include companies that pay small dividends or no dividend) which brings down the overall yield as well as increases the volatility and potential return.

(ZPR International's Thai High Dividend Portfolio was up an estimated 7.53% in the first quarter which is the best result of all our products in these bad stock markets.)

Thai listed firms' 2008 dividend yield averages 6.65%

Half of the listed firms on The Stock Exchange of Thailand (SET) and market for Alternative Investment (mai) have announced dividend payments for 2008. Their total payment for 2008 will be THB186,764 million (approx. USD5.15 billion), or 56% of total net profits. SET dividend yield is at 6.65%. The three industry groups yielding the highest dividends are Industrials, Property and Construction, and Service. Dividends for mai-listed firms for 2008 will be THB1,039 million (approx. USD28.66 million), or 47% of total net profits. The mai dividend yield is at 6.88%. The companies on mai with the highest dividend yields are Steel Intertech PCL (STEEL), Unique Mining Services PCL (UMS) and Pico (Thailand) PCL (PICO).

As of March 2, two hundred and seventy-two firms, or 52% of the 521 listed companies on SET and mai, excluding those in the Non-Compliance (NC) and Non-Performing Group (NPG) groups, had announced dividend payments, said SET President Patareeya Benjapolchai.

Two hundred and forty SET-listed firms announced a combined dividend payment of THB185,725 million. Their average dividend yield is 6.65%.

Details of the three highest-yielding industry groups (dividend as a percentage of the security's current market price) are:

1. Industrials, with an average dividend yield of 12.65%, is led by these sectors:
   - Industrial materials and machinery (14.41%)
   - Petrochemicals and chemicals (13.43%)

2. Property and Construction, with an average dividend yield of 8.09%, is led by these sectors:
   - Property funds (9.67%)
   - Construction materials (7.85%)
3. Service, with an average dividend yield of 7.36%, is led by these sectors:
   - Transportation and logistics (16.95%)
   - Commerce (6.51%)

"Thirty-two mai-listed firms announced a combined dividend payment of THB 1.039 million, accounting for 47% of total net profits, with an impressive average dividend yield of 6.88% The mai listings with the highest yields firms are Steel Intertech PCL (18.12%), Unique Mining Services PCL (15.23%) and Pico (Thailand) PCL (15.20%)," said Ms. Patareeya.

In terms of dividend amounts, the five industry groups on SET paying the largest sums are, in descending order: Resources, Technology, Financials, Property and Construction, and Service.

The Resources group will pay total dividends of THB 65,768 million. The leader, PTI PCL (PTT), will pay THB 22,562 43 million, or THB 8.00 per share, representing a yield of 5.29%.

The Technology group will pay THB 30,112 million, with Advance Info Service PCL (ADVANC) delivering the largest amount at THB 18,658.96 million, or THB 6.30 per share. ADVANC's yield is 7.73%.

The Financials group is the third highest, with THB 24,122 million Bangkok Bank PCL (BBL) will pay the most at THB 5,726.53 million, or THB 3.00 per share, representing a 4.26% yield.

The Property and Construction group is the fourth highest, at THB 23,528 million. Siam Cement PCL (SCC) leads the others at THB 9,000 million, or THB 7.50 per share. SCC's yield is 7.56%.

The Service group will pay the fifth highest amount at THB 21,482 million. Airports of Thailand PCL (AOT) will pay the most at THB 3,685.71 million, or THB 2.58 per share, a 17.09% yield.

The other listed companies are expected to announce their decisions soon. For more information, please visit the SET website at www.set.or.th and at www.mai.or.th.

OUR STOCKS

ARO and CPX

We sold some of the ARO shares we bought in December and early January at $18-19 for a little less than $24. Then we sold some lots we bought at $19.73 for $25.75. ARO continues to report spectacular results with same store sales up 11%. This is one of the rare stocks that went up in the massive decline, so it became 13-15% or our portfolios. We trimmed back a bit. This gave us cash to buy CPX (Complete Production Services) at less than $3. ARO is taking a charge in the next two quarters which will hold back comparisons.

