DAVID J. MONTANINO
[redacted]

Before the Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Administrative Proceeding
File NO 3-15943
In the Matter of David J. Montanino
January 16, 2015

RESPONDENT DAVID J. MONTANINO'S REBUTTAL MEMORANDUM

PRELIMINARY STATEMENT

I, Respondent David J. Montanino ("Montanino" or "me" or "I"), respectfully submit my Rebuttal Memorandum. The Securities and Exchange Commission ("the Commission") is attempting to make me the "fall guy" for Timothy Sullivan's ("Sullivan") misdeeds.

The Commission failed to produce any documentary evidence that proves I committed securities fraud, aided and abetted Sullivan in committing securities fraud, or that I misappropriated capital.

The Commission is asking the court to believe that suddenly at forty years old, I woke up and decided to hurt people that I truly cared about, committed fraud, compromised my own integrity, and risked losing my career, so Sullivan alone could live in excess.

The Commission has failed in their attempts to provide a motive for why I would do that. Their attempts include theories that my job prospects were "dim," or that I believed that Sullivan would pay me "handsomely," or that I wanted a "piece of Sullivan's flashy lifestyle for myself."

All of their desperate attempts at motive amount to nothing more than conjured up theories, not supported by the evidence. There was no documentary evidence produced, or testimony given, that suggests any of the Commission's theories are remotely accurate.

I was misled and defrauded by Sullivan, just as his investors were. That is the simple, and truthful explanation for what transpired while I was working with him.

All documentary evidence points to Sullivan conducting a fraud on his own. But the Commission in an attempt to make someone "pay" has disregarded it. Instead of fairly analyzing the evidence, they have chosen to selectively pick and choose small pieces of it, attempting to lump me in with Sullivan.

I am not perfect, but I am not a fraudster. I admitted that I exaggerated accomplishments on my resume. That does not make me a "liar for money." I envied what Sullivan had accomplished. That does not mean that I would commit fraud because "I wanted a piece of Sullivan's flashy lifestyle for myself."

The Commission now charges that my testimony "defied credibility." They had ample opportunity to prove that my submissions and my testimony were inaccurate. They did not.

I look back on my decision to work with Sullivan and wish I could change it. The outcome was a debacle.

I look back on the decision to business with Sullivan after the Yoos' money was lost, and I know now it was the wrong one.

With hindsight, I realize I should have made other choices. But at the time, I believed I was making the right judgments.

I did not think Sullivan was a fraud. I knew he did not steal the Yoos' money. There was a third party administrator that did accounting on the funds. I believed he was a bad trader, who made some big mistakes. He conned me into believing he was sorry. He cried and apologized to me. He promised to repay the Yoos'. He told me he wanted to atone for his mistakes.

I felt that he was sincere, and I believed that he would conduct himself differently in the future. He only became addicted to drugs and alcohol after I had left for New York.

I still believe today that if the funding continued; Calibourne would have been a success. It was a great plan. There was real work and dedication put into building the firm. We were accomplishing all of our goals. We were on the right track.

Sullivan was extremely accomplished at taking advantage of people. (Jones TR P. 105) [1]"Whenever I spoke to Mr. Sullivan, he was very sincere, believable person as far as I was concerned." (Pankey TR P. 855) You trusted Sullivan a lot didn't you? Answer "$700,000.00 worth."

Sullivan hurt a lot of people. Only four of them testified at the hearing. They testified because there was some nexus to me. Sullivan had scores of investors. His real partner, Klatch, went to prison for what they did to people.

Sullivan conducted a fraud. Sullivan misled his investors. Sullivan reaped the financial benefits. I unknowingly got connected to the wrong individual, and I have already paid a very steep price for that. It has made my life miserable. I had no intent to defraud people. I had no knowledge of Sullivan's intent to defraud people.

I was not Sullivan's partner.

---

[1] As a courtesy, the Commission provided me the transcripts of the hearing on January 6, 2015.

THE COMMISSION ADMITS THAT THEIR MOST SERIOUS CHARGE AGAINST ME WAS FALSE

Perhaps the most egregious charge that was made by the Commission against me was that I knowingly aided and abetted Sullivan in the act of committing securities fraud. The Commission presented no documentary evidence to back up that charge at the hearing. No witness testified that they had knowledge that I ever knowingly helped Sullivan commit securities fraud.

