

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9604 / June 24, 2014

SECURITIES EXCHANGE ACT OF 1934
Release No. 72461 / June 24, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3862 / June 24, 2014

INVESTMENT COMPANY ACT OF 1940
Release No. 31096 / June 24, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15943

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In the Matter of : :

DAVID J. MONTANINO, : :

Respondent. : :

ORDER INSTITUTING
ADMINISTRATIVE AND
CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTION 8A OF THE
SECURITIES ACT OF 1933, SECTION 21C
OF THE SECURITIES EXCHANGE ACT
OF 1934, SECTIONS 203 (f) AND (k) OF THE
INVESTMENT ADVISERS ACT OF 1940, AND
SECTION 9(b) OF THE INVESTMENT
COMPANY ACT OF 1940

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”), Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), Sections 203(f) and (k) of the Investment Advisers Act of 1940 (“Advisers Act”), and Section 9(b) of the Investment Company Act of 1940 (“Investment Company Act”) against David J. Montanino (“Montanino” or “Respondent”).

II.

After an investigation, the Division of Enforcement alleges that:

SUMMARY

These proceedings arise out of a fraud and misappropriation scheme conducted by Montanino and his now-deceased business partner. From February 2010 to June 2011, Montanino and his partner raised and lost, or misappropriated, at least \$794,000 of investor funds through two private placement offerings. Montanino and his business partner operated the scheme through American Private Equity, LLC (“APE”), an investment fund that purported to invest in a portfolio of other investment funds to which it also served as unregistered investment adviser; Calibourne Capital Management, LLC (“Calibourne”), a state-registered investment adviser; and American Private Fund I, LP (“APF”), an investment fund in APE’s supposed portfolio.

Specifically, Montanino deceived an advisory client, who invested in APF, about the amount of assets under management, the management of account assets, risks, losses, and liquidity. Montanino, with his business partner, also devised and implemented a scheme to solicit investors and advise them to invest in APE, a fund secretly designed to misappropriate investor funds. Among other things, Montanino prepared marketing documents describing the investment strategy and expected returns: through Calibourne, APE would manage \$300 to \$400 million within one year and sell APE within three years, generating returns of seven to ten times of capital. The investment strategy centered on Montanino running a highly profitable investment adviser, Calibourne, through which he would recruit and supervise investment professionals and successfully manage money. But Montanino had no relevant experience and no realistic expectation of implementing the investment strategy. Montanino also misrepresented his investment experience in APE’s marketing documents, falsely claiming that he had provided investment management services for a client base with over \$1 billion in assets and had fifteen years of investment management experience for high-net worth clients. Despite the misrepresentations made in the marketing materials and also during oral presentations in which he participated, Montanino (and his business partner) used APE investors’ money for personal benefit rather than to implement the supposed investment strategy. Based on this conduct, Montanino willfully violated Securities Act Section 17(a), Exchange Act Section 10(b) and Rule 10b-5 thereunder, and Advisers Act Sections 206(1), (2), and (4) and Rule 206(4)-8 thereunder, and willfully aided and abetted, and caused APE’s violations of Securities Act Section 17(a), Exchange Act Section 10(b) and Rule 10b-5, and Advisers Act Sections 206(1) and (2).

A. RESPONDENT

1. Montanino, age 42, lives in East Patchogue, New York. Montanino served as sole officer and director, including Chief Compliance Officer, of Calibourne; senior managing director of APE; and portfolio manager of APF. Montanino was associated with state-registered investment adviser Calibourne until September 4, 2011, held Series 7, 63, and 65 licenses, and last associated with a registered broker-dealer in 2008. Between July 1995 and October 2008, Montanino was at various times associated with over ten registered broker-dealers

and investment advisers. The Financial Industry Regulatory Association administratively terminated Montanino's registration for failing to meet continuing education requirements for two years.

B. RELATED ENTITIES

2. APE, formed in March 2005, purported to be an investment fund that invested its assets in a portfolio of other investment funds to which it also served as unregistered investment adviser. Montanino and his business partner operated APE from offices in Los Angeles, California.

3. APF, formed in November 2009, was an investment fund in APE's supposed portfolio of funds. Montanino and his business partner operated it from APE's offices.

4. Calibourne, formed in March 2005, is a Delaware limited liability company. Montanino and, through APE, his business partner controlled Calibourne and operated it out of APE's offices in Los Angeles, California. Calibourne registered as a California investment adviser on August 5, 2005, but lost that status on March 6, 2006 after failing to pay renewal fees. In July 2010, Calibourne reapplied for registration as a California investment adviser, which became effective on January 26, 2011, but terminated its status on September 4, 2011.

