INITIAL DECISION RELEASE NO. 773
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15943

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

In the Matter of	:	
	:	INITIAL DECISION
DAVID J. MONTANINO	:	April 16, 2015

APPEARANCES: Preethi Krishnamurthy and Danielle Sallah, representing the Division of Enforcement, Securities and Exchange Commission

David J. Montanino, *pro se*

BEFORE: James E. Grimes, Administrative Law Judge

SUMMARY

In this Initial Decision, I find that the Division of Enforcement sustained its burden to show that Respondent David J. Montanino violated subsections (1) and (2) of Section 206 of the Investment Advisers Act of 1940. I additionally find, however, that the Division failed to carry its burden to show that Respondent David J. Montanino violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, or Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder. In this Initial Decision, I order Montanino to pay a civil monetary penalty of $25,000.

INTRODUCTION

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP). As authority, the OIP cited Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, Section 203(f) and (k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940. The OIP alleges that Montanino is liable for primary violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 206(1), (2), and (4) of the Advisers Act and Rule 206(4)-8 thereunder. The OIP also alleges that Montanino aided and abetted, and caused violations of the above sections of the Securities Act and the Exchange Act, in addition to violations of subsection (1) and (2) of Section 206 of the Advisers Act.

I held a hearing in this matter in New York, New York, on November 3 through 7, 2014. During the hearing, the Division of Enforcement called nine witnesses, including Montanino. Aside from himself, Montanino called no witnesses. Having received the parties' stipulation, I admitted all but one of the exhibits they offered into evidence.[1]

FINDINGS OF FACT

I base the following findings of fact and conclusions on the entire record and the demeanor of the witnesses who testified at the hearing, applying preponderance of the evidence as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 100-04 (1981). All arguments that are inconsistent with this decision are rejected.

I. Pre-2009 events.

Although Montanino is the Respondent in this matter, Timothy Sullivan and his investment company, American Private Equity, are at the center of this proceeding. Unfortunately, Sullivan passed away in 2011, leaving a mess for Montanino. Although the OIP portrayed Montanino as Sullivan's partner, the hearing painted a different picture.

The allegations concern events that transpired between late 2009 and mid-2011. The allegations concern investments made by Susie and Henry Yoo, William Pankey, and Jeffrey Tilem.[2] To fully understand these events and investments, however, a brief background discussion is necessary.

From 1995 through 2004, Montanino worked for various firms in the securities industry, including Imagine Venture Capital and Fisher Investments. *See* Div. Ex. 9A; Tr. 743. Montanino testified that he worked at Imagine Venture Capital because his best friend, Phillip Redden, worked there. Tr. 1402. Sullivan worked there as well. Tr. 1401. From Imagine Venture Capital, Montanino moved to Fisher Investments, where he worked until April 2004. Div. Ex. 9A. After leaving Fisher, Montanino was unemployed for a period of time before he found employment in September 2004 at Torrey Pines Securities, Inc. Div. Ex. 9A.

In April 2005, while working at Torrey Pines, Montanino formed Calibourne Capital Management LLC. Div. Ex. 9A at 6; Tr. 1101-05. He registered it as an investment adviser in California and applied to register himself as an investment adviser representative. Div. Ex. 9A; Tr. 1101-05. At the same time, American Private Equity, the investment company Sullivan controlled with Redden, invested in Calibourne and acquired an ownership interest in it. Tr. 1124-25, 1403. According to Montanino, his plan was to develop a client base at Torrey Pines and then "transition [that] client base over to Calibourne." Tr. 1403.

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[1] Citations to the Division's Exhibits and Montanino's Exhibits are noted as "Div. Ex. ___," and "Resp. Ex. ___," respectively. Montanino's and the Division's posthearing briefs are noted as "Resp. Br. at ___" and "Div. Br. at ___," respectively.

[2] The allegations also concern another investor, described in the OIP at "APE Investor B." *See* OIP at ¶ 36. This investor did not testify and is not mentioned in the parties' briefing.

During April or May 2005, Montanino spoke to a prospective Torrey Pines customer named Sharon Jones. Tr. 21-24. Montanino eventually convinced Jones to invest $125,000 with Torrey Pines. Tr. 26-27. They also discussed the possibility that Jones might invest in American Private Equity. Tr. 27-32. Montanino told Jones that investing in American Private Equity would be risky and that any investment would take a number of years to "mature." Tr. 31. According to Jones, Montanino recommended American Private Equity because he was acquainted with Redden and confident in his abilities. Tr. 28.

Jones invested $25,000 in American Private Equity in June 2005. Tr. 17. At the same time, Montanino left Torrey Pines. Tr. 1098. Jones testified that both prior to investing and in later conversations, Montanino gave her the impression that he had invested in American Private Equity. Tr. 32, 55. During cross-examination, however, Jones conceded that she might have misunderstood what Montanino said. Tr. 108. Indeed, Montanino explained that what he told Jones was that because American Private Equity had invested in his company, he had "a lot invested in [American Private Equity's] success." Tr. 1131, 1406.

After Montanino left Torrey Pines, Jones was assigned a new investment adviser representative who told her that investing in American Private Equity was a bad idea. Tr. 44. Concerned, she contacted Redden who assured her that her investment was in good hands. Tr. 48-49. Jones eventually located Montanino at his new employer, Fidelity Investments. Tr. 51-52. Montanino also reassured her that "Phil Redden is a good guy, [who] knows what he is doing." Tr. 53-54. Subsequently, Jones moved her investments to Fidelity because she was unhappy with Torrey Pines. Tr. 56-57.

At some point in 2006, Redden passed away, leaving Sullivan in control of American Private Equity. Tr. 66. After Jones received some materials from Sullivan related to American Private Equity, she contacted Montanino to ask about Sullivan. Tr. 59-60, 66. Montanino told her that he did not "know [Sullivan] very well." Tr. 66.

As noted, Montanino left Torrey Pines in June 2005. At that point, he realized that Calibourne would not be successful and sought other employment, eventually finding work at Fidelity in September 2005. Tr. 52-53. As the Division demonstrated, Montanino was dishonest when he completed his employment application at Fidelity. For starters, in describing his employment history, Montanino omitted his employment with Torrey Pines and instead said he was employed by Calibourne from April 2004 to July 2005. Div. Ex. 110 at 5; Tr. 1098-1101; *see also* Div. Ex. 175 at 2. He also falsely described his salary at Calibourne and failed to include requested periods of unemployment. Div. Ex. 110 at 5; Tr. 1113, 1115-16. Montanino included other misrepresentations in his application as well. *See* Tr. 1127-29.

Despite these false statements, Montanino was hired and worked at Fidelity until October 2008. Tr. 1133. During that time, his first job title was financial planning consultant. Tr. 163. Later, he served as a dedicated financial planning consultant. Tr. 163. In the former position, Montanino was responsible for helping clients make investment decisions. Tr. 165, 171. Montanino's former supervisor, Anne Whatley, initially testified that in that role, he did not have (1) a group of clients for whom he was responsible, (2) discretion to make investment decisions, (3) authority to recommend specific stocks, or (4) the ability to manage assets. Tr. 173-74.

Later, however, Whatley testified that Montanino would have been "locked out on [certain Fidelity] customers." Tr. 200. By "locked out," Whatley meant that Montanino would have been" entitled to "future compensation for client[s] for a specific period of time" based on his having had a "sales interaction" with those clients. Tr. 196.

Montanino was successful in his tenure as a financial planning consultant. *See* Tr. 182-83, 230-32. He received awards for his performance. Tr. 184-85. After about two years, Whatley approached him about participating in a pilot program designed to explore changes in the way Fidelity provided services. Tr. 175-76. In the program, Montanino was required to "develop[] relationships" with clients and engage them more frequently, "providing guidance and investment solutions." Tr. 177. In that position, Montanino could pick mutual funds to recommend so long as they were consistent with Fidelity's guidelines. Tr. 242-46. He could also recommend annuities. Tr. 249-50.

As is discussed below, Montanino later managed investment funds in which American Private Equity invested. In that capacity, Montanino made certain representations in American Private Equity literature about his roles at Fidelity. Because the OIP alleged that certain of these representations were false, *see* OIP at ¶ 40, Montanino and the Division questioned Whatley about Montanino's responsibilities during his employment at Fidelity. Specifically, an American Private Equity Marketing Brochure (the "Marketing Brochure") said that Montanino was "tasked" while at Fidelity "with developing financial planning strategies, and providing investment management services for a client base with over $1 Billion in assets under management."[3] Div. Ex. 56 at 40. The Marketing Brochure also said that Montanino was "awarded the prestigious Chairman's Circle of Excellence Award and was recognized by the firm for his 'Excellence in Action.'" *Id.*

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[3] In relevant part, the Marketing Brochure described Montanino's tenure at Fidelity as follows:

> David was recruited to be part of a team to open that new and very high profile investor center. David was tasked with developing financial planning strategies, and providing investment management services for a client base with over $1 Billion in assets under management. During his tenure, David helped develop over 1,000 Advisor Generated Portfolio Reviews and Retirement Income Plans. For his significant contributions, he was awarded the prestigious Chairman's Circle of Excellence Award and was recognized by the firm for his "Excellence in Action", for assisting the firm in completing market and client research, which ultimately changed the relationship model that Fidelity Investments maintained with some of its most valuable clients.

Div. Ex. 56 at 40.

With respect to these claims, Whatley initially said it was unlikely that Montanino's hundreds of customers had invested as much as $1 billion with Fidelity. Tr. 179-80. As noted, she later testified that it was possible Montanino was "locked out on customers that could have had a billion dollars in aggregate and net assets." Tr. 200. With an exception, Whatley agreed that one could describe Montanino's role as "providing investment management services" for those clients. Tr. 226. To her mind, Montanino did not *provide* investment management services but rather "introduce[ed] or refer[red] to investment management services." Tr. 227. She conceded, however, that the distinction she made was "small." Tr. 227. As to Montanino's awards, Whatley said that rather than being awarded the Chairman's Circle of Excellence Award, Montanino received the Chairman's Award and the Excellence in Action Award.[4] Tr. 184.

In April 2006, Susie Yoo visited the Fidelity investor center in Santa Monica where Montanino worked. Tr. 260-61. Ms. Yoo hoped to open individual retirement accounts for herself and her husband, Dr. Henry Yoo. Tr. 260-61. In the course of her visit, Ms. Yoo was introduced to Montanino, who helped her open an account. Tr. 261-62.

Over time, the Yoos moved approximately $800,000 into various accounts they opened at Fidelity. Tr. 262-63. They also developed a personal friendship with Montanino. Tr. 264, 434. In this regard, Dr. Yoo was a veterinarian who provided care to Montanino's dog. Tr. 264, 1132. After he left Fidelity in 2008, Ms. Yoo lost touch with Montanino for a period of time. *See* Tr. 268-70.

II. The charged events

A. Montanino begins working with Sullivan and the Yoos invest with Montanino

Owing to a personal disagreement, Montanino and Sullivan had very little contact, if any, from the summer of 2005 until late 2009. Tr. 1404, 1408. In late November 2009, Sullivan approached Montanino and the two discussed the possibility of working together. Tr. 1135, 1408. Montanino's interest was raised by the fact that Sullivan appeared to be financially successful, as evidenced by his expensive homes and cars. Tr. 1409.

Sullivan initially proposed that Montanino work recruiting brokers for American Private Equity. Tr. 1409. After a short period, however, Montanino asked Sullivan about working in a different capacity. Tr. 1409. Sullivan responded positively and asked Montanino to prepare a

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[4] With respect to other aspects of the brochure, Whatley testified it was partly accurate to say that Montanino "complet[ed] market research and client research which ultimately changed the relationship model." Tr. 233-34. She felt that Montanino did marketing research rather than market research. Tr. 234. She also said the model used in the pilot program was modified before being generally adopted. Tr. 233-34. According to Whatley, Montanino was not "recruited to be part of a team to open [a] new and very high profile investor center." Tr. 192. Instead, he applied for the position. Tr. 192. She also said that he did not provide investment management services because he did not make "securities selection decisions." Tr. 193.

stock market outlook for Sullivan's new fund, American Private Funds.[5] Tr. 1409-10; *see* Div. Ex. 19B.

Sullivan was impressed with Montanino's work on the stock market outlook. Tr. 1410. Sullivan thus offered Montanino the opportunity to manage American Private Fund I. Tr. 1410-11. Sullivan told Montanino that if the fund performed well, Sullivan "would take care" of him. Tr. 1411. Montanino agreed to take on the role of fund manager. Tr. 1411-12.

In January 2010, Montanino's dog, Munky, developed a bacterial infection. Tr. 1412. Montanino took Munky to Dr. Yoo's clinic, where he saw Ms. Yoo for the first time in over a year. Ms. Yoo and Montanino have different recollections about what transpired over the next several months. For the reasons discussed below, I find that Montanino's testimony is more reliable.[6] I thus rely on his testimony while noting the areas of disagreement.

Ms. Yoo's testimony presented a number of problems. Ms. Yoo has a master's degree in clinical psychotherapy and was obviously very intelligent. Tr. 257. The fact, however, that English is not Ms. Yoo's first language occasionally led to unclear and contradictory testimony. *See* Tr. 1248 (Montanino testifying that "there is a language barrier"). For instance, on being asked whether she spoke to Montanino "at some point" after 2008, Ms. Yoo said "no." Tr. 269. She then testified extensively about her conversations with Montanino that took place after 2008. Tr. 269-393; *see also* Tr. 574 ("Q. Have you seen this document before, Mrs. Yoo? A. Yes, I see it now."). Additionally, Ms. Yoo was not completely familiar with the jargon used in the investment industry. *See* Tr. 1248. For example, when Division counsel asked Ms. Yoo whether

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[5] This case involves several entities with similar names: American Private Equity, American Private Funds, American Private Fund I, and American Private Fund II. American Private Equity was, through a separate entity, managed by Sullivan. *See* Div. Ex. 46 at 6. American Private Equity managed American Private Funds as its general partner. *Id.* American Private Funds, in turn, was the general partner of American Private Fund I. *Id.* American Private Fund I was thus a fund in American Private Equity's portfolio and was affiliated with American Private Funds.

Confusingly, American Private Fund II was not in American Private Equity's portfolio. Instead, it was an investment fund that Montanino was to manage through his later, reconstituted company, Calibourne Capital Management. In short, American Private Equity, American Private Funds, and American Private Fund I all go together, with the latter two names falling under the American Private Equity umbrella. Using acronyms such as APE, APF, APF I, and APF II would make this Initial Decision unintelligible. Given this fact and the fact that acronyms generally help the writer more than the reader, I avoid their use in this Initial Decision.