We sold CPX back in August of 2007 for $20-23. It then went to $37 when oil went to $147. At less than $3, it is trading at 1.5 PE and less than net current assets. They have many long-term contracts for their oilfield services. Like most companies, once the stock fell below its book value ($15) they had to write off the goodwill

of their acquisitions. (If you pay more than book value for the company, it is classified as Goodwill.) These are non-cash charges and really have nothing to do with earnings. It is just another distortion. They earned $.50 in the 4th quarter despite the collapse of oil prices and took a goodwill charge of $3.40 leaving them with $11.64 book. Revenues were actually up 25% in the 4th quarter over a year ago. How silly, very silly is this stock market when we can buy a good company at only 15 cents on the dollar when we owned it in 2007. Now it is at only 1.5x earnings. You may have noticed we also bought Parker Drilling at 15 cents on the dollar too. These companies are selling at far below where they were when oil was $40-50 a barrel in 2006. With spot oil at $49 and futures at $60, the market has oversold them.

USU

USU on February 25 announced 50 million in earnings and provided a large amount of information and guidance. The stock held firm on the day, but later underwent selling pressure when most of our small caps swooned and those with a lot of debt like USU were the usual short selling targets. (It fell from $5.5 to $3.25 or so before rallying back to over $5.) (4.80 at the end of the month.)

USU expects a 40 to 50% increase in sales in 2009 as the new refueling cycle for nuclear plants begins. However, it is still expensing large amounts ($120 million) for the American Centrifuge (ACP) in 2009 and this continues to distort and depress earnings. The decline in the stock market also means they need to increase their pension fund commitment to 50 million. Overall they expect to earn about the same as 2009;

$.45 a share or $.34 diluted. They are also capitalizing $700 million more of their construction of the ACP in 2009. I had expected them to make $1.50-1.75 which is "normal" earnings, but had not allowed for the continued heavy expenses of the ACP - and such a mismatch in accounting where there are no revenues yet. (Without the expenses for ACP, their pretax earnings would be $200 million.)

Sometime in 2010 (hopefully early), the American Centrifuge will begin its production and gradually increase it through 2012. About 70% of their production costs of enriching uranium is electricity. Their production costs are $800 million to 1 billion a year. (More this year.) And using the lower number, that is about $560 million. The ACP will reduce their electricity costs by 95%. That brings about 500 million or so to the pre-tax bottom line by 2012. (Every year!) Further increased demand, production, and uranium sales can be seen as far as one can see in the future. We have normal earnings of $8 to $10 pre-tax or $7 after tax - for a $3-5 stock before one builds in the great long run uptick in demand. Furthermore, this is a vitally important strategic company for the United States - one of its kind deserving a big premium as it is the only way to invest in nuclear power.

The company currently has about 200+ million in cash and it projects cash flow of 250 million in 2009. This falls short of the $820 million (700 + 120) they plan to spend on ACP to finish it. Hence, the big need for government guaranteed debt which they are now likely to get. This additional financing appears to us as the only uncertainty in what is a quantum leap in the technology of producing nuclear fuel. This centrifuge is

far too important after spending a couple of billion already on it not to be completed for a few hundred million more.

USU on March 27 announced it had commitments of 3.3 billion in sales for its new ACP production; over half its planned initial production. Ten customers are from the United States, Europe and Asia. (Japan and Korea will be major buyers and some customers are placing orders and signing contracts out to 2028!)

Since investors remain focused only on short-term quarterly earnings, we will need to remain patient longer since the $1.50 2009 earnings that I expected to jump start a long rise in the stock are now not likely given all the expenses of the ACP holding back 3/4's of their normal earnings. (The stock was at 24 in May of 2007 before they had to pick up all these ACP expenses instead of capitalizing them.) 2010 is not that far off. When ACP is operating and costs begin falling, we expect $2 in earnings (and stock price of 20+), but in this market it seems like an eternity to investors who want money now - even if it doesn't take a nuclear physicist to figure out they can have earnings twice their current stock price beginning 2011-2012.

We bought this one a year too early. The basic theme was our one plant-two plant or two plant-three plant concept. A company reaches maximum capacity with its one plant and must build a second when the long-time demographics are superb. The heavy expenses of the new plant being constructed wrecks the stock as earnings comparisons suffer. We buy at a fraction of the earlier price. Delays and additional startup costs can further hurt the price, we buy more and complete our position. When the new plant is operating, it is far

more efficient and far larger, allowing even more economies of scale. Sales and profits soar.