C. BACKGROUND

5. In March 2005, Montanino and his business partner formed affiliated private investment firms, Calibourne and APE, promoting APE to prospective investors as a Calibourne-advised investment fund of other investment funds. Montanino contemporaneously registered Calibourne with California's Department of Corporations (now known as the Department of Business Oversight, Division of Corporations), as an investment adviser owned in part by APE. About six months later, Montanino disassociated from APE for unexplained reasons, allowed Calibourne's registration to lapse, and abandoned at least one investor he solicited during that time who expressed concerns to Montanino about the legitimacy and suitability of her APE investment.

6. Beginning in October 2005, Montanino worked as a customer relationship representative at a brokerage firm. After resigning from the firm in October 2008, Montanino remained unemployed for over a year.

7. In about December 2009, Montanino returned to APE as a senior managing director of the firm and helped launch an APE portfolio fund, APF. In February 2010, Montanino raised at least \$299,000 of investor funds for APF in exchange for a passive limited partnership interest in the fund. APF collapsed a short time later, in May 2010, after its broker-dealer forced the fund to liquidate assets to satisfy outstanding liquidity-based demands generated by excessive margin transactions.

8. After the collapse of APF, Montanino and his business partner focused on soliciting investors for APE and developed a strategy – financing Calibourne’s operations – through which to manage APE investors’ funds. As part of this plan, in July 2010, Montanino filed an application to re-register Calibourne as a California investment adviser and, with his partner, promoted the financing of Calibourne’s operations as APE’s latest investment model. Between July 2010 and April 2011, Montanino and his partner raised at least \$485,000 for APE from five investors in exchange for passive limited membership interests in APE, and misappropriated nearly all of it.

9. Montanino prepared materially false and misleading APF and APE marketing documents and reports containing investment advice and knew that his partner intended to and did distribute those documents to investors.

D. MONTANINO’S APF-RELATED MISCONDUCT

10. In about February 2010, Montanino solicited APF’s first investor, exploiting a pre-existing relationship he had developed with her while working as a customer relationship representative at a brokerage firm, where she maintained an IRA account. Montanino approached the then-potential investor where she worked and asked her to invest in APE’s newest fund, APF, without any charge on principal because she was his “friend.” She transferred \$299,000 to APF’s escrow account on February 26, 2010, expecting to pay only performance fees as Montanino represented.

11. Montanino did not provide his client with an offering memorandum setting forth the terms of her APF investment. Instead, Montanino provided only the signature pages to a subscription agreement, wire instructions, and a brochure called “APF Stock Market Outlook and Analysis” having nothing to do with the investment’s terms. In executing the signature pages, the investor chose to invest in APF’s “Series B” class, which Montanino represented as bearing moderate to low risk. APF’s offering documents, although not provided to the investor, confirm that “Series B” interests bore moderate to low risk.

Deceptive Conduct Concerning Assets and Account Management

12. In soliciting the APF investor, Montanino misrepresented the amount of assets he managed and his authority to personally manage her money. *First*, Montanino told his soon-to-be client, when he approached her in February 2010, that he managed multi-million dollar accounts in connection with his APE employment. But neither APE nor APF had any assets at that time. In fact, APE’s only bank account was overdrawn by \$2,449 on the day the investor transferred her money.

13. *Second*, before agreeing to entrust money to his care, Montanino’s client sought and obtained Montanino’s explicit oral assurance that he personally would manage her investment. In promising he would personally manage her investment, Montanino failed to disclose that he had no actual experience managing client assets. Moreover, Montanino was not able to manage the investor’s money at the time of his promise because he did not have (or ever obtain) access to APF’s bank account, and he did not obtain trading authority over APF’s brokerage account until March 19, 2010, or about three weeks after she invested. By then,

Montanino's partner had already leveraged the investor's money by about 104 percent through risky margin transactions.

14. Even after obtaining trading authority, Montanino failed to act in his client's best interests, compounding his explicit promise to personally oversee her investment. Despite receiving near-daily emails from APF's broker-dealer advising of margin and risk calls, attaching reports analyzing the bases for those calls, and alerting Montanino to the fact that – at minimum – the fund was rapidly losing liquidity, Montanino did not take steps to institute liquidity safeguards, satisfy the margin and risk calls, or stop the trading activity triggering them.