The Commission's fallacious charge was based solely on their claim that I knew Sullivan was raising capital for APE, and I "knew" he was not appropriating it to finance Calibourne operations. Therefore, I must have "known" Sullivan was a fraud.

If the charge were true that APE did not fund Calibourne, the Commission probably would have been correct. But the charge was not true; it was a complete fabrication. Just as I told the Commission and the Court I would do, I proved APE was funding Calibourne.

Their admission was buried in one sentence on Page 30 of the Commission's Post-Hearing Memorandum.

"Calibourne did not pay its own bills; instead, ***American Equity apparently paid Calibourne's vendors directly."***

The Commission must have known that the expenses eventually would be detailed (R202).

They knowingly made a choice to disregard easy to understand documentary evidence, so they could make maliciously false charges against me. There was no epiphany had by Ms. Sallah at the hearing. She did not all of a sudden realize that APE funded Calibourne expenses directly. She and others at the Commission have always known.

That did not stop the Commission from charging otherwise in at least seven instances in their OIP, and in their Pre-Hearing Memorandum.

OIP Summary "Montanino (and his partner) used APE investors' money for personal benefit other than to implement the supposed investment strategy."

OIP 28 "But APE invested only a nominal amount of money in Calibourne."

OIP 34 "Of the $485,000 raised from APE investors from July 2010 and April 2011, bank records show APE provided just $33,515 to Calibourne, most of which Montanino who controlled Calibourne's only bank account diverted for his personal benefit."

OIP 37 "Instead of telling them the truth, Montanino told them APE legitimately provided financing to Calibourne, even though, as Calibourne Bank Records show, it did not provide enough funding to execute the proposed business plan."

OIP 39 "But APE did not allocate any meaningful capital to Calibourne and Montanino used the nominal amount that APE provided for his own personal benefit. Montanino therefore knew that APE used investors' money contrary to its disclosed investment strategy of financing Calibourne."

OIP 42 "During this time, investors sent about $485,000 by wire or check to APE's escrow account. Calibourne's bank records show that APE provided only $33,515, of which Montanino took $28,870 for himself even though APE compensated Montanino tens of thousands of dollars from its own account."

OIP 43 "Montanino knew of his own misappropriations and recklessly disregarded facts indicating his partner used APE's assets contrary to the firm's disclosures to investors. As explained above, Montanino prepared APE's primary marketing document representing that the fund would capitalize Calibourne. Montanino, who controlled Calibourne's only bank account, knew that no real capitalization

materialized, and, thus, knew his partner used investor money contrary to the representations both he and his partner made to fund investors."

PRE-HEARING MEMORANDUM P. 13 "In fact, most of the investor's funds never reached the advisory firm, and Montanino used the little that did for his own purposes."

*The Commission, **knowingly**, falsely charged me with securities fraud, aiding and abetting securities fraud, and misappropriation in those 8 instances.*

The Commission can no longer defend their fabricated and malicious charge. They now charge that neither APE nor Calibourne ever "accounted for such payments."

I had no ability to account for them after Sullivan passed away. The expenses would have been accounted for if Sullivan did not die, just as they were accounted for in (R161-R169). Sullivan hired Katz Fram to produce detailed accounting records for APE.

I DID NOT THINK SULLIVAN WAS FRAUDULENT

There was no evidence presented that would suggest that I ever had any knowledge that Sullivan was a fraud prior to his death. Simply knowing who Sullivan was for a long period of time, in no way proves I knew he was a fraud.

The Commission has no basis for charging that I knew Sullivan had **one** issue with a state regulator seven years prior.

Susie Yoo never testified that I told her Sullivan had regulatory problems (Yoo TR 430), as the Commission falsely charged in their Post-Hearing Brief. I told her I had a securities license and Sullivan did not.

Tillem never testified that I told him Sullivan lost his license due to inappropriate behavior. Tillem testified that I told him Sullivan's license was "forfeited." I would never use the term "forfeit", but

nonetheless; Tillem never testified that I told him that Sullivan had regulatory issues.

By the time Sullivan ran into problems in Wisconsin for not being properly registered to conduct business in that State, his securities license had already expired. He did not lose his license due to his issue in Wisconsin. If the Commission properly investigated, as I have, they would know that.

I was not aware of Sullivan's Wisconsin violation at any time before Discovery.

(R188) is what Sullivan told both me, and the regulatory agencies about himself. He made no mention of any violations of any sort.