This is a ZPR classic. Every time over the past 20 years we have found such a situation, it has paid off with huge returns. But here in our enthusiasm we were much too early. USU, selling at 2 times its free cash flow before the new plant, was too hard to resist. It is a turtle.

GLNG

Golar reported a surprising loss. Their normal business was fine and their day rates for LNG tankers actually increased. However, interest rate credit swaps wiped out their year's earnings and they also lost a pot of money on foreign currency hedging. They suspended their dividend. They should suspend their corporate treasurer too. With the price of natural gas dropping to multi year lows, some delays will show up in the great LNG expansion. We had no idea they had such exposure to big losses or interest rate swaps – otherwise wrecking their fine business we expected. We waited for it to come down from 21 to 6-7 before buying. We will take the money and buy more Spartan at its unjustified low. We will return to Golar when natural gas prices improve and after a few quarters when they reinstate their big dividend of $.18 a quarter.

We only got $3.64 for Golar and it fell even more after we got out ($3 before it turned around). We were able to buy more Spartan at $2.60 which hit $4.00 so it worked out.

BUY AND HOLD? A MAXIM BROKEN

It took an entire career to learn buy and hold. Every time in the past except for the one day crash in 1987,

buy and hold won big for us. (It was a loser for buyers of speculative stocks of 100 PE or no earnings in 2000.) As a professional investment manager and stock market theoretician, I learned that cash was trash. Academically, if you are not fully invested it is extremely difficult to stay up with the averages and almost impossible to beat them. The institutional investor stays fully invested. Trying to time the stock market is far more difficult and as we said before, there is no one in the market timing Hall of Fame - only empty chairs.

But then along comes the financial panic, and a melt down of equity prices not seemingly possible. Behavior, not logic, rules. We have had big declines before of 30%, but nothing like this. Those big declines were fully justified due to terrorist acts, wars, etc. But never has such an extreme panic in equity prices taken place on such relatively minor economic negatives. Perhaps it is because things were so good for so long economically.

So for the first time in my lifetime, the buy and hold philosophy appears broken. Maybe it happens once every 80 years. I don't know. Maybe it is also a fear of rising capital gains taxes, income taxes, and more regulatory burdens for businesses and welfare spending programs and future bankruptcy of the U.S. government and high inflation or simply a radical socialistic tilt. You can certainly take your pick of the hits to the morale of investors that has culminated in the worst drop in equity prices since 1937 when Hitler began his march by seizing Czechoslovakia. He was the ultimate nationalist - socialist.

THE END IS NEAR

No. Not the end of the world and capitalism as some would lead us to believe. The end of the recession. You need to think for yourself and use only the facts. Not what other people are guessing about. Those on TV rarely give any facts or even connect things logically. They pay for access, look good, say clever things, or try to say something dramatic to try to gain attention and fame. Talking heads. I don't think I have ever seen so many commentators so unqualified to comment.

So what am I looking at? How do I reach the "daring" conclusion that the recession may end soon? January retail sales were up 1.8%. February retail sales were up 0.1% in a deflationary environment. Hello! Retail sales do not increase in a depression, or in a recession without inflation for that matter. But we know manufacturing has fallen off a cliff as corporations have frozen in fear. We go to the inventory/sales ratio. This spiked in December-January to 1.43. Bad news. But some of this is seasonal and retailers' inventory/sales actually fell and total business inventory to sales was flat at 1.43. (Source: U.S. Census Bureau) The spike is over.

Industrial production fell 1.8% in January and the capacity utilization rate for all industry is a low 72%. (February's number for capacity utilization was 67%; the lowest since 1948 when they started the data series.) This is 8-9 (now 14%) percent below the long run average from 1972 to 2006. (Source: Federal Reserve) Consumer durable goods fell 10%. Automotive products fell 21%. These are remarkable drops. So if industry is not producing, but sales are still up, we can expect a decline in inventories soon. We won't have this

data on February inventories until mid-April. The inventory to sales ratio has already began to drop for retailers, but not yet for manufacturers.