15. Montanino did not disclose to his client that his partner executed trades on her (or APF's) behalf until several weeks after APF's broker-dealer shut down APF's account. Even then, Montanino falsely told the investor during a phone call that he personally generated positive returns on behalf of her account during the first month after she invested, or March 2010. In fact, Montanino did not have formal authorization to trade in the brokerage account during most of that month and, by the time he did, his partner had already exposed her investment to substantial risks that Montanino took no steps to cure or disclose.

Deceptive Conduct Concerning Risky Trades, Losses, and Liquidity

16. After his client subscribed in APF, Montanino engaged in a pattern of conduct inconsistent with that of a fiduciary, dodging the investor's attempts to obtain even basic account information and concealing facts about three important attributes of her investment: risky trading activities, investment losses, and fund liquidity.

17. On April 13, 2010, Montanino's client asked him by email for performance figures and for "some kind of proof where the money is." By then, Montanino had trading authority over APF's brokerage account for nearly a month, and knew from nearly a dozen emails and reports sent to him of repeated margin and risk-based calls triggered by stress tests the broker conducted at both the security and portfolio level. Montanino had not explained to the investor the concept of margin or its associated risks, or told her that APF might engage in margin trading.

18. Despite these facts, Montanino failed to provide his client with any information about the state or even whereabouts of her investment, responding to her April 13 email that "the portfolio value is being calculated and should be available in a week or two."

19. On April 22, 2010, Montanino's partner emailed him a statement prepared by the fund's administrator, dated March 19, 2010, concerning his client's subscription. Although the March 19 statement acknowledged the date and amount of her investment, it lacked any substantive information about performance. Regardless, Montanino did not email (or otherwise provide) it to his client until May 5, 2010 – thirteen days after obtaining it from his partner.

20. On receipt of Montanino's May 5 email, his client responded by confirming her expectation that Montanino would pay "personal attention" to her account and again asked for performance information. Montanino did not answer.

21. On May 7, 2010, APF's broker-dealer began liquidating the fund's remaining holdings to satisfy outstanding margin demands. Days later, on May 13, the broker-dealer shut down APF's account and wired the fund's last \$143,897 to an empty APF bank account controlled by Montanino's partner. Montanino's partner used approximately \$24,000 of APF's last dollars to satisfy existing debt owed to lawyers and other service providers, and transferred \$90,000 to a new online trading account opened in APF's name at another broker-dealer to be managed by an unrelated individual who lost the money on poor trades in two weeks.

22. Meanwhile, Montanino's client did not learn any substantive information about her investment until she obtained a second statement from the fund's administrator, dated May 19, 2010. The May 19 statement was outdated and incomplete, reflecting a mere 15.27 percent decrease in value as of March 31, 2010. In reality, records from APF's broker-dealer show that, by March 31, APF had leveraged nearly twice the amount of investors' deposits – comprised at the time of just two investments totaling about \$484,000 – and had hundreds of thousands of dollars in pending, losing trades.

23. After reviewing the May 19 statement, Montanino's client contacted Montanino, who for the first time claimed his "boss" was wholly responsible for her losses. On his client's insistence, Montanino and his partner agreed to discuss her concerns in person at APE's offices on May 26, 2010.

24. Neither Montanino nor his partner disclosed to Montanino's client during the May 26 meeting the nature and extent of her investment losses. In fact, they were unwilling to provide any details of the trades that led to her losses, prompting her to request redemption of the remainder of her account as reflected on the May 19 statement (about \$228,013). Even though APF did not have sufficient assets, Montanino and his partner promised to redeem her investment when the quarter ended, on June 30, 2010, creating the false impression that APF had sufficient assets to do so. Montanino even promised to return a 10 percent fee, or \$29,900, APF charged to his client's subscription contrary to Montanino's representation to her that APF would not charge her principal.

25. Montanino continued the charade for over a month, emailing his client a redemption request form on June 30, 2010 and instructing her to submit the request through a New York City fax number, which she did. Montanino and his partner failed to redeem any part of her investment.

26. During a phone call in mid-July 2010, Montanino finally admitted to his client that her money was "all gone." But Montanino shirked responsibility, falsely claiming that her losses occurred after his partner unilaterally transferred her investment to an unrelated hedge fund.

27. Montanino also advised his client during the July 2010 phone call to seek a “Ponzi-like” payment from his partner, suggesting that his partner, lacking sufficient funds or assets, could repay her from later investors’ funds. Montanino’s advice prompted his client to obtain legal counsel, who sent Montanino and his partner a letter, dated July 21, 2010, demanding a full accounting. Montanino’s client repeated the demand in a text message to Montanino on July 29, 2010, but never obtained an accounting of her losses.