WE WERE NOT PARTNERS

The Commission has repeatedly charged that Sullivan and I were partners, but they were never able to produce even a **single document**, legal or otherwise, that proved we actually were. Not only was I not Sullivan's partner, I never had any operational control of any kind, at any point in time, in any Sullivan controlled entity. There is no evidence to the contrary.

I WAS ENTITLED TO EARN COMPENSATION

I received no compensation as a result of either the Yoos' investing in APF, or Jones investing in APE. Of the $700,000.00 Pankey invested, **at most**, between **$17,000-$28,000** was allocated to me as compensation. Sullivan had many investors.

(Pankey TR 861) So you fully would have assumed me running Calibourne as a full-time position that I would be earning compensation? Answer "Again, I don't know the exact relationship, but is it-yeah, I would assume as much."
(Pankey TR 871) Do you believe that me without having any other compensation to speak of were within my rights to be compensated as the President of Calibourne. Answer "Yes."

I introduced (R94) and the Commission did not object. The document showed me receiving $88,500.00 in compensation over 17 Months. They claim I received over $89,000.00 in their Preliminary Statement of their Post-Hearing Memorandum.

Therefore, as I have always stated, I received no compensation as a result of the Yoos' investing. I have irrefutable proof that I am telling the truth. The timeline of compensation is clear.

I did not make money, nor was I interested in making money off of the Yoos'. They were friends of mine.

If I, or the Commission, were able to locate the bank records from ten years ago when Sharon Jones invested, the same would be reflected.

The Commission theorizes that I believed Sullivan would compensate me "handsomely" if I did a good job managing the fund. I never testified Sullivan would pay me "handsomely."

I detailed what profits could be derived from the Yoos' account in my Post-Hearing Memorandum. If the fund realized a 10% profit, the total gain for APE would be $2,900.00.

The Commission now theorizes that Sullivan "ran American Fund into the ground, before he could pay Montanino."

Apparently the Commission must believe that Sullivan chose to fire me as manager of the fund, and completely de-authorize me on April 13, 2010, but nonetheless would choose to pay me "handsomely" for doing nothing. But before he was to pay me the "handsome" profits that legally belonged to him and APE, he "ran the fund into the ground."

Those are the types of incredulous charges the Commission has continued to make.

BILL PANKEY

The Commission has finally made it clear what the "misappropriations" were that I was "aware" of in **OIP 43.** The Commission's charge of misappropriation is over a single payment of my compensation that was **made to me by Sullivan** on April 6, 2011. Compensation that I received in the same manner as all other compensation I received. I am being accused of misappropriating $11,000.00.

The Commission is basing their entire charge of misappropriation on Pankey's testimony that I was on a call when he instructed Sullivan and me to only use his capital for recruiting of advisors. I may have been on a call when Pankey thought his intentions were clear, but they were never made clear to me.

The Commission did not prove that I misappropriated Pankey's capital. The fact is, they cannot even prove that I was compensated from Pankey's capital.

(Montanino 1281-1282)
And this money came from Mr. Pankey's final investment right? Answer "I don't know." Were there any other investor's after January 2011? Answer " I think there were." Really? "I think so but I don't know." And if there were not any other investors in February or March 2011, do you dispute that? "If the records show there is not, then I don't dispute it."

Pankey's check for $100,000.00 was deposited on March 24, 2011 (DE 17-C3 P.3). One week later, on April 1, 2011, Sullivan makes a deposit for $30,000.00 into the APE account (17-C3 P.6). That deposit brought the balance to $130,000.00. The check that Sullivan wrote to me was dated April 6, 2011 (17C-4 P.8).

Sullivan raised $30,000.00 one week after Pankey invested, and one week before I was compensated. I was not compensated until additional capital was in the account.

I had no way of knowing exactly how much capital Sullivan had in his accounts at any time, or what intentions he had for the capital that was in place. There could have been capital in his account that he did not want to appropriate until more capital was in place. There could have been no capital.

Sullivan raising capital, and appropriating capital for APE was his business. My business was Calibourne. Sullivan allocated capital as he saw fit. Sullivan was the boss. Calibourne was a primary area of focus for Sullivan, but APE had other ventures.

I was aware when money was "tight" because bills would not get paid, but I never had true knowledge of APE's finances. And I surely could have never known if $11,000.00 came from one specific source. That is because I was not Sullivan's partner.

Calibourne was not an investor in APE. Calibourne was the recipient of APE's investment.