In the last recession (2001), we had a 1.45 high on inventory to sales (total business) that lasted about a year. Our peak inventory sales will be this January at 1.43 and now it is falling. When the inventory/sales ratio hits 1.35, production will restart as there will be too little inventory. This will mark the end of the recession. We will know if the bottom has been reached (If it is less than 1.43) when we get the inventory to sales ratio for February. This is classic economics - which still works. When sales are up or flat, and inventories are low, manufacturing comes back. If the inventory/sales gets to 1.25, the economy will go on steroids as plants jump start their production.

Bernanke now says the economy will recover in 2009 instead of 2010. I will see that and raise. If the inventory/sales ratio goes to 1.35, we will have an 80% chance (4 to 1) to have a positive GDP by September and when it gets to 1.25, that will do it.

Despite all the hoopla, the real recession that began the end of September may be a short one and looks even less than the 2001 recession. But if you follow the talking heads, it seems like the end of the world.

I have been extremely good at predicting anything with supply and demand; the dollar, oil (did you see oil hitting my equilibrium price of $51 on March 19?), whatever. Trying to predict the stock market however has been a failure. Nevertheless, we could see a rare summer rally once the talking heads and the much smarter investor sees evidence of the economic bottom

and recovery. The laws of classical economics of sales, inventories, and production have never ever been repealed. We can count on it.

RATIONAL BENCHMARKS

Having a theory of stock prices and rational benchmarks makes all the difference in knowledge and understanding in wild stock markets. We can take a high quality stock with very stable and reliable earnings and great management and observe the silliness of it all. Small cap and micro cap stocks have been most buffeted as individual investors have run away. KTRON's 52 week price range is a remarkable 170 high and 45 low. It's current efficient price is $198 which it nearly reached. At 180, we were holding our smallest position in 3 – 4 years after selling more shares at 160, 170, 180. (We bought it at 20.) The current price (March 27) is 66 and it has bounced between 71 and 45 this month.

There is no finer company or better management. There are no writeoffs, charges, or surprises. No fudging the books. It sells for one times revenues and has little debt. It has an ROE of 25%. We estimate 2009 earnings at $10, but if everything goes wrong it could be $8. (2008 was $8.94. 2007 was $7.46.) 7 PE? That's very silly – so we keep buying it. So if you joined us in the last couple of years, you may see this big loss on KTRON in your holdings and think what an awful investment. But if you are a veteran ZPR investor, you know better – and you smile to see we are buying again. Oh yes!

Stocks like KTRON are great benchmarks because they provide reality and a clear understanding that it

should rise back to at least 198 before we have a reasonable price for its profits in the current economic situation. (Our forecast of $10.) That is a 204% (65 to 198) gain. With a worse economic result (farmers quite growing food and miners quite producing coal) and a forecast of $8 we get a GRAPES[+] price of 173 which is a gain of 168%. And if it doesn't reach its efficient price, someone will eventually buy the company out, or take them private to get the profit – but only if you can keep the great management.

From this information, we certainly believe our stocks should be selling 160 to 200% higher in the current economic situation as there has been an enormous overreaction by panicking investors.

PERFECT DISCONNECT

There is a perfect disconnect between reality and the stock price of our featured stock below. Here is an excellent example of a company whose sales revenue is falling, but profits are soaring. Actual volume manufactured is up, but the average sales price is down. I wrote about this effect in the investment report – and emphasized it. Because the price of raw materials has collapsed, profits for manufacturing companies are going up, not down, and even in cases where sales are much less.

To have a return on equity of 30%, puts you in the category of the greatest companies – the rare few of Microsoft, Merck, Walmart, etc. in their best days. To have no debt, sell at 4-5 PE and near book value is unbelievable.

Earnings for this company in 2008 went up almost 30%, but its stock price fell 75% – a total disconnect.

We use a very conservative estimate (flat to slightly down earnings) for 2009. But you don't need sales growth or earnings growth if you are highly profitable. We would love to buy more of this fine company as we hold only a small amount, but we have no cash and we are knee deep in great investments. A lot of difficult choices, as I have never seen stocks so cheap. You can't miss with so many fantastic choices. But which one will go up faster, sooner and higher? That's the challenge.