[6] Montanino was generally credible. I base this determination in part on my assessment of his demeanor. Montanino was forthright in discussing negative aspects of his past. For example, without being evasive, he admitted during cross-examination that he made false statements in his Fidelity application. Additionally, Montanino's recollection of events, when compared with Ms. Yoo's, was much clearer and more consistent with other facts.

Fidelity charged a performance fee, *i.e.*, a fee based on obtaining positive returns, Ms. Yoo responded, "Yes. Performance up or down, they would charge per account. Per every quarter, they would charge an amount." Tr. 266-67. Finally, Ms. Yoo's memory of events was imperfect.[7]

Ms. Yoo initially insisted that Montanino visited her clinic to reconnect and that *he* solicited her investment. Tr. 439-41; *see supra*, note 7. She eventually changed her testimony, however, and conceded that Montanino came to the clinic to seek treatment for Munky. Tr. 442-43; *see* Tr. 271-72. She also conceded that she initiated discussions about investments and asked him to look at her investments. Tr. 447. This latter testimony was consistent with Montanino's recollection. Tr. 1137-38.

Munky's illness required Montanino to make several visits to Dr. Yoo's clinic. Ms. Yoo and Montanino thus had several opportunities to talk. Tr. 1413. During these visits, Montanino mentioned to Ms. Yoo that he was working with American Private Equity. Tr. 1413. He explained that American Private Equity was "a firm that starts different hedge funds and things like that." Tr. 1413. Montanino also said that Sullivan had told him that American Private Equity had done well and that it managed several million dollars. Tr. 1413. Ms. Yoo took this to mean that *Montanino* was managing millions of dollars. Tr. 272, 275.

After Montanino told Ms. Yoo that he had been given the opportunity to manage a new fund, she asked him to review her investments. Tr. 447. Ms. Yoo initially testified that because Montanino previously worked for Fidelity, he would have known in January and February 2010 how much liquid cash she had available in her account at Fidelity to invest. Tr. 276 ("He knew. He worked for Fidelity maybe."), 607. In reality, unless Ms. Yoo told him how much she had to invest, Montanino would have had no way of knowing how much money she had available. *See* Tr. 1414. Cross-examination thus revealed that the reason Montanino knew how much money Ms. Yoo had to invest was because she had logged on to her Fidelity account, showed Montanino her investment portfolio at Fidelity, and asked his advice. Tr. 460, 607.

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[7] By way of example, it was not unusual for Ms. Yoo to insist events transpired in one way, only to reverse course shortly thereafter. The following colloquy during which Montanino questioned her serves as an example:

> Q So the term ["]I approached you about an investment,["] do you think that is a proper term?
> A But you joined a new company.
> Q Yes or no, please. Would that be a proper term?
> A You approached me.
> Q Do you think that I approached you or did you ask me to look at your investments?
> A I did ask you to look at my investment, uh-huh.

Tr. 447. Had Montanino not pressed Ms. Yoo, she would have created the impression that Montanino approached her to invest with him.

Ms. Yoo was also uncertain about when Montanino gave her investment advice. She recalled that she complained to Montanino about Fidelity's fees and about the fact that her investments at Fidelity were losing money. Tr. 266-68. But Ms. Yoo could not remember whether these discussions occurred before Montanino left Fidelity in 2008 or later. Tr. 267; *see* Tr. 446 ("even after you left Fidelity, yes, I did solicit your service. I did ask for your help, guidance."). Given that Ms. Yoo lost contact with Montanino when he left Fidelity, Tr. 269-70, it is apparent that these discussions occurred in early 2010, long after Montanino left Fidelity. Indeed, that was when Montanino reviewed Ms. Yoo's Fidelity account and helped her make changes to her investments.

In any event, after seeing each other a few times in January and February, Ms. Yoo and Montanino reviewed the Yoos' accounts at Fidelity at least twice. Tr. 460-61, 607. Ms. Yoo then asked Montanino whether he could manage her money. Tr. 275, 1137-38, 1417.

Montanino had previously asked Sullivan whether, if a friend wanted to invest in American Private Fund I, Montanino could waive the placement and management fees called for in the formation agreement. Tr. 1415-16. Sullivan affirmed that he could. Tr. 1416. Montanino thus told Ms. Yoo that he could manage her money, waive most fees, and charge only a ten percent performance fee. Tr. 1416. Montanino would soon experience the truth of the old adage, "no good deed goes unpunished."

During this time, Montanino shared various investment documents with Ms. Yoo, although Ms. Yoo's account of what Montanino gave her was unclear. According to Ms. Yoo, one of the documents that Montanino supplied was "his company['s] brochure," which she said contained Montanino's picture and biography. Tr. 284-85, 462, 582, 623-24. Because the parties were unable to supply this document during the hearing, its contents remain unknown.

Montanino testified that Ms. Yoo must have been mistaken because at that time, no brochure existed that contained his picture. Tr. 1670. Without contradiction, he asserted that no brochures containing his picture were produced until late 2010 or early 2011. *Id.*

Ms. Yoo testified that she also received a document entitled American Private Funds, Stock Market Outlook and Economic Analysis for 2010. Tr. 285-86; *see* Div. Ex. 19B. Montanino had prepared this document at Sullivan's request. Tr. 1409-10, 1417. Among other things, this document depicted Montanino as having a role in "investor relations" with American Private Funds. Div. Ex. 19B at 15. Ms. Yoo testified that these two documents were all she could remember receiving. Tr. 288. By her own admission, however, Ms. Yoo did not review everything Montanino gave her. Tr. 284-85. And, in 2012, Ms. Yoo disposed of two boxes that contained her investment documents. Tr. 424-27. These facts make it difficult to rely on Ms. Yoo's testimony about what documents Montanino gave her before she invested.

It is undisputed that the Yoos invested $299,000 in American Private Fund I on February 26, 2010. *See* Div. Ex. 13A at 1. The parties also agree that before the Yoos invested,

Montanino expressly assured them that he would personally manage their money.[8] Tr. 1138; OIP at ¶ 13; Answer at ¶ 13. Additionally, all of Ms. Yoo's discussions with Montanino about her investment occurred in person, not by phone or email. Tr. 274, 1137. Virtually everything else about the Yoos' investment decision is in dispute.

According to Ms. Yoo, Montanino never gave her a subscription agreement or offering memorandum and never told her she would be investing in American Private Fund I, rather than American Private Equity. Tr. 295, 467-68, 356-57; Resp. Ex. 201. Ms. Yoo testified that Montanino visited her clinic on February 26, 2010, bearing a two-page, subscription agreement signature page for her and Dr. Yoo to sign. Tr. 289-90; *see* Div. Ex. 20. Ms. Yoo was certain Montanino came in that day because it was a Saturday and Saturdays were always quite busy in the Yoos' veterinary clinic. Tr. 290, 571. She stated that except for her and Dr. Yoo's signatures, the document "was filled out." Tr. 290. She said that, inasmuch as it was a busy time and the document required only signatures, Montanino left shortly after arriving. Tr. 290-91.

According to the subscription agreement, the Yoos invested $299,000 in what was designated as series B, Div. Ex. 20 at 2, which was the second most conservative investment series of the five series offered, *see* Div. Ex. 116A at 12.[9] The two pages Montanino brought to the Yoos were paginated with the numbers 12 and 13 at the bottom, thus indicating that they were part of what was presumably at least a thirteen-page document. Div. Ex. 20. Ms. Yoo testified that she was surprised to see "American Private Fund I" written at the top of the pages she signed. Tr. 294. She said that she had not previously heard of the fund.[10] Tr. 294.

Ms. Yoo's testimony about the circumstances of the signing of her subscription agreement is problematic. As an initial matter, February 26, 2010, was not a busy Saturday but was instead a Friday. *See* Tr. 572. When confronted with this fact, Ms. Yoo testified that Fridays were also busy days in the Yoos' clinic. Tr. 572. Second, the name American Private Fund I was not wholly foreign to Ms. Yoo; American Private Funds was emblazoned on the Stock Market Outlook she admitted Montanino gave her. *See* Div. Ex. 19B at 1.

Third, it would later develop that Ms. Yoo possessed at least one other American Private Funds document. On July 21, 2010, she visited an attorney, Lynn Poulson, and gave him "the brochures" Montanino had given her. Tr. 396, 568; *see* Tr. 503. That same day, Poulson sent

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8 Interestingly, Ms. Yoo was unsure whether Montanino told her he would manage her money or if this was simply "an understanding" she had. Tr. 626-27.

9 The Yoos sought a moderate to low-risk investment vehicle. Tr. 1177.

10 When asked whether she had "ever heard of" American Private Fund I, Ms. Yoo said:

> No. I just started – it's the same American Private Equity, his company name is American Private Equity, so it must be the company's money goes to the fund. That's how I thought.

Tr. 294.

Sullivan and Montanino a letter that contained a quote from American Private Funds' "promotional literature." *See* Div. Ex. 44; Tr. 395; *see also* Tr. 503. The language quoted, concerning seeking "positive nonmarket correlated returns for its investors, emphasizing capital preservation, strict risk control, and low volatility," was used in an American Private Funds brochure in evidence. *See* Div. Ex. 116A at 7. Given the timing of Poulson's letter, counsel must have obtained the brochure from Ms. Yoo.[11] Tr. 506-07. As such, Ms. Yoo necessarily had more literature in her possession concerning her investment than she remembered.

Montanino, by contrast, testified that he personally gave the Yoos the offering memorandum for American Private Fund I. Tr. 1177-84, 1198-99. He also gave them the subscription agreement and an investor presentation. Tr. 1417. The reason he only brought the last two pages of the subscription agreement with him on Friday, February 26, 2010, was that he had already left the entire agreement with the Yoos. Tr. 1451. Given that I have found Montanino's testimony reliable, I find that he gave the Yoos the subscription agreement and the placement memorandum before they invested.[12]

The American Private Fund I placement memorandum provided that fund partnerships were offered in "five separate series of limited partnership interests . . . designated [as] Series A" through Series E. Div. Ex. 46 at 7. The memorandum also provided that an investment could not be withdrawn during the first twenty-four months after it was first made. *Id*. at 7-8. In addition, the agreement authorized the general partner to "engage in[] option trading, leverage (including, but not limited to margin trading) and other strategies." *Id*. at 20. Through a series of entities, the memorandum identified Sullivan as managing the general partner of the fund. *Id*. at 2, 6, 16. Although the memorandum did not mention Montanino, it authorized the general partner to select portfolio managers. *Id*. at 2. The minimum investment by a Limited Partner in a Series was $1,000,000, but the General Partner was permitted to waive the minimum subscription requirement for any investor and could raise this minimum requirement in the

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[11] Mr. Poulson sent the letter the day Ms. Yoo met with him. *Compare* Div. Ex. 44, *with* Div. Ex. 42 at 13.

[12] The Division argues that the fact Montanino removed certain language from the Yoos' subscription agreement signature page shows that he did not give the offering memorandum or subscription agreement to them. See Div. Reply Brief at 3-4 (citing Div. Brief at 21-23). Specifically, the Division notes that Montanino deleted "By its signature below, the undersigned specifically acknowledges and affirms its representations made herein." *Compare* Div. Ex. 46 at 111, *with* Div. Ex. 20 at 2. But the Division omits that the entire sentence that Montanino deleted was: "By its signature below, the undersigned specifically acknowledges and affirms its representations made herein and *consents to the payment by the Partnership to the General Partner of 10% of the proceeds of its subscription as a Placement Fee*." *Compare* Div. Ex. 46 at 111 (emphasis added), *with* Div. Ex. 20 at 2. And the reason Montanino deleted this language was because he waived the referenced placement fee. Deletion of this language thus does not show that Montanino failed to give the Yoos anything. Instead, it shows that he intended to waive the placement fee. And, in fact, the Yoos' initial subscription confirmation showed that they were only supposed to be subject to a performance fee. *See* Div. Ex. 37 at 2.

future. Div. Ex. 46 at 7. The investor presentation explained that net asset value would be calculated quarterly. Div. Ex. 116A at 8.

Although the placement memorandum permitted the use of margin trading, Montanino did not mention margin trading to the Yoos because he did not intend to trade on margin with their money. Tr. 1154-55, 1158; *see* Tr. 1191-92. Nonetheless, he knew the general partner of American Private Fund I had the power to carry out investment activity and could use leverage. Tr. 1157-58.

Within hours of signing the subscription agreement, Ms. Yoo visited Fidelity investments and initiated a transfer of $299,000 to JPMorgan Chase for credit to American Private Fund I. Tr. 299-300; *see* Div. Ex. 20 at 3-4. According to Ms. Yoo, as soon as she completed the transfer she experienced difficulty contacting Montanino. Tr. 304-06. Indeed, during the Division's investigation, Ms. Yoo repeated the claim that Montanino became evasive and was difficult to reach after she invested. *See* Resp. Exs. 67 at 1, 68 at 1. As will become evident, however, the record belies Ms. Yoo's assertions.

Although Montanino told the Yoos he would personally manage their money, Sullivan did not authorize Montanino to trade in the American Private Fund I brokerage account at Lime Brokerage until March 19, 2010. *See* Div. Ex. 14B-7. Nonetheless, Montanino testified without contradiction that he picked the initial positions in the account. Tr. 1455. For the first week, Sullivan followed Montanino's recommendations and the value of the investment grew. *See* Div. Ex. 14A at 14-15; Tr. 1456.

Montanino testified that starting on March 11, 2010, Sullivan began executing trades that changed the makeup of the investments in the account for American Private Fund I. Tr. 1470-76. On March 16, 2010, Sullivan convinced a new investor to invest $185,000 in American Private Fund I. *See* Div. 14A at 15; Resp. Ex. 50.

Three days later, Sullivan authorized Montanino to trade in the account. From that point on, Montanino was copied on regular emails from Lime Brokerage about risk and margin calls in American Private Fund I's investment account. *See* Tr. 1207-24. Montanino asked Sullivan about these communications and Sullivan told him that "the risk . . . in the account was being taken by" the new "investor who was in a different share class." Tr. 1210-11. Montanino accepted Sullivan's explanation. Tr. 1210.

Within a week, however, Sullivan's trading in the account alarmed Montanino because he suspected the Yoos would be adversely affected. Tr. 1218-19, 1475-76. Montanino thus approached Sullivan who told Montanino that he (Sullivan) was in charge and if Montanino did not like what Sullivan was doing, Montanino could quit. Tr. 1476-77. Montanino then proposed that Sullivan simply redeem the Yoos' investment. Tr. 1478. Sullivan responded that he intended to hold the Yoos to the two-year lock-up authorized in the subscription agreement. Tr. 1478.