The Commission's charge that I misappropriated Pankey's investment should be denied. Our relationship was very attenuated and I had:

- NO ability to appropriate capital
- NO knowledge of Pankey's requirement
- NO access to Sullivan's bank accounts
- NO fiduciary responsibility
- NO operational authority at APE
- NO way of knowing if Pankey's investment was used to compensate me

(Pankey TR 877) Who had the fiduciary responsibility to you? Answer "Tim Sullivan." Who was your primary, if not sole point of contact with APE? Answer "Well I had your phone number, but I communicated directly with Tim."

In the OIP and in their Pre-Hearing Memorandum, the Commission details the timing for the call.

OIP 35 "During the Summer and Fall of 2010, for instance, Montanino told an existing APE investor ("APE Investor A") about the APE/Calibourne revenue model, stating over the phone that Calibourne would use the financing APE provided to recruit established financial professionals willing to transfer their client's assets' to Calibourne. APE Investor A invested an additional $100,000.00 in APE on March 23, 2011."

PRE-HEARING MEMORANDUM "Montanino told Investor A in the Summer/Fall 2010 that a portion of the capital invested would be used to recruit financial advisors, but denies saying that all money raised for Calibourne would be used to recruit advisors. With that understanding, Pankey invested a final installment of $100,000.00 in American Equity in March 2011."

Pankey testified and gave a different account about the timing of when the phone call took place. Presumably, Pankey must have told the Commission the phone call was in the Summer/Fall 2010. At the hearing, he testified that it was in March 2011.

In order for Pankey's testimony to be accurate about the timing of the phone call, that would mean:

i. The Commission misstated Pankey's timeline given to them about when the call took place both in their OIP **and** in their Pre-Hearing Memorandum.
ii. Pankey changed his story about the timing of the phone call that he gave to the Commission, but only after Pre-Hearing Memorandum was submitted.
iii. Pankey for the first time at the hearing claimed the phone call took place in March 2011, and not in the Summer/Fall 2010.[2]

[2] The OIP was drafted on June 24, 2014. The Pre-Hearing Memorandum was submitted on October 21, 2014. On Page 13 of the Pre-Hearing Memorandum, the same timeline is referenced for the phone call as was referenced in the OIP.

On Page 34 of their Post-Hearing Memorandum, the Commission for the **first time** claims the timing for the phone call was in March 2011.

When I examined Sullivan and Pankey's email conversations from November 2010-March 24, 2011, I counted 17 emails between them. Not in a **single instance** does Pankey ever instruct Sullivan that his investment should be used only for recruiting advisors.

In (R186), Pankey lays out his requirements for Sullivan, but never mentions his verbal agreement.

I asked Mr. Pankey at the hearing if he ever requested modifications to Sullivan's agreement (Pankey TR 856). He denied that he had. (DE 172 P. 97, DE 172 P.99, DE 172 P. 109) tell a different story. He requested modifications, or "required revisions" as Sullivan called them. The timeline is clear.

(Pankey TR 856) Had you read the entire agreement for APE? Answer "Yes."

The Pankey's knew they were legally bound to what they signed off on inside of the agreement unless they could prove that there was an agreement outside of the parameters of what they had previously agreed upon inside of it. Pankey never sought such proof. Not in a single instance.

(R178 Q 20) When asked if there was any evidence that it was an investment and not just some kind of loan, Pankey cites the Subscription Agreement. But when testifying about what his requirements were for his last $100,000.00 investment, he cited a verbal agreement.

There is no evidence outside of Pankey's testimony that would suggest that I had any knowledge of his requirement. (Pankey TR 877) Did I ever represent to you personally that your $100,000.00 was only going to be used to recruit financial advisors? Answer "No."

Pankey informed me in an email about his requirement for his last $100,000.00 investment, but never once gave any indication that I was aware of it.

(DE 172 P. 63)
Pankey informs me that, "Last quarter we made an additional 100k investment for the purposes of acquiring such assets. Given the assets have not been acquired, these funds should still be available."

Montanino "As I believe you know, I didn't work for APE, and I had no control of where any assets were deployed. Tim made all APE decisions."

Pankey " I appreciate the different roles here."

Mr. Pankey testified (TR 814) " I wanted to be very careful in maintaining some sort of relationship with David Montanino" when he described that language he used in (DE 172 P63) on June 13, 2011.