Appearances are misleading. If you look at your holdings, you see our initial November purchase is down 30% in this and so is our purchase in February (again about 4). But it was earlier at 8, and we have an estimated value of 14 which from its $3 current price is superb. And it's downside risk is minimal so the risk/reward ratio is simply outstanding. It is not what we have suffered in these irrational markets, but what we are about to do that is important. And that is why investing is so difficult.

Most people get fooled by looking at current valuations, but if you know what you own, you have the confidence to ignore the temporary. NGA is our example of how a stock can fall from $9 to almost $2 even though they have had greatly improving earnings, great profitability, and a solid outlook. Selling such a stock without an economic reason would be utterly stupid. Read more below.

NORTH AMERICAN GALVANIZING & COATINGS INC. (NGA)

Written by Mindaugas Repays

Business

North American Galvanizing & Coatings, Inc., incorporated in January 1955, is a manufacturing services holding company conducting business in galvanizing and coatings through its wholly-owned subsidiary, North American Galvanizing Company and its wholly-owned subsidiaries ("NGA"). It was formerly known as Kinark Corporation and changed its name to North American Galvanizing & Coatings, Inc. in 2003.

NGA is principally engaged in hot dip galvanizing of metal products an d components fabricated and owned by its customers. All of NGA's revenue is generated from the value-added galvanizing and coating of customer-owned products. NGA galvanizes iron and steel products by immersing them in molten zinc. This bonding process produces an alloyed metal surface that provides an effective barrier ("cathodic protection") against oxidation and corrosion from exposure to the elements, for up to 50 years. Additional coating services provided by NGA include sandblasting, quenching, metalizing (flame sprayed), centrifuge spinner galvanizing, Corrocote Classic II painting and INFRASHIELD^{sm} coating.

NGA operates ten galvanizing plants in seven states. These strategically located plants enable NGA to compete effectively by providing galvanizing to manufacturers representing a broad range of basic industries throughout the mid and south-central

United States, and beyond. Its galvanizing plants are located in Tulsa, Oklahoma; Kansas City, Missouri; St. Louis, Missouri; Nashville, Tennessee; Louisville, Kentucky; Denver, Colorado; Canton, Ohio; Hurst, Texas and Houston, Texas.

NGA is constructing a new hot dip galvanizing plant in Benwood, West Virginia. The new operation, which is expected to be operational in late April 2009, will utilize a 30 foot kettle and becomes the Company's eleventh hot dip galvanizing plant.

Competition

Hot dip galvanizing is highly competitive. NGA competes with other publicly and privately owned independent galvanizing companies, captive galvanizing facilities operated by manufacturers, and alternative forms of corrosion protection such as paint. The type and number of competitors vary throughout the geographic areas in which NGA does business. Competition is driven primarily by price, rapid turn-around service time, and the quality of the finished galvanized product. The Company continues to develop and implement operating and market strategies to maintain its competitive position and to develop new markets. These strategies are demonstrated by the purchase of the hot-dip galvanizing assets of a galvanizing facility in Canton, Ohio (2005) and the construction of the new operation in Benwood, West Virginia which is expected to be operational in late April 2009, as well as expanded service capabilities at its existing plants.

Fundamentals

The table below shows main items of the balance sheet

and income statement with calculated ratios and per share statistics.

Financial Data	Year 2006	Year 2007	Year 2008
Assets	48.211.000	45.572.000	54.772.000
Liabilities	22.645.000	11.543.000	10.382.000
Equity	25.566.000	36.029.000	44.390.000
Revenue	74.054.000	88.396.000	86.134.000
Net profit	4.535.000	9.232.000	11.870.000
EPS	0.28	0.55	0.70
Financial Ratios			
ROA	11.03%	19.15%	23.20%
ROE	14.73%	29.98%	29.52%
Net profit margin	6.12%	10.44%	13.78%
Trading Statistics			
P/E	9.36	8.43	5.47
P/BV	1.66	2.05	1.40
Book value per share	1.57	2.22	2.73
Year end price	2.62	4.55	3.83
Market cap	42.469.400	74.938.500	63.224.924

(all numbers in USD)

The company reported a decrease in 2008 revenues of 2.6%, which was due to a combination of an increase in

sales volume and a lower average sales price compared to 2007. Sales prices have decreased related to decreases in zinc costs. There was a 12% decrease in cost of goods sold in 2008 compared to 2007. This was mainly due to a decrease in zinc costs of 39.3%.