E. MONTANINO’S APE-RELATED MISCONDUCT

28. From July 2010 through April 2011, Montanino and his partner raised at least \$485,000 from five APE investors with the understanding that, unlike funds that traded liquid securities on a public exchange, APE would pool the investors’ money to make a private investment in Calibourne. Montanino and his business partner developed APE’s investment strategy together and used that strategy to solicit investors through oral pitches and a written investor presentation Montanino prepared. But APE invested only a nominal amount of money in Calibourne, made no other investments during this period, and teetered at all times on the verge of collapse due to misappropriation.

Use of Unsubstantiated Hypothetical Valuation Models

29. The APE presentation Montanino prepared provided a hypothetical valuation model having no rational relationship to APE’s past investment results or the purported present investment strategy. Specifically, the presentation represented that APE expected to manage \$300-400 million in assets through Calibourne within *one* year, and sell Calibourne within three years, yielding a “7-10x Return on Capital Raise Investment.”

30. But Montanino knew or recklessly disregarded facts indicating that APE’s past investment operations did not support a reasonable comparison to this model. *First*, Montanino knew that APE existed as a supposed private equity fund of funds for over five years because, as explained, he helped form APE in 2005 and even solicited one of its first investors. Despite its longevity as a fund, APE had no active portfolio investments when Montanino became a senior managing director in late 2009, indicating, at best, APE’s investment model was unsuccessful for four years. *Second*, Montanino was personally involved in managing APE’s most recent investment failure, APF, which collapsed in about two months.

31. Montanino also knew when he prepared the presentation that APE’s latest investment plan – financing Calibourne’s operations and recruiting effort – did not support the hypothetical valuation model because neither Calibourne (and APE) nor Montanino had experience recruiting or supervising investment professionals or successfully managing money.

32. Moreover, APE, as Montanino knew, was in a precarious financial condition, calling into question whether investor money would be used as represented. Indeed, Montanino repeatedly told one graphic designer he hired to design several APE marketing documents that APE could not pay her invoices and depended on raising new money to sustain operations. Montanino also told a consultant hired to proof APE marketing documents to cash a check from APE right away, warning that money was “tight.”

33. In late September 2010, Montanino's partner wrote him through personal email accounts about APE's desperate financial condition and the APE investor presentation Montanino was preparing:

I will cover short term problems. I have a lot of investors counting on me. The resource section looks great and the additions you are putting together for Advisors and articles will really help out. Perhaps we can approach all current investors, show them the progress... . But we all have to CLOSE I have a great call scheduled for tomorrow.

Deceptive Conduct Concerning APE's Investment Strategy

34. In the APE investor presentation he prepared, Montanino described the investment strategy he and Sullivan devised: APE would invest the fund's assets in Calibourne, financing Calibourne's operations and efforts to persuade experienced financial professionals managing multi-millions of dollars to move those assets to Calibourne. Of the \$485,000 raised from APE investors between July 2010 and April 2011, bank records show APE provided just \$33,515 to Calibourne, most of which Montanino – who controlled Calibourne's only bank account – diverted for personal benefit.

35. Montanino also personally misled investors about APE's investment model while participating in "pitch" calls with his partner. During the summer and fall of 2010, for instance, Montanino told an existing APE investor ("APE Investor A") about the APE/Calibourne revenue model, stating over the phone that Calibourne would use the financing APE provided to recruit established financial professionals willing to transfer their clients' assets to Calibourne. APE Investor A invested an additional \$100,000 in APE on March 23, 2011. But bank records show a transfer from APE to Calibourne of only \$11,000 of APE Investor A's March 2011 investment, about half of which Montanino promptly transferred to his personal bank account while spending the rest on purposes unrelated to Calibourne.

36. Similarly, during a phone call in May or June 2010, Montanino described to another investor ("APE Investor B") the method through which he and his business partner would manage the investor's money – by funding the Calibourne recruiting effort, which ultimately would generate investment returns. APE Investor B invested \$100,000 in APE in August 2010 and \$25,000 in October 2010. Bank records for Calibourne and APE show APE did not fund Calibourne as represented. Instead, Montanino's partner used most of APE Investor B's money for personal benefit within weeks of obtaining it. APE's bank records even reflect the use of \$10,000 of APE Investor B's August 2010 investment to make a Ponzi like payment to another investor.