(DE 172 P. 69) references a conference call that we had planned with his wife over the weekend of June 25/26 2011. Pankey cancelled that phone call, and I do not believe we ever communicated again.

Pankey decided over those twelve days that it was no longer important to have a relationship with me, but he never questioned my assertions.

I was always clear with Pankey about my role. In (DE 172 P63), Pankey shows he was clear about the relationship between APE and Calibourne.

Pankey "APE has the partnership interest in Calibourne"

Pankey testified he knew a key component of our role differences. (Pankey TR 844) "Yes, I mean I understand that Tim Sullivan wasn't making operational decisions with respect to Calibourne.

(Pankey TR 874) Do you ever remember seeing my name in any legal document? Answer "No." (Pankey TR 855) Did I ever tell you I was a partner in APE? Answer "No."

Pankey included what he stated was my "vcard" in (R178 Q. 5). He testified (TR 886-887) that I sent him an email with that signature attached to it. Mr. Pankey's testimony was inaccurate. I never sent him an email from an APE address, or represented to him that was my vcard.

(DE 172 P. 84) was an email **I sent to Sullivan** in October 2010. Sullivan forwarded it to Pankey. Before Calibourne was licensed, I maintained that email address. It was used exclusively That is where he pulled the vcard from and represented to the Commission that I sent him an email from that address in 2011.

LISTED BELOW ARE EXAMPLES OF DOCUMENTS THAT WERE PROVIDED TO PANKEY

(DE 172 P. 7) Sullivan emails the Stock Market Outlook I wrote (R10). In the outlook my role is APF Investor Relations.

(DE 172 P. 23) Sullivan emails the APE Presentation (R15) to Pankey where my title was Chairman and CEO Calibourne Capital Management.

(DE 172 P. 25) Sullivan emails the recruiting brochure I wrote (R13) to Pankey where my title is listed as President Calibourne Capital Management.

(DE 172 P. 30) Sullivan emails the 2011 Stock Market outlook I wrote (R16) where my title is Chairman and CEO Calibourne, Lead Portfolio Manager APF II.

(DE 172 P. 45) Sullivan emails the Carlos Sanchez LOI (R128) where my title only mentions Calibourne and APF.

SHARON JONES

Mrs. Jones testified both that I told her I invested in APE, and that I never told her I invested in APE.

(Jones TR 79) "Mr. Montanino told me when he recommended the investment and again in October 2007 that he was, and is, an investor in APE, not an employee."
Sallah: Why did you write that? Answer "Because that's what he told me."

When referencing the October 2007 phone call earlier in her testimony, Mrs. Jones contradicts her previous statement (Jones TR 65). Did he say anything one way or the other whether he was an investor? Answer "No, no."

(Jones TR 108) Did I ever tell you I wrote a check and invested in APE? Answer "No"

(Jones TR 109) Did I ever tell you I invested in APE? Answer " I don't believe you told me in so many words that you invested X dollars in APE. I don't think those words came out of your mouth."

(TR 108) What led you to believe I was an investor in APE? Answer "I don't know what the precise words were, and it may have just been a **misunderstanding**, but I definitely believed you had a personal stake in APE."

I never cold called Sharon Jones. David Montanbeau did. He was my employee.

Mrs. Jones failed to admit at the hearing that it was Montanbeau who cold called her, and had the relationship with her before I did. I had never spoken to her before we met her in person. Montanbeau set the meeting, and attended it with me. I believe she knows exactly who he is. We all laughed and about the names and made jokes.

Mrs. Jones knew that APE and Calibourne had a business relationship, even as she claimed she did not (Jones Tr. 34).

It would be hard to believe that she could remember the obscure name Calibourne after all this time if I had only mentioned it to her **one time** when we met at her home when she became a client (R176 May-June 2005). She described it as something that I wanted to do in the future. Something I was "daydreaming" about. It was a "pipe dream." She opened an account at Torrey Pines, not Calibourne.

She remembers Calibourne, but cannot remember David Montanbeau.

The only other time she mentions the name Calibourne is when she called me (R176 December 2005-April 2006).

In that exhibit, she states that I told her that "Calibourne was more work then he thought it would be." The questions are:

I. Why would I even believe that she would know what Calibourne was if I had only met with her on one occasion at her home, and mentioned Calibourne as a future plan?
II. Why would we be talking about Calibourne nearly a year after I left Torrey Pines where she was my client?

In its first go around, Calibourne was much to do about nothing. The entire existence lasted a few months. There were no clients. It was never marketed in any capacity.