According to Montanino, he felt that he was on the horns of a dilemma. He professed to being motivated by his personal friendship with the Yoos. Yet, if he told the Yoos Sullivan was

managing their account and they stormed in demanding the return of their money, Montanino was sure Sullivan would not comply. Tr. 1476-79. If, on the other hand, he worked with Sullivan, he thought he might be able to convince Sullivan to return the Yoos' money. Tr. 1478-79. He decided to follow this latter course and did not immediately tell the Yoos about Sullivan's actions.

Montanino testified that Sullivan traveled to Florida on March 31, 2010. Tr. 1480, 1484. Montanino followed him there on April 4 to try to convince Sullivan to redeem the Yoos' investment. Tr. 1480. According to Montanino, within a few days, he convinced Sullivan to redeem the Yoos' money. Tr. 1481. Indeed, the evidence reflects that on April 6, Sullivan contacted American Private Fund I's brokerage company, Lime Brokerage, about authorizing a wire out of the American Private Fund I investment account. Resp. Exs. 52, 53. The stated purpose of the wire was "redemption of a client[']s investment." Resp. Ex. 53. Further, the Division does not dispute that Lime Brokerage received a "wire request" dated April 6, 2010, directing that $260,749 be wired to an escrow account at JPMorgan Chase. Resp. Ex. 54. This transaction occurred on that date. Resp. Ex. 64 at 5.

Montanino averred that having convinced Sullivan to redeem the Yoos' money, he left Florida around April 10 or 11 "feeling great." Tr. 1485. When he called Sullivan two days later, however, Sullivan said he had changed his mind and would not be returning the Yoos' money to them. Tr. 1485. Montanino "blew up on the phone" and "physically threatened" Sullivan. Tr. 1485-86. Sullivan responded by summarily firing Montanino, Tr. 1486, and informing Lime Brokerage that Montanino was no longer authorized to trade in the American Private Fund I account, Resp. Ex. 57.[13] Sullivan transferred $260,000 from the escrow account back to Lime Brokerage on April 21, 2010. Resp. Ex. 64 at 5.

Meanwhile, Montanino's friendship with the Yoos continued and they remained in contact. At some point between February 26, 2010, and March 15, 2010, they asked Montanino to help Dr. Yoo evaluate a business in which the Yoos were considering making an investment. *See* Div. Ex. 21; Tr. 1420-23. The Yoos had invested a substantial amount of money in Passionate Vet, a veterinary clinic located inside a pet store called Passionate Pet. Tr. 1421. Dr. Yoo was considering investing in Passionate Pet. Tr. 1421. Montanino reviewed the offering memorandum for Passionate Pet and the business's financial status before visiting it with the Yoos and meeting with the business's principals. Tr. 534, 537, 1421-22. Afterwards, Montanino advised the Yoos against investing in Passionate Pet. Tr. 1422. They did not take Montanino's

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[13] Sullivan subsequently hired Anthony J. Klatch, II, to manage American Private Fund I. Tr. 1494-95; *see* Resp. Ex. 62. Klatch later pled guilty to conspiracy, securities fraud, wire fraud, and money laundering. *See Anthony J. Klatch, II*, Investment Advisers Act Release No. 3783, 2014 SEC LEXIS 672, at *4 (Feb. 21, 2014). He is currently serving a five-year term of imprisonment. *Id*. The facts underlying Mr. Klatch's conviction are unrelated to American Private Fund I or American Private Equity. *See id*. at *4-6.

advice and, within a year, lost a substantial portion, if not all of their investment.[14] Tr. 535, 1422-23.

After working with Montanino on the Passionate Pet investment, Ms. Yoo e-mailed him on March 15, 2010, to thank him "for bringing in [his] insight to Passionate Vet."[15] Div. Ex. 21. She also sought Montanino's advice about the best mutual fund for her IRA and about what to do with cash in her IRA. *Id*. Ms. Yoo then asked Montanino to call her. *Id.* Ms. Yoo could not recall whether Montanino responded to her request that he call her.[16] Tr. 310.

On Tuesday, April 13, 2010, which was on or near the day Sullivan fired Montanino, Ms. Yoo emailed Montanino. Div. Ex. 35. She first mentioned Montanino's dog before asking how her "portfolio [was] performing," and whether she could obtain a "statement or some kind of proof where the money is?" *Id*. She then proposed meeting for dinner later that week at a restaurant near her home. *Id*. She suggested that the restaurant's proximity to her home would give her a chance to show Montanino the progress on renovations being made on the Yoos' home. *Id*.

Montanino responded about two hours later saying that he could meet the following Thursday night and would "go over the portfolio with [her] then." Div. Ex. 35 at 1. He also said "[t]he portfolio['s] value is being calculated and . . . should be available in a week or two." *Id*. With regard to this latter comment, net asset value in American Private Fund I was then calculated on a quarterly basis. Div. Ex. 116A at 8; *see also* Resp. Ex 35; Tr. 1235-36.

During the hearing, Ms. Yoo explained that during this period, she was concerned because she had not received an initial confirmation of her investment or regular statements thereafter. *See* Tr. 304-05, 542. She was worried because she did not have account information that would have allowed her to access her account on-line. *See* Tr. 316. It turned out, however, that Ms. Yoo's concern about the lack of regular statements had more to do with her unfamiliarity with private equity investments. *See* Tr. 528-30. As noted above, net asset value for American Private Fund I was calculated quarterly. Div. Ex. 116A at 8; *see* Resp. Ex. 35; Tr. 1235-36. The investor presentation for American Private Fund I explained this fact. Div. Ex.

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[14] Whether the Yoos invested in Passionate Pet or Passionate Vet is unclear. Montanino testified that he advised them about Passionate Pet. Tr. 1420-23. Ms. Yoo initially testified that Montanino advised the Yoos about Passionate Pet, Tr. 532, but then said Montanino advised them about Passionate Vet, Tr. 535-36. Regardless of which company in which the Yoos invested, they invested and lost a good portion and possibly all of the $300,000 they invested. *See* Tr. 536 (Ms. Yoo testifying that the investment result was "not good"); Tr. 1422 (Montanino testifying that the business closed within ten months after he visited it).

[15] *See supra*, note 14.

[16] The fact that Montanino was willing to give the Yoos so much of his time to help them with this investment decision shows that he was not avoiding them and is circumstantial evidence in support of Montanino's testimony that he was motivated by his friendship with the Yoos rather than a desire to defraud them.

116A at 8. Ms. Yoo, however, expected that as with mutual funds, the value of her investment would be calculated daily.[17] *See* Tr. 542.

The fact that Ms. Yoo did not receive an initial confirmation and lacked account access appears to have resulted from a miscommunication or possibly a problem with Columbus Avenue, the administrator for American Private Fund I. Inasmuch as Montanino was Ms. Yoo's point of contact, she apparently concluded at some point that he was dishonest with her. Whether she reached this conclusion at the time—her communications with Montanino gave little indication of a problem—or once she realized her investment was lost, is unclear.

As it turned out, in response to a phone conversation, Columbus Avenue e-mailed the Yoos' subscription confirmation to Sullivan on April 22, 2010. Div. Ex. 37. The confirmation was dated March 19, 2010, and purported to have been sent "To the Attention of: Susie Yoo," at her home address. *Id*. at 2. It reflected that the Yoos had invested $299,000 on March 1, 2010, and that their investment was subject to a 10% performance fee and no other fees. *Id*. Knowing of Montanino's relationship with the Yoos, Sullivan immediately forwarded the confirmation to Montanino. *Id*. at 1.

Montanino did not forward this e-mail to Ms. Yoo until May 5, 2010. *See* Div. Ex. 37 at 1. Montanino testified that he waited until then because the face of the confirmation suggested that it had already been mailed to Ms. Yoo. Tr. 1240-41, 1425. Once he learned that Ms. Yoo had not actually received it, he forwarded it to her. Tr. 1242.

I credit Montanino's explanation because there would have been no reason for him to delay forwarding the subscription confirmation to the Yoos; it confirmed their investment. Further, because the subscription confirmation was purportedly sent to Ms. Yoo's attention at her home address, it was reasonable for him to assume that the confirmation had previously been sent to her. Additionally, the evidence shows that once he realized the Yoos did not have the confirmation, Montanino sent it to Ms. Yoo.

In any event, Montanino had dinner with the Yoos and their son on April 22, 2010.[18] Despite Ms. Yoo's professed concern about her investment, she testified that she did not press

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[17] The first statement issued by Columbus Avenue, the administrator for American Private Fund I, was for the quarter that ended March 31, 2010. *See* Div. Ex. 178B at 8. This statement was issued on May 19, 2010, and it reflected a loss of over $41,000. *Id.*

[18] Ms. Yoo testified that, consistent with her email exchange with Montanino on April 13, 2010, this dinner took place the Thursday or Friday after Tuesday April 13, 2010, or on April 15 or 16, 2010. Tr. 317-18. It was evident from counsel's questions of Ms. Yoo that the Division believed this dinner took place a week later on Thursday, April 22, 2010. *See* Tr. 317-18. When asked whether she was "sure" the dinner took place the same week she exchanged emails with Montanino, Ms. Yoo said the dinner took place "that Friday," which was April 16, 2010. Tr. 317-18. Montanino, however, evidently remembered that this dinner took place Thursday, April 22, 2010. *See* Tr. 1232, 1237. The Division now represents that the dinner occurred on

the issue with Montanino during that dinner. *See* Tr. 318-21. Instead, she considered the dinner to be a "social get together." Tr. 318-19.

Montanino, by contrast, testified that he told the Yoos everything at the dinner. According to Montanino, he told them that Sullivan had fired him and was managing their account. Tr. 1232. He also said that he told them that they had lost approximately $35,000. Tr. 1232, 1242-43.

On Saturday, May 1, 2010, Ms. Yoo emailed Montanino while he was out of town and asked how long it might be before she obtained the log-in information for her account. Resp. Ex. 19. She then said that she would "like to have some kind of proof where [her] money is." *Id*. Montanino returned home late on May 3, 2010, and sent Ms. Yoo a text message early on May 4 saying he would call her later. *See* Resp. Ex. 20.

At this point, Montanino realized that Ms. Yoo did not have any information concerning her investment account. Tr. 1242. He thus forwarded to Ms. Yoo the subscription confirmation Sullivan had sent him by e-mail on April 22, said that "Columbus Avenue must have messed up," Resp. Ex. 21, and spoke to Sullivan about the Yoos' log-in information. Sullivan e-mailed Columbus Avenue on May 6 and asked whether "the Yoos [could] at least register and logon to see their account?" Resp. Ex. 22. A representative from Columbus Avenue responded that the problem was that the Yoos subscription documents did not contain a contact email address. *Id*. This was apparently why the Yoos had never received their initial subscription confirmation. Later during the day on May 6, Columbus Avenue e-mailed Ms. Yoo directions concerning how to log-in and set up her on-line access. Resp. Ex. 24.

On May 6, 2010, Ms. Yoo emailed Montanino to thank him "for working so hard to set [her] account up." Resp. Ex. 25. She also asked Montanino whether he had "any idea how [her] money was invested," and chastised Montanino, saying that she had "transfer[red] the funds hoping that you watch the growth [a] bit more closer. Hopefully that's what I'm going to see." *Id*.

Ms. Yoo offered varying accounts of what happened over the following three weeks. On May 19, 2010, Columbus Avenue issued the Yoos' quarterly statement for the quarter ending March 31, 2010. Div. Ex. 43. The statement reflected contributions of $269,100, a $41,087 loss, and $228,013 balance. *Id*. The fact that the statement reflected contributions of approximately

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Thursday, April 22, 2010. Div. Br. at 25-26. Given that the parties agree that the dinner took place on Thursday, April 22, 2010, I find that to be the date of the dinner.

Standing alone, the fact that Ms. Yoo was "sure" the dinner took on Friday, April 16, 2010, when it actually took place on a different day of the week, during a different week, is not significant. In context, however, it adds weight to my conclusion that Ms. Yoo's testimony was not as reliable as Montanino's testimony. In fact, the Division now qualifies Ms. Yoo's testimony, saying that it "was accurate to the best of her recollection." Div. Reply Brief at 7. The Division has thus tacitly conceded that Ms. Yoo's testimony was problematic.

$30,000 less than what the Yoos actually invested resulted from Columbus Avenue subtracting a 10% placement fee.[19] *Id.*

Ms. Yoo "was furious" when she saw the balance. Tr. 346. She responded by calling Columbus Avenue and Montanino. Resp. Ex. 43; Tr. 347-48. Ms. Yoo testified that Montanino told her to call Sullivan. Tr. 347-48. When Division counsel asked Ms. Yoo whether she knew why Montanino told her to call Sullivan, Ms. Yoo testified that she had "somehow . . . learned that" Sullivan, not Montanino, was in "control of [her] money." Tr. 349. Ms. Yoo then phoned Sullivan and arranged a meeting to take place on May 26, 2010. Tr. 349-50.

Ms. Yoo would later testify that she did not learn until just before the May 26 meeting that Montanino was no longer managing her money. Tr. 478-79. She then conceded that she might have learned this fact before May 19, 2010, Tr. 543, before saying that she learned this fact between May 6 and May 19, Tr. 548.

Given Ms. Yoo's uncertainty about when she learned that Montanino was no longer managing her money, I am compelled to rely on Montanino's account. Based on his testimony, I conclude that the Yoos learned on April 22, 2010, that Sullivan—and not Montanino—was managing their money. I find that Ms. Yoo's May 6, 2010, e-mail is equivocal on this point. On the one hand, asking Montanino whether he had "any idea how [her] money was invested," suggests that, contrary to her testimony she knew before May 6, 2010, that he was not managing her money. *See* Resp. Ex. 25. On the other hand, she said she "transfer[red] the funds hoping that you watch the growth [a] bit more closer. Hopefully that's what I'm going to see." *Id.* This could indicate that she thought on May 6, 2010, that Montanino was still managing her money. In context, however, I find that the latter quote merely evidenced her hope that he would watch what was happening, not her continuing expectation that he would personally manage the investment.

In any event, the meeting on May 26, 2010, took place at American Private Equity's office in Century City. Tr. 350-51. When Ms. Yoo and Dr. Yoo arrived, Montanino met them in the lobby and the three rode together in an elevator. Tr. 351-52. According to Ms. Yoo, she asked Montanino during the elevator ride whether she could get her money back and he responded that if she were to "shake Mr. Sullivan hard, he will give you something." Tr. 353.