37. After his partner's death through at least June 2011, concerned investors contacted Montanino about the status of their APE investments. Instead of telling them the truth, Montanino told them APE legitimately provided financing to Calibourne even though, as Calibourne's bank records show, it did not provide enough funding to execute the proposed business plan.

38. In an email on May 10, 2011, for instance, Montanino assured one APE victim, (“APE Investor C”), that “there was no ‘scam’ with [APE’s] dealings with my company,” stating:

I believed at the time [] of investment, [APE] was getting a very good deal for the amount of capital that was allocated. Again, I don’t know if [APE’s] investments outside of what the firm did with Calibourne Capital Management were good or bad one’s [sic], but I can tell you that [APE] did make a private investment in my company and for that investment, [APE] took a 50% ownership stake in Calibourne.

39. But APE did not allocate meaningful capital to Calibourne and Montanino used the nominal amount that APE provided to Calibourne for his personal benefit rather than for attracting investment professionals. Montanino therefore knew that APE used investors’ money contrary to its disclosed investment strategy of financing Calibourne.

False and Misleading Statements About Montanino’s Background

40. In the APE investor presentation he prepared, Montanino falsely represented that he had over 15 years of investment management experience for high-net worth clients and earned prestigious awards for his work. Montanino asserted, for instance, that he provided “investment management services for a client base with over \$1 Billion in assets under management” during his tenure at a brokerage firm between 2005 and 2008, and earned that firm’s “prestigious Chairman’s Circle of Excellence Award.” But the brokerage firm stated that Montanino never managed client assets and that no such award exists at the firm. In reality, Montanino’s then-recent abysmal performance managing APF Investor A’s money constituted his only actual investment management experience.

Looting of APE’s Assets

41. Between at least July 2010 and April 2011, Montanino played an integral role in using APE as a vehicle for the misappropriations of his partner and, through Calibourne, himself.

42. During this time, investors sent about \$485,000 by wire or check to APE’s escrow account. Calibourne’s bank records show that APE provided only about \$33,515, of which Montanino took \$28,870 for himself even though APE compensated Montanino tens of thousands of dollars directly from its own account. Montanino’s partner looted the rest of APE’s assets for personal benefit, transferring tens of thousands of dollars to his checking account, withdrawing substantial amounts in cash, paying others having no apparent business relationship with APE, and otherwise spending investors’ money on luxury rental homes costing \$15,500 to \$20,000 per month, luxury car payments, shopping sprees, and to make partial redemption payments to existing investors. No investor funds remain.

43. Montanino knew of his own misappropriations and recklessly disregarded facts indicating his partner used APE’s assets contrary to of the firm’s disclosures to investors. As explained above, Montanino prepared APE’s primary marketing document representing that

the fund would capitalize Calibourne. Montanino, who controlled Calibourne's only bank account, knew that no real capitalization materialized and, thus, knew his partner used investor money contrary to the representations both he and his partner made to fund investors.

VIOLATIONS

44. As a result of the conduct described above, Respondent willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the offer or sale of securities and the purchase or sale of securities.

45. As a result of the conduct described above, Respondent willfully violated Sections 206(1) and (2) of the Advisers Act, which prohibit an investment adviser from employing any device, scheme, or artifice to defraud, or engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon, any client or prospective client.

46. As a result of the conduct described above, Respondent willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-8 promulgated thereunder, which prohibit any fraudulent, deceptive, or manipulative act, practice, or course of business by an investment adviser to any investor or prospective investor in a pooled investment vehicle.

47. As a result of the conduct described above, Montanino willfully aided and abetted, and caused APE's primary violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the offer or sale of securities and the purchase or sale of securities.

48. As a result of the conduct described above, Montanino willfully aided and abetted, and caused APE's primary violations of Sections 206(1) and (2) of the Advisers Act, which prohibit an investment adviser from engaging in any act, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, Section 203(f) of the Advisers Act, and Section 9(b) of the Investment Company Act; and

C. Whether, pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, and Section 203(k) of the Advisers Act, Respondent should be ordered to cease and desist from

committing or causing violations of, and any future violations of, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1), (2), and (4) of the Advisers Act and Rule 206(4)-8 thereunder, whether Respondent should be ordered to pay a civil penalty pursuant to Section 8A(g) of the Securities Act, Section 21B(a) of the Exchange Act, and Section 203(i) of the Advisers Act, and whether Respondent should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act, Sections 21B(e) and 21C(e) of the Exchange Act, and Section 203(j) of the Advisers Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Kevin M. O'Neill
Deputy Secretary