She never had an account at Calibourne, and never saw even a single document with that name on it. She heard the name one time. She would have had no nexus to Calibourne. But she somehow remembers it ten years later.

She remembers it because it was important to her in the context of her investment in APE. I told her APE invested in Calibourne.

When I proposed she consider APE as an investment, she asked me if I invested in APE. I told her APE invested in Calibourne, and by way of that, I was invested in APE.

Mrs. Jones provided an extraordinary amount of detail about her interactions with numerous people over multiple years in (R176), but has never been able to offer any sort of coherent explanation about how I "led her to believe" I was "personally, invested in APE."

Criminal defense attorney's are not "led to believe" anything. They are masterful crafters of language.

Here are some examples of Jones' carefully chosen language:

(R176 July 2005) "Dave led me to believe that he, personally, was invested in APE."
(R176 December 2005) "He did NOT, tell me he was employed by APE, I continued to believe that Dave was invested in APE."
(TR 54) "I don't know if we discussed that he was invested as well as I was, but I was under the impression, and I just simply believed since he was so confident in the investment that he was also invested."
(TR64) "I asked if he had received a copy of it because I assumed he was also a partner and he would have received a schedule K1."
(TR 71) I don't recall whether, I must have mentioned something about Mr. Montanino. I mentioned something about Mr. Montanino having a common investment in American Private Equity and he had been the one who suggested it to me because he was also invested."
(TR71) "Because all along I assumed he was an investor."
(TR 109) "I don't believe you told me in so many words that you invested x dollars in APE. I don't think those words came out of your mouth."

No one in a management role at Torrey Pines testified that they did not authorize the investment in APE (R176 September 2005).

If Mrs. Jones is to be believed, it was her broker-not the firm- who claimed that Torrey Pines did not authorize the investment. He was also the person who told her that her investment was "probably gone." Paul "Scuvy" Scavuzzo has never spoken for Torrey Pines Securities.

He is the same person that Mrs. Jones says she wants "Out of her life" because of all of the "shit" he put in her portfolio (R175). She

considered him to be a pretty "mediocre" broker. Mrs. Jones has shown a propensity for speaking badly about people.

Private Equity Investments need a specialized custodian to house the assets if they are to be held in an IRA. It is much the same process as when someone wants to hold gold in an IRA. The title for the account is a self-directed IRA. It is quite different from a traditional IRA that is opened at a brokerage firm. The assets needed to be "qualified." Torrey Pines did not qualify assets. In order for her to invest in APE in her SEP IRA, the assets needed to be transferred.

Mrs. Jones believed that her investment was unauthorized, and she believed it might have been worthless, but that did not stop her from tracking me down nearly a year later and begging me for "HELP! (R175).

Jones complained to me that she did not want to work forever and she very much wanted to retire. I believed that if the investment worked out, it could help her accomplish her goal. She testified I told her it was a risky investment. There was no intent to deceive.

The timing of me resigning from Torrey Pines and Jones investment being made was merely coincidental. I had told her about the APE investment sometime weeks before I resigned. There was back and forth, and she actually signed the paperwork two days prior to my resignation. $25,000.00 was transferred to APE as an investment, and I saw none of it.

Sullivan told her that I was his employee. Knowing how egomaniacal Sullivan was, that is not surprising.

That bogus claim by Sullivan is where the entire charge stems from that I was working for APE when I recommended she invest. She believed Sullivan's word in that instance, without so much as ever even asking me if it were true. I had gone out of my way to help Mrs. Jones. I gained nothing when assisting her at Fidelity. I helped her out of kindness. Even when factoring in APE, I have made her a significant amount of money.

That did not stop her from believing Sullivan then, she believed him when she produced (R176) to the Commission, and she represented she still believed him throughout the hearing.

If the following statements are true, why does Mrs. Jones continue to believe Sullivan's account of me being his employee?

(TR 107) " I mean I lost all credibility in Mr. Sullivan when I found out he killed himself."

(TR 105) "Well at this point I have a very low opinion of his credibility."

Mrs. Jones is still representing that I was an employee of APE, because she is interested in recouping her investment from me.

Mrs. Jones attempted to avoid answering a direct question posed to her on the topic. (TR 106) Would you put a different weight today on Sullivan's representation? Answer "That is sort of an unrealistic hypothetical."