During the meeting, Ms. Yoo asked Sullivan to redeem her investment. Tr. 357. She initially testified that both Sullivan and Montanino told her that she had "to sign a redemption form" and that she would have to wait until June 30, the end of the second quarter, to receive her money. Tr. 358-60, 364. During cross-examination, Ms. Yoo explained that she had previously said that both Montanino and Sullivan told her these things because Montanino and Sullivan

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[19] Sullivan learned on May 11, 2010, that the Yoos had been charged a placement fee. *See* Resp. Ex. 35. On May 25, 2010, after making inquiries about how to waive the fee, *see* Resp. Ex. 36, Sullivan asked Columbus Avenue to waive it, *see* Resp. Ex. 44, consistent with Montanino's agreement with the Yoos. Two months later, however, Sullivan reversed course and decided not to return the fee to the Yoos. *See* Resp. Ex. 47.

"were in the same company." Tr. 488-89. She conceded that in reality, Montanino was "just sitting there" and "Sullivan did all of the talking." Tr. 489.

Montanino sent Ms. Yoo the redemption form on June 30, 2010, via e-mail. Div. Ex. 40 at 1; Tr. 361-64. Dr. and Ms. Yoo completed the form that same day and sent it to Sullivan via fax. Div. Ex. 41; Tr. 366-68. Around this same time, Sullivan told Montanino that all of the Yoos' investment had been lost. Tr. 1503. Because the Yoos were leaving the next day for a vacation in Japan and Korea, *see* Tr. 365, Montanino decided to wait to deliver the bad news, Tr. 1503. When the Yoos returned around July 13, Ms. Yoo phoned Montanino about her investment and he told her that her investment was gone. Tr. 370.

As noted above, Ms. Yoo visited her attorney, Poulson, on July 21, 2010. Tr. 395, 503, 568. Poulson sent Sullivan and Montanino a letter in which he demanded an accounting, copies of certain documents, and return of the Yoos' investment. Div. Ex. 44. Sullivan responded in August by sending a copy of the offering memorandum for American Private Fund I. *See* Div. Ex. 46; Tr. 397-400. Ms. Yoo testified that she had not previously seen this document. Tr. 400. Around this same time, Ms. Yoo received a statement from Columbus Avenue for the quarter ended June 30, 2010. Div. Ex. 45. This statement confirmed that the Yoos' investment was a total loss. *Id.*

During the hearing, Ms. Yoo revealed that she and Dr. Yoo moved offices in 2012. Tr. 424. In connection with that move, Ms. Yoo "tossed" two boxes containing documents related to her investments. Tr. 425-27.

B. William Pankey invests with American Private Equity.

William Pankey is a partner in an information technology consulting firm. Tr. 721. During the hearing, he testified that he invested a total of $700,000 in American Private Equity. Tr. 885. Pankey first heard of American Private Equity when Sullivan phoned him "out of the blue" sometime in 2009. Tr. 724-25. Over the course of about six phone conversations, Sullivan explained that American Private Equity planned "to capitalize on the disruptions in the financial services" sector by "investing in other companies." Tr. 726-27. In November 2009, Pankey invested $100,000 in American Private Equity. Tr. 723.

Pankey invested $500,000 in American Private Equity in late June 2010. Tr. 729; *see* Div. Ex. 17B-4 at 97. Prior to doing so, he spoke to Sullivan at least twelve times. Tr. 729-30. At some point during those calls, Sullivan mentioned that he worked with Montanino at American Private Equity, and that Montanino was previously employed by Fisher Investments. Tr. 730-31. After that, Montanino participated in about three calls with Sullivan and Pankey. Tr. 731. Pankey and Montanino spoke on the phone without Sullivan at least once. Tr. 731. At some point before Pankey made his second investment, Montanino told Pankey that his "role" at American Private Equity would be as the manager of Calibourne Capital Management.[20] Tr. 733.

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[20] Pankey "was unclear about what [Montanino's] role was" with American Private Equity. Tr. 733, 855. Pankey "believe[d]" Montanino "had some role, [because] his e-mail or V card

With regard to this latter point, Montanino testified that in May 2010, Sullivan approached him knowing that Montanino was considering reconstituting Calibourne. Tr. 1528-29. According to Montanino, he did not want to enter into another venture with Sullivan because of the way things had transpired with American Private Fund I. Tr. 1528-29. If, however, Sullivan were willing to make a significant investment in Calibourne while allowing Montanino to run it, Montanino "felt comfortable enough to do another venture with him." Tr. 1529. Montanino opined that while Sullivan had shown that he could not manage money, he had also shown that he could raise money. Tr. 1551. Montanino thus felt that he was hitching his horse to Sullivan's money-raising wagon instead of his money-managing wagon.

As eventually constituted, Montanino was installed as Calibourne's manager and owner of half of the firm's Class A interests. Resp. Ex. 5 at 4, 34. American Private Equity was granted the other half of the firm's Class A interests. *Id*. at 34.

Montanino's plan for Calibourne was based on research that led him to believe that a financial advisory firm was worth between one and three percent of the assets it had under management. Tr. 1547. Thus, if he wanted to buy a firm with $100 million under management, he would have to raise about $1.5 million. Tr. 1547. Montanino proposed instead to acquire assets under management by recruiting established investment advisers who already possessed a book of clients, with the hope that the advisers would bring their clients with them. *See* Tr. 1547-50; *see* Resp. Ex. 128. Calibourne would thus only need to pay the advisers a bonus and salary and would not need to purchase an entire investment management company. *Id*. Using one example, Montanino suggested that if Calibourne paid a newly-recruited adviser $15,000 per month for three months, they would spend $45,000 to obtain $30 million in assets under management. Tr. 1550; *see* Resp. Ex. 128. On that basis, if Sullivan could raise $5 million, Montanino posited that it would be a simple matter to acquire $350 million in assets under management. Tr. 1550.

Montanino opined that advisers who wished "to go independent" in order to increase "their payout" faced the daunting prospect of having to pay for legal and accounting services and for office space. Tr. 1552-55. Through Calibourne, Montanino proposed providing advisers the payout they were seeking, office space, and compliance services. Tr. 1553. Montanino then planned "to transition 25 percent of" the assets under management to American Private Fund II, which was Calibourne's "proprietary hedge fund."[21] Tr. 1554; *see* Resp. Ex. 3; Div. Ex. 56 at

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had identified him[] as either an employee or partner or something that said American Private Equity. That V card wasn't specific with respect to a title." Tr. 733. Later, he clarified that what he saw was a signature block in an email. Tr. 887. Oddly, he said he saw this email in 2011, Tr. 886, 887, which would have been after his first two investments and possibly after his third investment. Pankey conceded that Montanino never claimed to be a partner in American Private Equity. Tr. 855.

[21] According to Montanino:

> The reason that was important was twofold. Number one, on a valuation metric for business that I had stated before, it is one to

35. At some point, the strategy would culminate in the sale of Calibourne to a larger investment firm for a profit. Tr. 745; *see* Div. Ex. 56 at 36.

Pankey verified that Montanino had previously worked at Fisher Investments, Tr. 742-44, and then invested $500,000 in American Private Equity in June 2010 because he "believed that Calibourne as a business model had a high likelihood of success." Tr. 744; *see* Tr. 849-50 ("I thought it was a great business model. It is one that made a lot of sense to me . . . . I thought it had some real advantages"). Knowing what Fisher Investments paid to acquire new accounts, Pankey thought the numbers Sullivan gave him were plausible. Tr. 746.

Pankey expected that his second investment would go toward Calibourne formation expenses. Tr. 737, 747. He did not, however, have a "specific understanding" of how those funds would be used. Tr. 739. He also understood, based on having read American Private Equity's prospectus, that it would invest in other ventures, in addition to Calibourne. Tr. 740.

At the time he invested, Pankey assumed that in his role at Calibourne, Montanino would be compensated and that American Private Equity would fund that salary.[22] Tr. 860-61. He also expected that American Private Equity's rent would be paid out of fund assets. Tr. 861.

Pankey made his final investment, in the amount of $100,000, in March 2011. Tr. 796; *see* Div. Ex. 66. Between his second and third investments, Pankey and Sullivan discussed a spreadsheet which contained information about numerous investment advisers in California. Tr. 779-80. Sullivan told Pankey that "they had virtually visited every . . . retail bank in California," spoken to advisers, and created a database with pertinent information about the advisers with whom "they" had spoken. Tr. 779-80. Montanino was not present during this discussion. Tr. 781.

Sullivan also sent Pankey numerous emails containing investment materials to be provided to recruited financial advisers. Tr. 772. Among these was a December 2010 email

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> three percent of assets management. And if you -- and a significant portion of hedge fund assets or private equity investments to that overall pool, the business is significantly valued higher. It is an order of magnitude. It is tenfold because those assets are much more profitable A, and B, they are much more sticky. Once people are invested in those assets, typically they are there for a while and they are higher revenue producing assets and they are just worth more.

Tr. 1554-55; *see* Div. Ex. 56 at 35.

[22] During the hearing, Pankey testified that as a partner, Montanino should not have taken a salary. Tr. 868-69. Pankey agreed, however, that as an officer of Calibourne, Montanino was entitled to compensation. Tr. 871.

through which Sullivan conveyed that Calibourne was making progress in relation to a number of tasks he and Pankey had discussed. Tr. 777, 830.

Sullivan attached the American Private Equity Marketing Brochure to the December 2010 email. Tr. 773-75; Div. Ex. 56. Under the heading "our team," the Marketing Brochure contained the language related to Montanino's biography that the parties addressed with Whatley.[23] *See* Tr. 774-75; Div. Ex. 56 at 40.

The Marketing Brochure also contained certain language with which the Division takes issue. Specifically, the Marketing Brochure provided that, using the approach and figures Montanino discussed, *see* Div. Ex. 56 at 35, 37, American Private Equity planned to raise $5 million and "Company Management believes that American Private Equity, LLC will become profitable very quickly and may only be in a cash flow negative position for 12 months or less," *id*. at 36. The brochure further said that American Private Equity "aim[ed] to purchase between $300-400 Million in financial assets within the first year of closing of capital raise." Div. Ex. 56 at 37. The Marketing Brochure also provided that "if goals are achieved, Calibourne . . . will be an attractive candidate for acquisition" at a sales price of between $35 and $52 million "at current valuation metrics." *Id.* at 39. It further provided that "[i]f management can generate above average market returns, the value could rise" up to $70 million. *Id*. To substantiate its projections, the Marketing Brochure included five examples of hedge funds that were acquired for between 9.1% and 17.5% of assets under management. *Id*.

During this period between his second and third investments, Pankey asked Sullivan for an accounting. Tr. 781-82. Sullivan "put [Pankey] off," although not "in a way that . . . particularly raise[d] any concerns" for Pankey. Tr. 782. At that point, Pankey did not know whether Calibourne had books and records. *Id.*

In February 2011, Sullivan emailed Pankey to report that Calibourne's website had "launched." Div. Ex. 67. Sullivan also gave Pankey log-in information for the website. *Id*. Using this log-in information, Pankey was able to log-on to Calibourne's site. Tr. 785-86; *see* Resp. Ex. 200. The bottom right corner of the site contained links to Charles Schwab and Fidelity, who purportedly provided custody services. Tr. 787; *see* Resp. Ex. 200. Based on what Sullivan told him, Pankey understood that as of February 2011, Calibourne's Charles Schwab and Fidelity "platforms had been established." Tr. 787-88.

Sullivan emailed Pankey on March 2, 2011, to say that "[w]e have achieved almost every milestone we have aimed for." Div. Ex. 147A at 1; Tr. 788-89. Pankey discussed Calibourne's milestones around this time with Sullivan over the phone. Tr. 789-90. Montanino participated in at least one of the calls Pankey had with Sullivan during this time. Tr. 790, 1272.

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[23] In addition to Montanino's biography, the "our team" section of the brochure contained biographies for Troy Gordon and Brandon Tafurt. Div. Ex. 56 at 40-41. Under the heading "investment advisory committee biographies," the brochure included biographies for Sullivan, Bertram Witham, and Joseph Goodman. Div. Ex. 56 at 42-44.

Pankey understood that moving forward, Calibourne would necessarily have to offer signing bonuses to advisers in order to induce them to leave their current positions. Tr. 792-93. Based on conversations with Sullivan and Montanino, Pankey knew that Calibourne needed capital in order to provide those bonuses. Tr. 793-94. Pankey testified that he made clear to Montanino and Sullivan over the phone that he expected his third investment to be used to recruit advisers. Tr. 795-97. He also testified that he would not have made a third investment if he had "not had a common understanding with Mr. Sullivan and Mr. Montanino" that his "third investment would be used" to fund signing bonuses for advisers. Tr. 798-99, 823. Pankey believed Montanino and Sullivan knew he wanted his money spent on recruiting because recruiting was the theme of the conversations. Tr. 801. Pankey said that if he had "heard some confusion or dissension or lack of agreement," he "would have perceived it." Tr. 801. He conceded, however, that Montanino never told him that his third investment would be used to recruit advisers. Tr. 877-78.

According to Pankey, before he made his final investment, Montanino had been an active participant in three or four phone calls. Tr. 879-80. His participation, however, came in the form of describing Calibourne's business model and the ways he planned to execute it. Tr. 880. Montanino essentially confirmed this latter point, saying that he was "very clear with Mr. Pankey, [that] American Private Equity was the distributor of his cash" and that Montanino "merely was running Calibourne." Tr. 1274.

Montanino explained that from November 2010 to March or April 2011, he was in New York caring for his mother, who was terminally ill. Tr. 1541, 1569; *see* Div. Ex. 61 at 2, 10. He thus testified he only spoke to Pankey once during this period. Tr. 1272.

As it happened, this time period roughly coincided with a decline in Sullivan's health and behavior. According to Montanino, Sullivan developed a drug and alcohol problem in the fall of 2010 after contracting diverticulitis. Tr. 1668-69. Montanino thus began to lose confidence in Sullivan. Tr. 1669; *see* Tr. 1269.

Sarah Lindsey, who worked on some marketing projects for Calibourne, corroborated Montanino's observations. She testified that by early 2011, Sullivan had become increasingly erratic. Tr. 1047-48. Jeffrey Tilem, an investor discussed below, also witnessed Sullivan's erratic behavior in January 2011. *See* Tr. 1328-29.

During this same period, American Private Equity's finances deteriorated. *See* Tr. 1261-63. Sullivan had difficulty paying the fund's bills and had to prioritize among its creditors. *See* Div. Ex 61 at 5; Tr. 1266-67. By April 2011, Montanino advised David Evanson, who provided editing services, to quickly cash a check Sullivan had given him because money was "very tight" at American Private Equity. Tr. 1268-69; Div. Ex. 78 at 2.