Zinc is the primary raw material and largest cost component in the Company's galvanizing process. Over the past several years, the market price of zinc, as quoted on the London Metal Exchange ("LME"), has been volatile. During 2006, the LME spot price of zinc was as high as $2.10 per pound and as low as $0.87 per pound. During 2007, the LME spot price of zinc was as high as $1.93 per pound and as low as $1.00 per pound. During 2008, the LME spot price of zinc was as high as $1.28 per pound and as low as $0.47 per pound, ending the year at $0.51.

Despite decrease in revenues, NGA reported record net income of $11.9 million (a 27% increase compared to previous year). They had stable earnings per share from continuing operations of $0.18-$0.20 each quarter in 2008. It is a higher level compared to 2007 ($0.13-$0.15 each quarter) and 2006 ($0.06-$0.09). While zinc prices are at a low, we expect company to keep its profitability ratios at a high level.

NGA has no long term debt and that is very important in such weak credit markets. We always prefer a company that doesn't have any long-term debt.

NGA Stock

In 2008, the Board of Directors authorized the Company to buy back $5,000,000 of its common stock, subject to market conditions. NGA bought back around

90% of authorized amount paying $4.59 per share at the open market in 2008.

As of March 26, 2009, NGA was trading at $3.13, 27% less our initial purchase price of $4.29 last year in November. We bought more in February after the full year earnings report. A 52-week trading range is between $2.15 and $8.66.

	Market Cap (millions USD)	P/E	ROE, %	Price to Book
Sector: Industrial Goods	**572.960**	**13.32**	**17.27**	**0.89**
Industry: Industrial Equipment & Components	**39.620**	**12.70**	**16.60**	**2.16**
Parker Hannifin Corporation	5.830	6.65	19.52	1.27
Roper Industries Inc.	3.970	14.45	15.11	1.96
Emerson Electric Co.	2.233	10.03	27.23	2.67
Pentair, Inc.	2.210	9.72	13.46	1.16
Watts Water Technologies, Inc.	752	16.22	5.38	0.89
Barnes Group Inc.	606	7.43	15.69	1.04

American Science & Engineering	494	21.31	13.06	2.73
Sun Hydraulics Corp.	268	10.41	25.94	2.52
OmegaFlex, Inc.	168	22.72	25.55	5.73
Standex International Corp.	115	8.10	8.69	0.54
Chase Corp.	87	7.98	18.20	1.35
North American Galvanizing & Coatings	**51**	**4.45**	**31.17**	**1.13**

NGA now has P/E ratio of 4.45, deeply discounted compared to industry average of 12.70. With a current Book Value of $2.73 per share, the company is trading at a discounted P/B ratio of 1.13 compared to the industry (Industrial Equipment & Components) average of 2.16.

The company's current ROE is 31.17%. One of the best in the industry! NGA doesn't pay dividends for shareholders. They are focusing on growing the company's value instead.

ZPR stock valuation model G.R.A.P.E.S. projects a NGA price of $14.57 in Dec, 2009.

ZPR Projections		
Fiscal Year	**Fiscal Year-end EPS**	**Fiscal Year-end Price**
Dec. 2007	$0.55*	$ 4.55*
Dec. 2008	$0.70*	$ 3.83*
Dec. 2009	$0.66 Est.	$14.57

*Actual

(The analyst on this stock has always been wrong on his forecasts. Now he fails to take into account the very low current costs of zinc and the company's ability to control inventory and its pricing adjustments with its customers. I would not be surprised to see they improve earnings again in 2009 and in 2010 with an economic recovery have another surge. Did you notice that a good management team in increasing capacity with improving technology? (M.Z)

DISCLAIMERS

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A list of securities discussed in our Investment Report during the last year is available upon request.