No it was not. It was a direct question that she did not want to answer. When she did finally answer the question, she would not answer it definitively. She opted to use carefully chosen language. (TR 106) "Probably, I mean if I had found out he was lying, I suppose so."

The Commission, without a shred of other evidence, chose to recklessly charge that I misled Jones because of a claim made to her by of all people, Sullivan. Apparently, Sullivan's word should be considered as "oak," but only in this one specific instance. It is preposterous.

THE YOOS'

Mrs. Yoo is very angry. Her anger is misguided, but she does not know it.

She has not seen all of the evidence that proves Sullivan took advantage of her all on his own. Up until I pointed out Munky's giardia issue at the hearing, she was still under the impression that I came into the clinic to reconnect with her.

(Yoo TR. 439) When we reconnected in early 2010, do you remember why that was? Answer "I don't know why or how. Just to reconnect. So is it your belief I came in just to reconnect with you? Answer "Yes."
(Yoo TR 440) Yoo "I don't recall exactly how it came about, but I thought you came in before Munky. Now you're mentioning, maybe you came with Munky first."
(Yoo TR 442) "When you came, it seemed like you came to get Munky treated."

I did not solicit her investment.

(Yoo TR 446) "So while you were working for Fidelity, yes even after you left Fidelity, Yes, I did solicit your service. I did ask for your help, your guidance. "
(Yoo TR 447) Do you think that I approached you, or did you ask me to look at your investments? Answer "I did ask you to look at my investment, uh huh."
(Yoo TR 449) "If you didn't have, if you're not financially compensated, would you have motivation to take my investment"? Answer "Yes." And what would that be? Answer "Because of our friendship."

Perhaps, Mrs. Yoo's biggest issue with me is that she feels I lied to her when I told her I managed her money in the beginning, and it profited, before Sullivan fired me and lost all of her money. She mentioned it over and over again at the hearing.

(Yoo TR 456) "I don't think that is a big violation. I think from the beginning, that you said that you had control over my money for about a month, and the money was up then, then the money was lost. That would be more."

Documentary evidence proves I told her the truth over 4 years ago when I described that scenario to her.

She believes it was hard to get in touch with me. I do not know why she believes that. I felt that I was always responsive to her. Documentary evidence shows whenever she texted me or emailed me, I responded. She testified we spent an entire afternoon together in Mid March 2010, and had dinner together on April 13, 2010. There are texts and emails that prove we were conversing.

She believes I held back information from her. I did not. (Yoo TR 333) "So this was a result of me getting after him for the past two and a half months."

I had no information to provide to Mrs. Yoo. Columbus Avenue calculated the portfolio quarterly, and Sullivan was not sharing any information with me about the account.

In large part, Mrs. Yoos' contempt for me is predicated on her own false beliefs. She has not seen the evidence that proves:

- I was not compensated in any way for taking her investment
- I did not withhold information from her
- I managed her account, it was diversified, and it rose in value
- Sullivan took over and began using margin
- I traveled all the way down to Florida to get Sullivan to redeem her investment
- Sullivan wired her money out of the account, and it was being returned to her, before later changing his mind
- Sullivan de-authorized me
- Sullivan concentrated the entire portfolio into a single penny stock on margin
- Sullivan alone charged her the placement fee

MY BIO

There was more to Mrs. Whatley's testimony than the Commission is acknowledging on page 13 of their Post-Hearing Brief. Whatley and I had a discussion about the term "locked out." Locked out at Fidelity means that a specific customer is attached to a specific Financial Planning Consultant. Mrs. Whatley stated that in her opinion, being locked out on a client, was different than being assigned a client. She did not consider it as being part of a "book of business."

My opinion is different from Mrs. Whatley's. Mrs. Whatley is a fine manager, but to my knowledge, she has never run an investment plan meeting with a customer in her entire career.

Clients were not aware of the term "lock out." They knew who their advisor was. When they requested guidance on their investments, they contacted their advisor both before the pilot, and after it.

There were a few small differences, but only two major differences between being assigned a client as was done in the pilot program, and being locked out on a client at Fidelity before the pilot.

In my first two years, before the pilot, in order for an advisor to gain a lock out on a client, it was mandated that the advisor would have engaged in a substantive investment discussion with a client first (TR 197-198).

In my third year, during the pilot, the client was assigned without ever having an investment discussion in advance. Therefore, there is a much stronger argument to be made that before the pilot, there was more of a relationship in place between the advisor and the client, then after it. That was part of the feedback I offered.