On March 22, 2011, Pankey made his third investment in American Private Equity. *See* Div. Ex. 66. On that same day, an investment adviser named Carlos Sanchez signed a letter of intent with Calibourne. *See* Resp. Ex. 128. Sanchez's letter provided that he would start work on May 1, 2011. *Id.* at 3. Sanchez was initially contacted by Brandon Tafurt, who generated leads, and later by Troy Gordon, whose job was to follow up on leads Tafurt generated. Tr.

1541-42, 1564. Shortly after Sanchez signed the letter of intent, Sullivan notified Pankey by email. Tr. 835.

Pankey's $100,000 investment was credited to American Private Equity's bank account on March 24, 2011. Div. Ex. 17C-3 at 3. This brought the account balance to $100,232.93. *Id.* On April 1, 2011, a deposit of $30,000 was credited to the account bringing the balance to $130,232.93. Div. Ex. 17C-3 at 6. American Private Equity issued Montanino an $11,000 check on April 6, 2011, which he immediately deposited. Div. Ex. 17C-3 at 8; Div. Ex. 17C-4 at 8.

Sullivan passed away later in April 2011. Tr. 1286. As a result of Sullivan's death, Sanchez did not begin working with Calibourne. *See* Tr. 835.

In May 2011, Montanino phoned Pankey to report Sullivan's death. Tr. 806. During the conversation, Montanino told Pankey that no advisers had been signed by Calibourne. Tr. 807. He also said that because he was not aware of how American Private Equity's finances worked, he did not know what had happened to the $100,000 Pankey invested in March 2011. Tr. 807. This surprised Pankey because he thought Montanino had a role in American Private Equity. Tr. 807, 812. Montanino also said that Calibourne lacked sufficient funds to continue and asked Pankey for more money. Tr. 809-10. Pankey and Montanino then exchanged emails in which Montanino reiterated that he was not employed by American Private Equity and had little knowledge about its finances. Tr. 811-12; *see* Div. Ex. 91.

Pankey and Montanino exchanged emails in June in which Pankey expressed his concern that Sullivan's brother Sean, who was the executor of Sullivan's estate, had not responded to his calls. Tr. 815-21; Div. Ex 111. Being unable to contact Sean Sullivan, Pankey asked Montanino for help. Div. Ex. 111. Pankey felt Montanino "was . . . very forthcoming" during this period. Tr. 821.

In the end, Pankey never received an accounting from American Private Equity or Calibourne. Tr. 822. At some later point, a receiver was appointed for American Private Equity. *See* Tr. 823-24. In March 2013, the receiver returned $30,000 to Pankey.[24] Tr. 824.

During the 18-month period from November 2009 until Sullivan's death, Montanino participated in three to seven phone calls with Sullivan and Pankey. Tr. 852, 1273. During that same period, Pankey spoke to Sullivan about fifty times and exchanged about ten emails. Tr. 852-53. Pankey did not exchange emails with Montanino until after Sullivan died. Tr. 852-53.

C. Jeffrey Tilem invests $50,000 in American Private Equity.

Jeffrey Tilem, who owns and runs a hardware store in Los Angeles, invested $50,000 in American Private Equity in January 2011. Tr. 1303-04. Tilem's first contact with Sullivan occurred in October or November 2010 when Sullivan cold-called him. Tr. 1309. Before Tilem

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[24] According to Pankey, American Private Equity had approximately thirteen investors. Tr. 824.

invested, he and Sullivan spoke about six times and exchanged "many, many e-mail[s]." Tr. 1309. Tilem also met with Sullivan in person three times. Tr. 1310-11. Tilem did not speak to Montanino until after he invested. Tr. 1310.

Before Tilem invested, Sullivan told Tilem that he (Sullivan) was running a hedge fund and that investing in it would be risky, but that returns would be "great." Tr. 1313. Sullivan also said that his fund would invest in publicly traded companies. Tr. 1313-14.

In January 2011, Sullivan sent Tilem an email containing the American Private Equity Marketing Brochure Sullivan had sent to Pankey in December 2010. Tr. 1315-16; *compare* Div. Ex. 182 at 2-42, *with* Div. Ex. 56 at 4-44.[25] To Tilem, the "our team" section of the brochure, which included biographies for Montanino, Tafurt, and Gordon, "represented the people who" were "affiliated" with Sullivan and "who made up American Private Equity." Tr. 1317. Using the internet, Tilem researched every person listed in the brochure and determined that they "appeared to [be] . . . legitimate people." Tr. 1318. Tilem, however, did not speak to any of the "team" members at that time. Tr. 1318.

Although Tilem placed no more weight on Montanino's biography than any other person's, Tr. 1318, Montanino's former employment at Fidelity mattered to Tilem because of the trust he placed in people who worked for Fidelity, Tr. 1320. The fact Montanino previously worked at Fidelity thus "created credibility" for Tilem. Tr. 1320-21.

Also in January, Sullivan sent Tilem an email with the subject line "Login for website development." Div. Ex. 59. In the email, Sullivan provided a user name and password for "our great development." *Id*. The great development was the website "calibourne-dev.cog1.net." *Id*. The "cog1" in the address refers to Cog1, "an interactive design firm in San Francisco" that designed Calibourne's website. Tr. 1005.

Tilem testified that he probably attempted to log onto the site. Tr. 1323. He remembered seeing what was earlier identified as an image of Calibourne's website, *see* Resp. Ex. 200, but stated that the image was from "a really nice brochure" or "magazine type pamphlet," Tr. 1324-25.

In discussing Tilem's possible investment, Sullivan told Tilem that the minimum investment was $100,000. Tr. 1329. After Tilem said he could not invest that amount of money, Sullivan asked what Tilem could afford. Tr. 1329. Tilem responded that he could afford $25,000 or $50,000. Tr. 1329. Sullivan then told Tilem that he could make a one-time exception and accepted $50,000. Tr. 1330.

As noted, Tilem invested in January. On the day he invested, Tilem noticed that, in contrast to his previously calm and professional demeanor, Sullivan was agitated. Tr. 1328-29. To Tilem, Sullivan seemed overly concerned about the money being wired. Tr. 1328-29. As a result, Tilem immediately experienced remorse and a desire to reacquire his money. Tr.

[25] The only difference between the brochures is that one is in black and white, *see* Div. Ex. 56 at 4-44, and one is in color, *see* Div. Ex. 182 at 2-42.

1330-31. This feeling was exacerbated when he was forced to pay certain fees after having been told that he would not have to do so. Tr. 1331.

Within a month, Sullivan asked Tilem to invest again. Tr. 1332. Over the phone, Sullivan said "it would be the best investment opportunity of a lifetime, and" Tilem was "young and [could] afford to put money at risk." Tr. 1332. Evidencing desperation, Sullivan asked for $50,000 and after Tilem declined, Sullivan asked for $25,000. Tr. 1333. Tilem declined to invest any additional money. Tr. 1333. After Sullivan asked for $10,000, Tilem said he would not invest anything else. Tr. 1333.

At some point in April or May, Tilem phoned Sullivan because Sullivan's constant stream of emails had ceased. Tr. 1334. He then learned that Sullivan had died. Tr. 1334. This led Tilem to attempt to contact Sean Sullivan. Tr. 1334-35. Having no success in reaching Sean Sullivan, Tilem contacted Montanino. Tr. 1335. Through a series of meetings and email exchanges, Tilem concluded that Montanino was polite, "seemingly forthcoming, and . . . responsive to . . . questions and . . . seemed to genuinely care." Tr. 1343-44. During discussions, Montanino confirmed that Tilem's money was gone. Tr. 1345.

As is relevant to this matter, Tilem confirmed that he never spoke to Montanino before he invested. Tr. 1372. All representations about American Private Equity were made through Sullivan or a third party Tilem could not identify. Tr. 1372. Finally, Tilem testified that he never wrote Montanino a check and was never Montanino's client. Tr. 1373.

D. American Private Equity paid Calibourne's expenses.

In the OIP, the Division alleged that $485,000 was raised from investors in American Private Equity based on American Private Equity's planned investment in Calibourne. OIP at ¶ 34. Continuing, the Division alleged that between July 2010 and April 2011, American Private Equity invested only $33,515 in Calibourne. *Id.*; *see id.* at ¶ 42. It thus alleged that American Private Equity failed to provide Calibourne with "enough funding to execute [its] proposed business plan." *Id.* at ¶ 37.

The evidence presented during the hearing told a different story. According to Montanino, because Sullivan controlled American Private Equity, Sullivan could determine how to allocate American Private Equity's investment funds. Tr. 1566-67. Part of the way Sullivan and American Private Equity invested in Calibourne was by directly paying Calibourne's bills. *See* Tr. 165-70. And, in fact, a number of documents in the record reflect such payments.[26]

Because Sullivan was friends with an employee of Cog1, he hired Cog1 to design Calibourne's website. Tr. 1007, 1582-83. Sarah Lindsey was employed by Cog1 and worked on

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[26] The Division has seemingly given up the fight regarding whether American Private Equity failed to fund Calibourne. It does not dispute in post-hearing briefing Montanino's claim that American Private Equity partly invested in Calibourne by paying Calibourne's bills. It also does not assert that paying Calibourne's bills was an improper method of investing in Calibourne.

the project for several months in 2010. Tr. 1005-06, 1008. Part of the project involved a photo shoot, the purpose of which was to develop photos for Calibourne's website. Tr. 1009-12. For this work, American Private Equity paid Cog1 $39,000 in June 2010. Resp. Ex. 143. American Private Equity made payments to other entities related to the photo shoot, *see* Tr. 1587-90, totaling $10,875, *see* Resp. Exs. 144, 190, 191. American Private Equity separately paid Ms. Lindsey $3,450 in October 2010 for other work she did for Calibourne. Tr. 1579-80; Resp. Ex. 134. It also paid her $4,050 in April 2011. Div. Ex. 17C-4 at 12.

American Private Equity paid Calibourne's rent. Tr. 1590-91. Because American Private Equity and Calibourne were co-located in adjacent offices, payments to the lessor would have covered the rent for both entities. Tr. 1591. In total, American Private Equity spent approximately $76,000 on rent from July 2010 to April 2011. *See* Resp. Exs. 147-153. Allocating half that amount to Calibourne amounts to approximately $38,000 spent on Calibourne's rent.

Montanino hired David Evanson to edit Calibourne's promotional materials. Tr. 1581; *see* Resp. Ex. 137 (invoice). American Private Equity wrote Evanson four checks for a total of $9,833. *See* Resp. Exs. 138-141.

The record contains copies of checks totaling $24,600 made payable to Troy Gordon on American Private Equity's account. Resp. Ex. 123. According to Montanino, Gordon first worked for American Private Equity and moved to Calibourne in approximately July 2010. Tr. 1564-65. About $20,000 of the checks were thus paid to Gordon after he moved to Calibourne. *See* Resp. Ex. 123.

American Private Equity paid Brandon Tafurt $30,000 in the summer of 2010. Tr. 1575-76; Resp. Ex. 130. It also paid $6,500 to Sean Sullivan. Resp. Ex. 132. Montanino testified that Sean Sullivan and Tafurt were Calibourne employees at the time. Tr. 1576-1578.

Montanino also testified that Sullivan hired Benchmark Law Group to prepare formation documents for Calibourne and American Private Fund II. Tr. 1592-94. Two invoices support this testimony. Resp. Exs. 193, 194. In July 2010, American Private Equity paid $10,000 to Benchmark. Resp. Ex. 155.

Montanino estimated that American Private Equity paid him $18,500 before he reconstituted Calibourne and $71,000 in connection with his work with Calibourne. *See* Resp. Ex. 122. These figures are roughly consistent with the Division's evidence.[27] *See* Div. Ex. 181C (reporting respective aggregate amounts of $18,500 and $77,870).[28]

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[27] According to a series of checks he submitted, Montanino received $15,500 between December 2009 and May 2010, and $52,000 thereafter. *See* Resp. Ex. 113.

[28] These figures represent $18,500 paid before July 7, 2010 and $77,870 paid on or after that date. *See* Div. Ex. 181C. They do not include two payments totaling $22,015, paid directly to Calibourne. *Id.*

Based on the foregoing, American Private Equity provided nearly $250,000 to fund Calibourne's operations.[29]

By way of context, Pankey invested $500,000 on June 29, 2010. *See* Div. Ex. 181B at 1-2. Between July 6, 2010, and July 19, 2010, American Private Equity transferred $343,000 to Sullivan. *Id.* at 2. This included three wires totaling $31,000 on July 6, 2010, and a $286,000 wire transfer on July 7, 2010. *See* Div. Ex. 17A-1 at 1-2. Also in July, American Private Equity issued Montanino three checks in the aggregate amount of $17,000.[30] Div. Ex. 17A-1 at 2, 5, 10. Sullivan received $12,000 in August, $2,300 in September, $16,000 in October, $18,500 in November, and $11,500 in December. *Id.* at 11, 13, 21, 27, 32, 33. American Private Equity thus transferred over $400,000 to Sullivan during the last six months of 2010. The Division did not investigate what Sullivan did with those funds. Tr. 994.

Those American Private Equity documents in the record that mention Montanino describe him as an officer of Calibourne and sometimes as a Managing Director and Lead Portfolio Manager for American Private Fund II.[31] *See* Div. Ex. 56 at 40; Div. Ex. 147A at 39; *see also* Resp. Ex. 14 at 3. Although Montanino used an American Private Equity email address, *i.e.*, one with an "apequity.com" suffix, in those emails, his signature block identified him as being affiliated with American Private Funds. *See* Div. Ex. 48 at 1; Div. Ex. 53A at 1; Div. Ex. 70 at 3; Div. Ex. 154A at 2.

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[29] It also paid roughly $22,000 directly to Calibourne. *See* Div. Ex. 181C.

[30] A third check was issued in July but was not deposited until August. *See* Div. Ex. 17A-1 at 10.

[31] The stock market analysis that Montanino prepared in late 2009 or early 2010 is emblazoned with the name American Private Funds. Div. Ex. 19B at 1. It lists Montanino's name under the caption "investor relations." *Id.* at 15.

ISSUES

I. With respect to the Yoos, did Montanino violate:
   (A) the antifraud provisions of the Securities Act or Exchange Act?
   (B) Section 206 of the Advisers Act?

II. With respect to Pankey and Tilem, did Montanino violate:
   (A) the antifraud provisions of the Securities Act or Exchange Act; or
   (B) the Advisers Act?

