

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1961/October 30, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15943

In the Matter of

ORDER

DAVID J. MONTANINO

On Monday, October 27, 2014, this Office received a motion filed by Respondent David J. Montanino “to preclude Sharon Jones[’s] testimony and to strike disgorgement claim.” The Division of Enforcement responded by letter of the same date. Mr. Montanino replied the next day. For the reasons explained below, I DENY Mr. Montanino’s motion.

The Order Instituting Proceedings (OIP) contains the general allegation that “[f]rom February 2010 to June 2011,” Mr. “Montanino and his business partner operated” “a fraud and misappropriation scheme” “through American Private Equity, LLC.” OIP at 2. In his motion, Mr. Montanino concedes that in 2005, he recommended that Ms. Jones invest in American Private Equity. Motion to Preclude at 2.¹ He asserts that he had no contact with Ms. Jones after October 2007. *Id.* Mr. Montanino also asserts that he received no compensation from American Private Equity as a result of Ms. Jones’s investment and was unaware that American Private Equity was “not legitimate.” *Id.* at 2-3. Relying on these assertions and the general federal five-year statute of limitations, *see* 28 U.S.C. § 2462, he asserts the Division should not be permitted to call Ms. Jones to testify.² Motion to Preclude at 2-3. He also seeks to bar the Division from

¹ Mr. Montanino’s motion is not paginated. He is reminded that all future pleadings should have page numbers.

² Section 2462 provides:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

seeking disgorgement from him because there is no evidence that he received compensation or “ill[-]gotten gains” from any investor.³

It is true that the statute of limitations bars the Division from seeking a civil monetary penalty for acts that occurred before June 24, 2009, five years before the OIP was issued in this matter on June 24, 2014. *Gabelli v. SEC*, 133 S. Ct. 1216, 1220-24 (2013). *Gabelli*, however, does not apply to injunctive relief or disgorgement. *Id.* at 1220 n.1. As a result, if the Division demonstrates the relevance of Mr. Montanino’s interactions with Ms. Jones to the allegations listed in the OIP, it may rely on those interactions to establish liability or to seek injunctive relief or disgorgement. *See Riordan v. SEC*, 627 F.3d 1230, 1234-35 (D.C. Cir. 2010); *Johnson v. SEC*, 87 F.3d 484, 491 (D.C. Cir. 1996). And acts outside the statute of limitations may be considered to establish Mr. Montanino’s motive, intent, or knowledge with respect to violations that are alleged to have occurred within the statute of limitations. *See Sharon M. Graham*, Exchange Act Release No. 40727, 1998 SEC LEXIS 2598, at *41 n.47 (Nov. 30, 1998).

Mr. Montanino’s argument about Ms. Jones’s testimony is also premature. Whether he received compensation for her investment or whether there is any connection between his interactions with her and what transpired during the time-frame charged in the OIP are matters that will be subject to proof during the hearing held in this matter. I cannot make determinations on these matters based simply on Mr. Montanino’s allegations in a pleading and instead must base any determination on the evidence presented at the hearing. For similar reasons, I find premature Mr. Montanino’s request that I bar the Division from seeking disgorgement from him because there is no evidence that he received compensation for any investment or “ill[-]gotten gains” from any investor. Whether the Division will present sufficient evidence as to these questions and whether these questions matter are issues I will address after considering the evidence presented. Mr. Montanino and the Division will have the opportunity to present their positions on these issues in post-hearing briefing.

SO ORDERED.

James E. Grimes
Administrative Law Judge

³ It appears that Mr. Montanino is operating under the misapprehension that I have previewed the evidence that will be presented and am as familiar with his case as he is. To the contrary, he should bear in my mind that as the trier of fact, my only knowledge of this matter comes from the parties’ filings with this Office and the evidence that will be presented during the hearing.