Second, a lock out was for only one year. It needed to be renewed. There would need to be another discussion about investments to renew a lock out. In the pilot program, there was no renewal component for the assigned client.

Everything else was the mostly the same. I excelled in both roles. I was awarded the Excellence in Action Award in part due to my feedback on the pilot program. So when I referred to my client base in my bio being over $1 Billion, I absolutely considered clients I was locked out on to be part of that base.

Mrs. Whatley confirmed that it was entirely possible that I was locked on clients with net assets of over $1 Billion. (TR 200) Is it conceivable that I was locked out at one point for customers before the Dedicated Financial Planning Consultant Position came about, that I was locked out on customers that could have had a billion dollars in aggregate and net assets? (Whatley) "Yes."

Here is the excerpt from the Bio that has been dissected.

"David was tasked with providing financial planning strategies, and providing investment management services for a client base with over $1 Billion in Assets under Management.

I will concede I could have been more careful or descriptive when the phrase "provided investment management services" was used. It was not written to deceive. I never claimed I selected individual securities, or had a track record. I never once claimed I was a money manager.

Was I recruited? I think so. I put my information into the Fidelity website first. That is true. A period of time after that, I was contacted by a Fidelity recruiter, and interviewed. That person told Whatley to contact me. Whatley definitely recruited me.

There were only two people that invested after the bio was drafted.

Bill Pankey, had already invested $600,000.00 and viewed it as a "sunk cost." Pankey initially stated he placed no weight on my bio, then at the hearing said he placed a little weight on it. He only mentioned it was important to him in the context of my relationship with Fidelity; and how that would help in securing them as a custodian for Calibourne's assets (Pankey TR 876).

My relationship did help in securing Fidelity as a custodian for Calibourne's assets.

Jeff Tillem did not invest because of my bio. Tillem invested because Sullivan solicited him aggressively for a long period of time.

DISGORGEMENT

Disgorgement is a remedy that is in place to force fraudsters to give back profits that were obtained illegally. The Commission has not proven that I obtained any profits illegally, or that I was aware that Sullivan was obtaining profits illegally.

Sullivan ran APE. He raised capital from accredited investors with legal documents prepared by Benchmark Law Group. Regardless of whether APE was successful or not, the Agreement (R1) that was provided to all investors made clear that all expenses that were incurred by the fund, were to be paid as expenses from fund assets.

As an employee of APE, and then as the founder of a portfolio company of APE, I was entitled to **earn** a wage. My below market compensation was in no way egregious, and was drawn from contractual commitments that Sullivan's accredited investors were made aware of, and signed off on.

The Commission has failed to produce a single piece of documentary evidence to show that my minimal compensation was paid from funds that were expressly dedicated for investment purposes.

In order to prove "ill gotten gains, " the Commission would have to prove that my nominal compensation was allocated from the investable funds of APE, as opposed to the expense portion of the fund, or they would have to prove that I knew that the funds were in place as a result of fraudulent activity. They have done neither.

I legitimately **earned** my compensation. It was typical for me to work 70-80 hours a week. I was working while caring for my

terminally ill mother. I deserved every bit of the $60,000.00 per year I earned, and I deserve to keep it.

CONCLUSION

The Commission has made many demonstrably false allegations about me for years.

They produced no documentary evidence that proves any wrongdoing. I believe that after an assessment is made about the credibility of the witnesses, and there is a resolution of competing inferences that can be drawn from the disputed facts, my version of the events will be considered to be the accurate one.

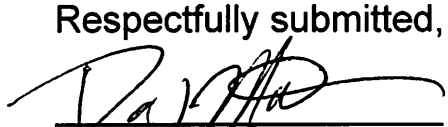
Nothing I have written or said has been proven even in a single instance to be false.

I did not mislead any investors. I did not commit securities fraud. I did not knowingly assist Sullivan in committing securities fraud. I did not misappropriate capital. I was not negligent. There is no evidence to the contrary.

As such, all charges should be dismissed in their entirety.

Dated: January 16, 2015

Respectfully submitted,



David J. Montanino

David J. Montanino
[redacted]

Before the Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090
Administrative Proceeding
File NO 3-15943
In the Matter of David J. Montanino
January 16, 2015
Re: Rebuttal Memorandum

Office of the Secretary,

I have included an original and three copies of my Rebuttal Memorandum. Thank you very much for all of your help.

Kind Regards,

David Montanino