III. Did Montanino violate the Advisers Act with respect to American Private Equity?

DISCUSSION AND CONCLUSIONS OF LAW

I. Legal Principles

The OIP charges Montanino with willful violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. It further alleges that he willfully violated subsections (1), (2), and (4) of Section 206 of the Advisers Act and Rule 206(4)-8 thereunder. Finally, the OIP alleges that Montanino aided, abetted, and caused American Private Equity's primary violations of Section 206(1) and (2) of the Advisers Act, Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Section 17(a) of the Securities Act provides that:

> It shall be unlawful for any person in the offer or sale of any securities . . . by the use of any means or . . . communication in interstate commerce or by use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a). In order to demonstrate liability under paragraph (1), the Division must show that Montanino acted with scienter. *John P. Flannery*, Securities Act Release No. 9689, 2014 SEC LEXIS 4981, at *31 (Dec. 15, 2014). Liability under paragraphs (2) and (3) can be predicated on a showing of negligence.[32] *Id.*

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[32] The fact that liability under paragraphs (2) and (3) can be based on negligence is largely academic in this matter. The Division's entire presentation, from the OIP to post-hearing

Section 10(b) of the Exchange Act makes it:

> unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails. . .
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). Rule 10b-5 makes it:

> unlawful for any person, directly or indirectly . . .
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5. To demonstrate liability under Section 10(b), the Division must show that Montanino acted with scienter. *Aaron v. SEC*, 446 U.S. 680, 691 (1980). Likewise, "[l]iability under all three subsections" of Rule 10b-5 "requires a showing of scienter." *John P. Flannery*, 2014 SEC LEXIS 4981 at *30. "[O]nly conduct that is itself manipulative or deceptive violates Rule 10b-5." *Id*. at *38-39.

The Division has also charged Montanino with violating Advisers Act Section 206(1), (2), and (4) and Rule 206(4)-8 thereunder. Subsections (1), (2), and (4) of Section 206 make it:

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briefing has been based on assertions that Montanino acted with scienter. In post-hearing briefing, the Division has done nothing more than note that negligence is a sufficient predicate for finding liability under some of the provisions at issue. *See* Div. Brief at 48, 50 n.20. Negligence is thus not at issue. *See SEC v. Ginder*, 752 F.3d 569, 576 (2d Cir. 2014); *John Thomas Capital*, Securities Act Release No. 9703, 2015 SEC LEXIS 257, at *3 (Jan. 20, 2015) ("the Commission (like any other administrative agency) is not obliged to independently sift through the record to identify and develop arguments that a party fails to advance with clarity").

> 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). Liability under subsection (1) of Section 206 requires a showing of scienter. *See Vernazza v. SEC*, 327 F.3d 851, 859-60 (9th Cir. 2003); *SEC v. Steadman*, 967 F.2d 636, 641 & n.3 (D.C. Cir. 1992). A showing of negligence, however, is sufficient to establish a violation of subsections (2) and (4).[33] *Vernazza*, 327 F.3d at 860; *Steadman*, 967 F.2d at 643 n.5, 647.

Section "206 establishes 'federal fiduciary standards' to govern the conduct of investment advisers." *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) (quoting *Santa Fe Indus. v. Green*, 430 U.S. 462, 471 n.11 (1977)). Investment advisers must therefore fully disclose all material facts and "employ reasonable care to avoid misleading [their] clients." *Montford and Co*., *Inc*., Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, at *50 (May 2, 2014).

Advisers Act Rule 206(4)-8 provides:

> (a) Prohibition. 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 to a pooled investment vehicle to:
>
> (1) Make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading,

[33] *See supra*, note 32.

> to any investor or prospective investor in the pooled investment vehicle; or
>
> (2) Otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

II. Montanino violated the Advisers Act with respect to the Yoos, but not the antifraud provisions of the Securities Act or the Exchange Act.

A. Threshold issues

The Division alleges that Montanino deceived and defrauded the Yoos before and after they invested and that his acts and omissions give rise to liability under the Securities Act, Exchange Act, and Advisers Act. These allegations regarding the Yoos' investment raise a threshold question of whether the mails or other instrumentalities of interstate commerce were used in connection the acts Montanino allegedly committed. The issue is relevant because Ms. Yoo and Montanino agreed that prior to February 26, 2010, Ms. Yoo only communicated with Montanino in person.

The Division does not address this issue with respect the Advisers Act. With respect to Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, it says that "Montanino's use of phone and e-mail to defraud [Ms.] Yoo . . . satisfies the interstate commerce requirement." Div. Brief at 48 n.19. But, the first relevant email or phone call to Ms. Yoo from Montanino occurred on April 13, 2010. Div. Ex. 35 at 1. This email could not have induced Ms. Yoo's investment forty-six days earlier.

I nonetheless find that jurisdictional means were used with respect to the Yoos' investment. The mails and interstate commerce element has always been "broadly construed." *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 861, 865 (S.D.N.Y. 1997). It is thus the case that in order to satisfy this element, the Division "'need not'" show that a respondent's use of jurisdictional means is "'central to the fraudulent scheme.'" *Franklin Sav. Bank of New York v. Levy*, 551 F.2d 521, 524 (2d Cir. 1977) (quoting *United States v. Cashin*, 281 F.2d 669, 673-74 (2d Cir. 1960)). Rather, that use "may be entirely incidental to'" the scheme. *Id*. As a result, use of the mails to distribute securities obtained as part of a fraudulent scheme is sufficient to satisfy the use of the mails element. *United States v. Brown*, 555 F.2d 336, 340 (2d Cir. 1977).

Here, within a few hours of signing her subscription agreement, Ms. Yoo visited Fidelity Investments and initiated a transfer of $299,000 to JPMorgan Chase for credit to American Private Fund I. Tr. 299-300; *see* Div. Ex. 20 at 3-4. Although Ms. Yoo could not remember how she obtained the wire transfer instruction, based on the timing of her visit to Fidelity and the fact the instructions concerned wiring her money to the escrow account American Private Fund I had with JPMorgan Chase, it is reasonable to infer that Montanino gave her the instruction. *See* Div. Ex. 20 at 4. Use of the wires to affect the transfer of the Yoos' funds satisfies the instrumentalities of interstate commerce requirement.

B. Montanino violated Section 206(1) and (2) of the Advisers Act

Having crossed this threshold, I move on to the Division's allegations concerning the Advisers Act. Section 202(a)(11) of that Act defines the term "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." 15 U.S.C. § 80b-2(a)(11). Montanino falls within the terms of this definition.

First, the Division met the compensation requirement. Sullivan paid Montanino and told Montanino he would "take care of" Montanino "[i]f the fund did well." Tr. 1411. This expectation of compensation upon success is enough. *SEC v. Fife*, 311 F.3d 1, 11 (1st Cir. 2002). Second, the Yoos were Montanino's investment clients. Although it is true that the client of an adviser to an investment fund is generally only the fund itself, *Goldstein v. SEC*, 451 F.3d 873, 878-883 (D.C. Cir. 2006), Montanino did not function solely as an adviser to American Private Fund I. Instead, based on his personal friendship with the Yoos, he made several exceptions for them and promised to personally manage their money. *See* Answer at ¶ 13. He was thus their investment adviser and owed them a fiduciary duty.

The Division says Montanino violated Advisers Act Section 206(1) and (2) because he intentionally defrauded the Yoos before and after they invested.[34] Div. Brief at 43-44. My determination that Montanino's testimony was more reliable than Ms. Yoo's testimony—a determination that was partly based on my assessment of Montanino's demeanor—largely defeats the Division's claim that Montanino defrauded the Yoos before they invested.

Contrary to the Division's claims, Montanino gave the Yoos their subscription agreement and offering memorandum before they invested. Montanino told the Yoos he would personally manage their investment because that is what he thought was going to happen. While it is true that he did not tell the Yoos that Sullivan could trade on margin, Montanino relied on Sullivan's statement that Montanino would run the fund. Montanino had no intention of trading on margin and did not think he needed to address the issue with the Yoos. In short, Montanino did not intentionally defraud the Yoos before they invested.

Other than noting that negligence alone is sufficient to establish a violation of Section 206(2), Div. Brief at 43 n.18, the Division does not argue that Montanino's conduct amounted to negligence. It has never contended that Montanino accidentally failed to disclose investor materials before the Yoos invested or that he accidentally failed to tell them about Sullivan's actions. And I have found in any event that Montanino did not fail to give the Yoos the investor documents and did not accidentally fail to disclose Sullivan's actions.

The Division might have argued that Montanino was negligent in not confirming that he had the authority to trade in the account of American Private Fund I. But it has never alleged or

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[34] The Division does not argue that Montanino violated Advisers Act Section 206(4) with respect to the Yoos. *See* Div. Brief at 42-44.

argued this failure could amount to negligence and presented no evidence that it would have been unreasonable for Montanino to rely on Sullivan's representation that Montanino could run the fund. Having failed to argue negligence or present evidence about the appropriate standard of care for someone in Montanino's position, the Division is foreclosed from doing so now. *See SEC v. Ginder*, 752 F.3d 569, 576 (2d Cir. 2014).

Montanino's conduct after the Yoos invested is another matter, however. The "'fundamental purpose of [the Advisers Act is] to substitute a philosophy of full disclosure for the philosophy of caveat emptor.'" *Montford*, 2014 SEC LEXIS 1529 at *51-52 (quoting *SEC v. Capital Gains Research Bureau, Inc*., 375 U.S. 180, 186 (1963)). By his own admission, Montanino knew by March 24, 2010, that Sullivan was trading recklessly with the Yoos' investment. Tr. 1225-26. Montanino was no longer in control. At that point, his fiduciary responsibility obligated him to fully disclose to the Yoos the departures from what he told them before they invested. *See Capital Gains Research Bureau*, *Inc*., 375 U.S. at 200 ("Failure to disclose material facts must be deemed fraud or deceit within its intended meaning"). This is particularly so here because Montanino's control of the Yoos' account was the basis for their decision to invest with him.

As noted, Section 206(1) makes it unlawful "to employ any device, scheme, or artifice to defraud any client or prospective client." Montanino's month-long failure to tell the Yoos the truth falls within the terms of Section 206(1). First, "a misstatement is . . . a 'device' or 'artifice' to defraud." *John P. Flannery*, Securities Act Release No. 9689, 2014 SEC LEXIS 4981, at *58 (Dec. 15, 2014). Second, an omission by a fiduciary can amount to an untrue statement of material fact. *See SEC v. Zandford*, 535 U.S. 813, 823 (2002); *John P. Flannery*, 2014 SEC LEXIS 4981 at *32 n.31 (using "the terms 'misstatement' and 'misrepresentation' to encompass both affirmatively false statements and misleading omissions"). Third, the failure to reveal material facts constitutes fraud and deceit. *Capital Gains Research Bureau*, *Inc.,* 375 U.S. at 200.

Montanino's month-long omission similarly amounted to a violation of Section 206(2). Again, subsection (2) makes it unlawful "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." Because Montanino owed a fiduciary duty to the Yoos, his omissions regarding the management of their money were tantamount to untrue statements of material facts and were thus fraudulent and deceptive. *Zandford*, 535 U.S. at 823. Montanino's fiduciary duty turned his omissions into a continuing series of untrue statements made to the Yoos. And that series amounted to a practice or course of business. *See John P. Flannery*, 2014 SEC LEXIS 4981 at *91 ("while not every isolated act of making, drafting, or employing a misstatement will qualify as a 'practice' or 'course of business' with a deceptive 'effect . . . on member[s] of the investing public,' an individual's repeated use of a misleading statement may satisfy that standard").

I take as true Montanino's representation that he acted in what he thought was the Yoos' best interest. He testified that when he realized what was happening, he confronted Sullivan and Sullivan responded that the Yoos' investment was locked-up for two years. Tr. 1477-78. Montanino also said he felt that he faced a dilemma because he believed that if he told the Yoos what he knew, they would confront Sullivan and he would refuse to redeem their investment. Tr.

1478-79. Based on his knowledge of Sullivan, he decided it would be in the Yoos' best interest not to inform them and to instead "work on [Sullivan] to get him to . . . redeem their money." Tr. 1479. Indeed, after pressing Sullivan, Montanino followed him to Florida and initially convinced Sullivan to do just that. Tr. 1480-82.

Montanino's subjective motivation notwithstanding, the fact remains that he was obligated to tell the Yoos the facts once he realized the basis on which they invested no longer existed. *Capital Gains Research Bureau*, 375 U.S. at 200. That he may have had "the best of motives" does not change this fact. *Id*. at 192 n.39 ("'[T]he fact that the defendant was disinterested, that he had the best of motives, and that he thought he was doing the plaintiff a kindness, will not absolve him from liability, so long as he did in fact intend to mislead.'") (citation omitted). The decision about what to do was not his to make. By failing for one month to tell the Yoos the truth, Montanino violated his fiduciary duty and, thus, subsections (1) and (2) of Section 206 of the Advisers Act.

C. Montanino did not violate the Securities Act or the Exchange Act.

The Division argues that the same pre-investment conduct that would have supported liability under the Advisers Act, shows that Montanino violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act. Div. Brief at 48-49. Again, however, my assessment of Montanino's credibility dooms the Division's position. He did not "mak[e] materially false statements and omissions to induce" the Yoos to invest. *Id*. at 48. Instead, he gave them the materials the Division alleges he failed to provide and told them the things it says he omitted.

The Division suggests that the fact Montanino did not tell the Yoos about Sullivan's trading is evidence of his intent. Div. Brief at 49. But, as is discussed above, the failure is evidence of nothing more than Montanino's good-faith belief—right or wrong—that telling the Yoos would hurt their chances of having Sullivan redeem their money. The fact Montanino sat on this information does not show that he intended to defraud the Yoos when they invested.

III. The Division failed to carry its burden to show that Montanino violated the antifraud provisions with respect to Pankey or Tilem.

A. Montanino did not defraud Pankey.

With respect to Pankey, the Division argues that Montanino violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act. Div. Brief at 48-49. Specifically, it says that he "misrepresented to Pankey the use of his final $100,000 investment." *Id*. at 48-49. The Division also argues that the American Private Equity Marketing Brochure contained "material misrepresentations and omissions, which mattered to [Pankey]." *Id*. at 49.

As the factual discussion above reveals, the bad actor in this drama was not Montanino. It was Sullivan. Montanino simply happens to be the last person standing.

1. *Montanino did not misrepresent how Pankey's third investment would be used.*

The Division's allegation regarding Montanino's final investment fails because Pankey conceded that Montanino never told him that his third investment would be used to recruit advisers. Tr. 877-78. The Division is thus left with Montanino's silence on this point while Pankey and Sullivan discussed how Pankey's $100,000 investment in Sullivan's firm, American Private Equity, would be used. But without a duty to speak, Montanino's silence is not actionable. *Overton v. Todman & Co., CPAs, P.C.*, 478 F.3d 479, 483 (2d Cir. 2007) ("A fundamental principle of securities law is that before an individual becomes liable for his silence, he must have an underlying duty to speak."). The Division has not shown that Montanino was either a fiduciary to Pankey or had a similar relationship of trust and confidence with him. Montanino is thus not liable with regard to Pankey's third investment. *See Chiarella v. United States*, 445 U.S. 222, 228 (1980) ("one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so").

2. *Montanino did not make misrepresentations in the Marketing Brochure.*

a. *The projections*

The Division's allegations about the American Private Equity Marketing Brochure ultimately also fail. The Division says there was no basis for the Brochure's "projected seven-to-fourteen fold return on investment." Div. Brief at 46. In general, arguments that forward-looking statements or projections are unreasonable play out in four ways: (1) there is clear evidence that the respondent knew that the projection could not be accomplished, *e.g.*, the respondent knew that an asset that was being relied on for the projection calculation was no longer in existence; (2) an expert testifies that the methodology or figures relied upon to make the projection were inappropriate or unreasonable; (3) past financial data for the business at issue starkly contrasted with that projected, with no reasonable explanation for the change, *e.g.*, historically there were 2% returns and a 20% return is projected without any additional information or basis; or (4) there was an inherent or obvious flaw in the projection or business model.

The Division did not produce an expert or articulate any *per se* problems with Montanino's projections. There is also no evidence that Montanino knew his projections could not be accurate. The Division's argument that the projections were baseless also does not rest on the assertion that Calibourne's business model was inherently unworkable or flawed. Indeed, the Division did not call an expert to testify about this issue. Aside from Montanino, the only person who testified about Calibourne's business model was Pankey. And he thought the model was a "great" idea that "had a high likelihood of success." Tr. 744, 849. Pankey was also the only person aside from Montanino who testified about the possible return on an investment in Calibourne. Again, his testimony supported Montanino. Pankey testified that he knew what Fisher Investments paid to acquire new accounts. Tr. 746. Based on that knowledge, Pankey thought the numbers he saw for Calibourne were plausible. Tr. 746.

Instead, the Division says there was no basis for the projections in the Marketing Brochure because Montanino:

> knew that: (1) Sullivan had made "completely reckless" trades in the American [Private] Fund earlier that year, causing the American [Private] Fund to collapse in about four months; (2) Sullivan had substance abuse problems; (3) American [Private] Equity's and Calibourne's finances were precarious; (4) American [Private] Equity's plan to make money through Calibourne depended on Calibourne's ability to sell investments in American [Private] Fund II to Calibourne's own advisory clients; and (5) to do so, Montanino and Sullivan would have to conceal American [Private] Fund's quick collapse and Sullivan's reckless trading from potential investors.

Div. Brief at 46-47.

Other than saying it is so, however, the Division does not explain why these facts make the projections baseless. True enough, Montanino knew about Sullivan's reckless trading in March 2010 in the account of American Private Fund I. But, unlike with Calibourne and American Private Fund II, Sullivan ran American Private Fund I. Although he was the most important investor in Calibourne, he did not manage it or American Private Fund II. Montanino's knowledge of Sullivan's prior reckless trading is of no consequence because Sullivan was not going to be managing Calibourne or executing trades in the account of American Private Fund II.

It is also true that Montanino knew about Sullivan's drug and alcohol problems that developed in the fall of 2010 when Sullivan had diverticulitis. Tr. 1669. Again, however, the Division does not explain what these problems had to do with Calibourne's projected future worth. *See* Div. Brief at 46-47.

The Division also fails to show how the fact that American Private Equity and Calibourne were in a precarious financial situation made the Calibourne projections unreasonable. In other words, it did not show what American Private Equity's or Calibourne's financial situation had to do with whether the Calibourne projections were baseless. It is not unreasonable that a nascent investment company would require several infusions of capital before becoming self-sustaining. Montanino admitted as much. Tr. 1607-08 ("all startup companies have cash flow issues" and "are one round financing [from] being a success or a failure"). That fact, however, does not consequently mean that the business plan for the new firm is baseless.

It may also be that Montanino's projections were baseless because a portion of American Private Equity's plan to make money through Calibourne depended on Calibourne's ability to sell investments in American Private Fund II to Calibourne's own advisory clients. But in order to reach the Division's conclusion, there would have to be evidence that the plan was unsound. Without that evidence, the Division's argument is simply a statement of its conclusion: the projection was baseless because it depended on Calibourne's ability to sell investments in

American Private Fund II to Calibourne's own advisory clients. Inasmuch as the only people to testify about Calibourne's business plan thought it was a great idea, this argument fails.

Finally, the "quick collapse" of American Private Fund I has nothing to do with the projections for Calibourne and the Division does not explain why Montanino would have to hide that collapse or Sullivan's "reckless trading" from investors in order to create a basis for the projections. The investment strategy for American Private Fund I, if there was a strategy, had nothing to do with Calibourne's model. There is no evidence that Sullivan and Montanino were using the Calibourne model when they traded in the American Private Fund I account. And Sullivan's reckless trading in the American Private I account had nothing to do with whether Calibourne could be a viable business model.[35]

b. Montanino's biography

In addition to the projections in the Marketing Brochure, the Division takes issue with Montanino's biography. Div. Brief at 47. The Division says that Montanino's biography was false because he: (1) was not "recruited" by Fidelity; and (2) did not "manage[] over $1 billion of Fidelity clients assets." *Id*. The former point, however, is not material and the latter point is partly based on a misreading of the biography.

In regard to the statement that Montanino was recruited by Fidelity, the Marketing Brochure said that he "was employed with Fidelity Investments in Santa Monica" and "was recruited to be part of a team to open that new and very high profile investor center." Div. Ex. 56 at 40; *see supra*, note 3. The initial problem with the Division's argument is that the materiality of any single statement is not considered in isolation. *See Dalberth v. Xerox Corp*., 766 F.3d 172, 187 (2d Cir. 2014). Instead, the question is whether the representations in the Marketing Brochure "'considered together and in context, would affect the total mix of information and thereby mislead a reasonable investor.'" *Id*. (quoting *Halperin v. eBanker USA.com, Inc*., 295 F.3d 352, 357 (2d Cir. 2002)). And, in context it is difficult to imagine that a reasonable investor's investment decision would be influenced by the distinction between whether Montanino was *recruited* by Fidelity or simply *hired* by Fidelity.[36]

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[35] Because a different business model was being used as compared to the past, this case is distinguishable from *SEC v. Carriba Air, Inc*., where the court found that a material omission occurred when an airline failed to disclose in its prospectus that its predecessor airline went bankrupt. 681 F.2d 1318, 1323-24 (11th Cir. 1982).

[36] The Division makes much of the fact that Montanino lied on his Fidelity job application. As the Division suggests, these lies can cast doubt on Montanino's credibility. I do not believe, however, that is it reasonable to infer, based on these lies, that Montanino defrauded people out of hundreds of thousands of dollars. It is one thing to lie in order to get a job—and I do not condone such behavior—but it is another thing entirely to lie in order to defraud people out of their savings. While both actions involve deceit in order to obtain something that would otherwise be unobtainable, defrauding someone out his or her savings amounts to stealing money from someone and lying to get a job does not. This is especially the case where, as with Montanino, the person in question performs in the job at a high level.

Indeed, the only thing Pankey cared about with respect to Montanino's previous employment with Fidelity was that his employment would, because of "relationship[s] with persons at Fidelity," allow him to "position Calibourne on the Fidelity platform in ways that . . . otherwise [might] be difficult for Calibourne to do." Tr. 827. Likewise, Tilem's concern was that Montanino had worked at Fidelity. Tr. 1320. He did not testify that he placed any weight on whether Montanino was recruited.[37] *See* Tr. 1320-21.

The Division's second point, that Montanino did not "manage[] over $1 billion of Fidelity clients assets," is partly based on a misreading of the record. First, the biography did not say Montanino managed money. It said that he "was tasked with developing financial planning strategies[] and providing investment management services." Div. Ex. 56 at 40. Second, Whatley, Montanino's former supervisor at Fidelity, thought that with the exception of the word "providing," this statement was not necessarily inaccurate. Tr. 226-27. She conceded, however, that even her disagreement about the word "providing" amounted to "a small distinction in verbiage." Tr. 227.

Montanino's biography also did not say that he "managed over $1 billion." It said that his clients had that much money under management. Div. Ex. 56 at 40. And how much money Montanino's clients actually had under management is unclear. Whatley said that it was possible that Montanino's clients during the *first part* of his tenure at Fidelity, when he was employed as a financial planning consultant, had "aggregate and net assets" of $1 billion. Tr. 200, 226. She did not say how much they had under management. And, Whatley's best guess was that during the *second part* of Montanino's tenure, when he was employed as a dedicated financial planning consultant, his "book" was worth several hundred million dollars. Tr. 195-96. It is thus entirely possible that Montanino's clients during his entire time at Fidelity had in aggregate $1 billion under management.

Even assuming the Division showed by a preponderance of the evidence that Montanino's clients had only "several hundred million dollars" in aggregate assets under management, rather than $1 billion, it nonetheless failed to show that the distinction between several hundred million dollars and $1 billion is material. The question of whether a statement is material presents a mixed question of law and fact. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). The legal aspect of the inquiry concerns determining the correct standard, to wit: whether a "reasonable investor would have viewed" a particular misstatement as "'significantly alter[ing] the "total mix" of information made available' about [the investor's] investment." *Montford and Co., Inc.*, 2014 SEC LEXIS 1529 at *53 (citations omitted). The

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[37] The test for materiality is objective. *See S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 SEC LEXIS 4691, *23 (Dec. 5, 2014). As a result, "'the reaction of individual investors is not determinative of materiality.'" *Id.* (quoting *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 SEC LEXIS 3015, at *23 (Dec. 21, 2007)). Inasmuch as, Pankey and Tilem were the only witnesses to provide any evidence about the materiality of these statements, their testimony is informative—though not dispositive—of whether the statements in the Marketing Brochure were material.

factual part of the question, like all factual matters, is necessarily susceptible to proof.[38] The Division, however, presented no evidence regarding whether the distinction between several hundred million dollars and $1 billion is material.

In this regard, it is sometimes the case that the materiality of a statement is readily apparent without the need for additional evidence to demonstrate materiality. When "misstatements are 'so obviously unimportant [or important] to a reasonable investor that reasonable minds could not differ on the question of their importance," little or no evidence beyond the misstatement itself is necessary to carry the Division's burden to show materiality. *Feinman v. Dean Witter Reynolds, Inc*., 84 F.3d 539, 540-41 (2d Cir. 1996) (discussing summary judgment on the question of materiality in the context of Section 10(b) of the Exchange Act); *see also TSC Indus.*, 426 U.S. at 450. But in a close case, such as this one, some evidence on the issue of materiality is needed. Perhaps, a reasonable investor would conclude that the distinction between several hundred million dollars and $1 billion is not material because either way Montanino's clients had a lot of money and he was responsible for providing investment services to people with a lot of money. On the other hand, a reasonable investor might conclude that $1 billion is a significant benchmark. Absent some evidence on this point, however, I am not in a position to conclude that the Division carried its burden to show that the statement in Montanino's biography was material.

B. Montanino did not defraud Tilem.

Because there was no evidence that Montanino spoke to Tilem before he invested, the Division's case with respect to Tilem's investment comes down to whether the Marketing Brochure contained material misstatements or omissions. For the reasons already stated with respect to Pankey, I find that the American Private Equity Marketing Brochure does not give rise to liability regarding Tilem's investment.[39]

IV. Montanino did not violate the Advisers Act with respect to American Private Equity.

The Division argues that Montanino was an investment adviser to American Private Equity. Div. Brief at 45. On the basis of this assertion, it says he violated Section 206(1) and (2) of Advisers Act by defrauding American Private Equity of $11,000 on April 7, 2011. *Id.* Specifically, the Division traces this $11,000 to Pankey's final $100,000 investment in American Private Equity. *Id.*

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[38] Were it otherwise, materiality could always be decided by a dispositive motion. That is not the case, however. *See In re Morgan Stanley Information Fund Securities Litigation*, 592 F.3d 347, 360 (2d Cir. 2010); *Kronfeld v. Trans World Airlines, Inc*., 832 F.2d 726, 731 (2d Cir. 1987).

[39] For similar reasons, Montanino did not aid and abet and cause American Private Equity's fraud in the Marketing Brochure. *See* Div. Brief at 50-51.

As noted, Section 206 applies to a person "who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." 15 U.S.C. § 80b-2(a)(11). Bearing this in mind, it is apparent that the Division's premise is flawed.

It is true that Montanino initially worked for American Private Equity starting in December 2009. *See* Div. Brief at 45 (stating that Montanino was employed by American Private Equity). But Montanino's roles at American Private Equity—Montanino prepared a stock market outlook for American Private Funds, Tr. 1410, *see* Div. Ex. 19B, then managed American Private Fund I—ceased on April 13, 2010, when Sullivan fired him. Even if Montanino continued to have some unnamed role with American Private Equity after April 13, 2010, and no specific evidence was presented on this point, by June or July 2010, Montanino had transitioned to running Calibourne. Any fiduciary role Montanino might previously have had as an investment adviser with American Private Equity ended prior to July 2010, before he spoke to Pankey or drafted the Marketing Brochure.

The Division says, however, that Montanino received "compensation" from American Private Equity until April 2011. Div. Brief at 45. But Montanino testified without contradiction that this "compensation" was his salary as president of Calibourne and that American Private Equity made such payments in lieu of investment. There was no evidence that these payments were made to compensate Montanino for serving as an investment adviser.

Furthermore, while it may be that Pankey was a client of Sullivan such that *Sullivan* could have been charged with violating Section 206(1) and (2), there is no basis to conclude that Pankey was Montanino's client. Indeed, even if Montanino had continued in his former role with American Private Equity in March 2011, which he did not, Pankey would not have been his client. *See Russell W. Stein*, Exchange Act Release No. 47504, 2003 SEC LEXIS 608, at *9-10 (Mar. 14, 2003) ("fund clients were clients of the investment adviser . . ., not [its] employee").

Pankey's relationship was with Sullivan and American Private Equity. Montanino had no fiduciary relationship with Pankey. American Private Equity was Sullivan's fund and as the person running that fund, Sullivan decided where and how to allocate capital. If Pankey disagreed with Sullivan's decision to allocate $11,000 to Montanino in April 2011, Pankey's complaint would properly have been directed to Sullivan, the person who ran the fund in which Pankey invested. Moreover, it is not even possible to trace the $11,000 to Pankey. On April 1, 2011, one week after Pankey invested, a $30,000 deposit was credited to American Private Equity's Account. Div. Ex. 17C-3 at 6. This brought the balance to $130,232.93. *Id*. It is thus not possible to say whether the $11,000 payment to Montanino six days later came from Pankey's $100,000 or from the other deposit.

The Division also says that Montanino violated Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder because he made material misrepresentations in the Marketing Brochure. As I have explained above, "Section 206 applies by its terms only to investment advisers, rather than associated persons of investment advisers" *Russell W. Stein*, 2003 SEC LEXIS 608 at *9. By the time Montanino prepared the Marketing Brochure, however, he was no

longer employed by American Private Equity and was not an investment adviser to American Private Equity or its clients.[40]

SANCTIONS

Although the Division requests a variety of sanctions, its request is premised on its argument that Montanino engaged in many more violations than I have determined occurred. As is discussed below, I decline to issue a cease-and-desist order, suspend or bar Montanino from the industry, or order disgorgement. Montanino is ordered to pay a civil monetary penalty of $25,000.

I. Sanction Considerations

In determining the appropriateness of any remedial sanction, I am required to consider the public interest factors set forth in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981); *see John P. Flannery*, 2014 SEC LEXIS 4981 at *138 & n.184. These factors include:

> 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.

John P. Flannery, 2014 SEC LEXIS 4981 at *138. The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. *Ralph W. LeBlanc*, Exchange Act Release No. 48254, 2003 SEC LEXIS 1793, *26 (July 30, 2003). Additionally, in conjunction with other factors, the Commission considers the extent to which the sanction will have a deterrent effect. *Peter Siris*, Exchange Act Release No. 71068, 2013 SEC LEXIS 3924, *48 n.72 (Dec. 12, 2013), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014).

The "'inquiry into the appropriate sanction to protect the public interest is . . . flexible . . . and no one factor is dispositive.'" *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 SEC LEXIS 3015, at *61 (Dec. 21, 2007) (quoting *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 SEC LEXIS 2238, at *13 (Sept. 26, 2007)). The determination of what is in the public interest "extends . . . to the public-at-large," *see Christopher A. Lowry*, Investment Company Act Release No. 2052, 2002 SEC LEXIS 2346, at *20 (Aug. 30, 2002),

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[40] The OIP alleges that Montanino had at least one other victim, referred to as "APE Investor B." *See* OIP at ¶ 36. The Division has not discussed APE Investor B in its brief, nor did it present any evidence regarding Investor B during the hearing. It has therefore waived any arguments related to this investor. *See John Thomas Capital,* Securities Act Release No. 9703, 2015 SEC LEXIS 257, at *3 (Jan. 20, 2015) ("the Commission (like any other administrative agency) is not obliged to independently sift through the record to identify and develop arguments that a party fails to advance with clarity").

aff'd, 340 F.3d 501 (8th Cir. 2003), "the welfare of investors as a class[,] and . . . standards of conduct in the securities business generally," *Arthur Lipper Corp*., Exchange Act Release No. 11773, 1975 SEC LEXIS 527, at *52 (Oct. 24, 1975).

Although the Division alleged a host of violations, I have determined that Montanino is liable for two violations arising from one course of conduct that, relative to what the Division alleged, are minor. Montanino violated Section 206(1) and (2) by failing to immediately tell the Yoos that the circumstances that led them to invest had changed. Crediting Montanino's testimony, however, his decision not to immediately inform the Yoos was not based on a desire to defraud. Tr. 1477-79. Instead, it was based on his desire to achieve what he believed was the best possible outcome for the Yoos given the circumstances. This is borne out by evidence that (1) Montanino went to Florida to try to convince Sullivan to redeem the Yoos investment; and (2) was initially successful in his attempt to persuade Sullivan. Resp. Ex. 52-54, 64 at 5.

In terms of the *Steadman* factors, Montanino's conduct was neither egregious nor recurrent. He acted wilfully in not immediately informing the Yoos, but his intent was to achieve a positive result for them.

Montanino did not make any assurances that he would not commit future violations or explain that he recognized the wrongful nature of his conduct. At the same time, he testified that he made a judgment call about the best course to follow. Tr. 1477-79. Additionally, he eventually told the Yoos and was almost successful in getting Sullivan to redeem $260,749 of the Yoos' investment. *See* Resp. Ex. 54. Given the unique circumstances of the situation surrounding his friendship with the Yoos, his loss of control over their investment, and his knowledge of Sullivan, I find it unlikely that this misconduct will recur. As a result, although Montanino's occupation in the industry would present opportunities for him to commit future violations, this factor does not carry significant weight in this case.

II. Cease-and-desist order

Section 203(k) of the Advisers Act authorizes the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" any provision of that Act or rules thereunder. 15 U.S.C. § 80b-3(k). In deciding whether to issue a cease-and-desist order, I must consider: (1) whether future violations are reasonably likely; (2) the seriousness of the violations at issue; (3) whether the violations are isolated or recurrent; (4) Montanino's state of mind; (5) whether he recognizes the wrongful nature of his conduct; (6) the recency of the violations, (7) "whether the violations caused harm to investors or the marketplace; (8) whether [he] will have the opportunity to commit future violations;" and (9) the "remedial function [a] cease-and-desist order would serve in the overall context of any other sanctions sought in the same proceeding." *Gordon Brent Pierce*, Securities Act Release No. 9555, 2014 SEC LEXIS 4544, *82-83 (Mar. 7, 2014); *Joseph John VanCook*, Exchange Act Release No. 61039, 2009 SEC LEXIS 3872, at *63 (Nov. 20, 2009), *pet. denied*, 653 F.3d 130 (2d Cir. 2011).

"Absent evidence to the contrary," a single past violation ordinarily suffices to establish a risk of future violations. *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 SEC LEXIS 98, at *102 (Jan. 19, 2001), *recon. denied*, Exchange Act Release No. 44050, 2001

SEC LEXIS 422 (Mar. 5, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002); *see id*. at 102-03 ("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"). The showing necessary to demonstrate the likelihood of future violations is "significantly less than that required for an injunction." *Id*. at *114. A determination "that a violation is egregious 'raises an inference that it will be repeated.'" *Joseph John VanCook*, 2009 SEC LEXIS 3872 at *63.

Here, a cease-and-desist order is neither necessary nor appropriate. I have already determined that future violations are unlikely and that his violation was isolated. Further, Montanino's intent was to achieve as positive a result as possible for the Yoos under the circumstances. Because of Montanino's intent and the fact that he felt he was making a judgment call in a difficult situation, I place less weight on the seriousness of his fiduciary violation and the fact that he did not expressly recognize the wrongfulness of his conduct than I would in cases with more egregious circumstances.

The Division has not argued that Montanino's failure to immediately inform the Yoos harmed the marketplace. It is also not entirely clear that his failure harmed the Yoos. There is no way to know whether, if Ms. Yoo had complained to Sullivan in March 2010, he would have held the Yoos to the two-year lock-up or would have relented. There is also no way to know whether Ms. Yoo would have immediately complained to Sullivan. Recall that even after Montanino finally told Ms. Yoo that he no longer controlled her investment account she took no immediate action. Instead, she waited until she received the May 19, 2010 account statement. Although it is possible that Ms. Yoo would have taken action on March 24, 2010, if Montanino had told her the truth then, later circumstances suggest that she would have waited until after May 19, 2010, when she concretely knew of her losses, before confronting Sullivan.

Although, Montanino will have the opportunity to commit future violations, my determination that future violations are unlikely lessens the importance of Montanino's possible opportunities to commit future violations. Finally, a cease-and-desist order would serve little remedial function "in the overall context" of this case.

Given the foregoing, I conclude that it is neither necessary nor appropriate to order Montanino to cease and desist from committing or causing violations of Advisers Act Section 206.

III. Collateral Bar

The Division requests a permanent industry-wide collateral bar against Montanino. Div. Br. at 52-54. Collateral bars are authorized by Section 203(f) of the Advisers Act in the case of any person who violates any provision of the Advisers Act. 15 U.S.C. § 80b-3(f); *see* 15 U.S.C. § 80b-3(e)(5).

In *Ross Mandell*, the Commission directed that before imposing an industry wide bar, an administrative law judge must "review each case on its own facts to make findings regarding the respondent's fitness to participate in the industry in the barred capacities." Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at *7-8 (Mar. 7, 2014) (internal quotation marks

omitted). The administrative law judge's analysis "should be grounded in specific findings regarding the protective interests to be served by barring the respondent and the risk of future misconduct." *Id.* at 8 (internal quotation marks omitted).

I have determined that Montanino committed two violations that were limited in scope. That he thought he was acting in his clients' ultimate best interest further weighs in Montanino's favor. As discussed above, I find there is little risk of future misconduct. Although I am given pause by the fact that Montanino lied on his Fidelity employment application, he was forthright in admitting his false statements and did not try to dissemble when questioned about them. Under the circumstances of this proceeding, I find that imposing a permanent collateral bar or a suspension would not comport with the statute's remedial purpose and would not be in the public interest for the reasons discussed and the public interest factors weighed above.

IV. Disgorgement

Section 203(j) and (k)(5) of the Advisers Act permits the Commission to order disgorgement, including reasonable interest, in this proceeding. 15 U.S.C. § 80b-3(j), (k)(5). Disgorgement is equitable in nature and is intended to prevent unjust enrichment and to act as a deterrent. *SEC v. First City Fin. Corp*., 890 F.2d 1215, 1230 (D.C. Cir. 1989). A disgorgement order "need only be a reasonable approximation of profits causally connected to the violation." *Montford and Co*., *Inc.,* Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, *94 (May 2, 2014) (citing *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995)). At that point, "the burden shifts to the respondent to show that the amount of disgorgement is not a reasonable approximation." *Id.* It is thus the case that "[t]he risk of uncertainty in calculating disgorgement . . . fall[s] on the wrongdoer whose illegal conduct created that uncertainty." *Id*.

Disgorgement is distinct from restitution. *Montford*, 2014 SEC LEXIS 1529 at *97. Whereas the latter is designed to recompense investors for losses, the former is designed to "to 'force[] a [respondent] to give up the amount by which he was unjustly enriched.'" *Id*. (quoting *SEC v. Commonwealth Chem. Sec., Inc*., 574 F.2d 90, 102 (2d Cir. 1978)).

The Division argues that Montanino should be ordered to disgorge $105,295.73, which includes $89,340 received from American Private Equity, plus pre-judgment interest. Div. Brief at 54. The Division's argument, however, is based on its position that Montanino is liable for a number of violations in addition to the single allegation I have sustained. Inasmuch as the Division has not presented an "approximation of profits causally connected to the violation" I determined occurred,[41] *i.e*., the failure to promptly notify the Yoos about the changes in their account, I find that it has failed to carry its burden to show that disgorgement is warranted. In other words, there is no evidence that Montanino was enriched, unjustly or otherwise, as a result of his failure to promptly notify the Yoos of the changes in their account. I therefore decline to order disgorgement.

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[41] *See Montford*, 2014 SEC LEXIS 1529 at *94.

V. Civil Penalties

Section 203(i)(1)(B) of the Advisers Act permits me to impose a civil monetary penalty in a case instituted under Section 203(k) of the Advisers Act, based simply on the determination that a respondent has violated any provision of the Advisers Act. *See* 15 U.S.C. § 80b-3(i)(1)(B). The statute sets out a three-tiered system for determining the maximum civil penalty for each act or omission. 15 U.S.C. § 80b-3(i)(2). For the time period at issue, the maximum first, second, and third-tier penalty for each violation for a natural person is $7,500, $75,000 and $150,000, respectively. 15 U.S.C. § 80b-3(i); 17 C.F.R. § 201.1004 (adjusting the statutory amounts for inflation).

A maximum third-tier penalty is permitted if: (1) the violations involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and (2) such act or omission 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 person who committed the act or omission. 15 U.S.C. § 80b-3(i)(2)(C). Second-tier penalties may be imposed if the misconduct involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. 15 U.S.C. § 80b-3(i)(2)(B). First-tier penalties may be imposed simply for each violation. 15 U.S.C. § 80b-3(i)(2)(A). 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. Opulentica*, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007) (quoting *SEC v. Moran*, 944 F. Supp. 286, 296-97 (S.D.N.Y. 1996)). I thus have discretion in determining the appropriate penalty within a given tier. *SEC v. Kern*, 425 F.3d 143, 153 (2d Cir. 2005); *S.W. Hatfield, CPA*, 2014 SEC LEXIS 4691, at *48.

Six factors may be considered in determining whether a penalty is in the public interest. These include: (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)(3).

The statutory requirement for a third-tier penalty is not met here. Montanino's omission did not cause, directly or indirectly, the Yoos' losses. Those losses were caused by Sullivan. It is true the Yoos could have taken action in March 2010, but their conduct in May 2010, suggests that they would not have done so.

My determination that Montanino violated Section 206(1) and (2) of the Advisers Act necessarily means that his violation involved fraud or deceit. The statutory requirements for imposition of a second-tier penalty are thus met. *See* 15 U.S.C. § 80b-3(i)(2)(B). Considering the public interest factors, however, I find that a penalty that falls toward the lower end of the second tier is most appropriate.

First, while Montanino meets the fraud or deceit requirement for second-tier penalties, he was not actually trying to defraud Yoos. Rather, his fraud or deceit entailed not observing his fiduciary duty to timely provide complete information. Second, Montanino did not cause the

harm that befell the Yoos. Third, Montanino was not unjustly enriched. Fourth, Montanino has no history of securities violations.

On the other hand, considering the fifth factor, I find that some marginal deterrent would result from imposition of a penalty. Relatedly, although Montanino thought he was acting in the Yoos' best interest, he nonetheless violated his fiduciary responsibility. Violating a fiduciary responsibility is ordinarily a serious matter. *See Superintendent of Ins. of State of N. Y. v. Bankers Life & Cas. Co*., 404 U.S. 6, 11-122 (1971); *James C. Dawson*, Advisers Act Release No. 3057, 2010 SEC LEXIS 2561, at *15-16 (Jul. 23, 2010). The goal of discouraging others from failing to strictly observe their fiduciary responsibilities supports imposition of a sanction.

Balancing the above factors and considering the serious nature of violating one's fiduciary responsibility, I impose a civil monetary penalty of $25,000.

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 Amended Record Index issued by the Secretary of the Commission on April 16, 2015.

ORDER

IT IS ORDERED THAT, pursuant to Section 203(i)(1)(B) of the Investment Advisers Act of 1940, Respondent David J. Montanino shall PAY A CIVIL MONEY PENALTY in the amount of $25,000.

Payment of disgorgement, prejudgment interest, and civil penalties shall be made no later than twenty-one days following the day this Initial Decision becomes final, unless the Commission directs otherwise. Payment shall be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) 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.

Any payment by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order shall include a cover letter identifying the Respondent and Administrative Proceeding No. 3-15613, and 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 a 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.

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James E. Grimes
Administrative Law Judge