

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

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 2693/May 20, 2015

ADMINISTRATIVE PROCEEDING  
File No. 3-16339

In the Matter of

JOHN BRINER, ESQ., DIANE DALMY, ESQ.,  
DE JOYA GRIFFITH, LLC, ARTHUR DE JOYA, CPA,  
JASON GRIFFITH, CPA, CHRIS WHETMAN, CPA,  
PHILIP ZHANG, CPA, M&K CPAS, PLLC,  
MATT MANIS, CPA, JON RIDENOUR, CPA, and  
BEN ORTEGO, CPA

ORDER FOLLOWING  
PREHEARING  
CONFERENCE AND  
FINDING ONE  
RESPONDENT IN  
DEFAULT

The Securities and Exchange Commission initiated this proceeding in January 2015 when it issued an Order Instituting Administrative and Cease-and-Desist Proceedings. The hearing in this matter is currently scheduled to begin on Wednesday, May 27, 2015, in Denver, Colorado.

On May 18, 2015, this Office received a motion from the Division of Enforcement asking that I issue Mr. Briner an order to show cause why he should not be found in default. In its motion the Division asserted that Mr. Briner has not timely filed exhibit and witness lists, objections, or his prehearing brief. Motion at 2. It also asserted that Mr. Briner has not responded to the Division's attempts to contact him. *Id.* at 2-3. Finally, it noted that the Division's anticipated witnesses against Mr. Briner would have to travel significant distances to attend the hearing. *Id.* at 4.

As scheduled, I held a second telephonic prehearing conference yesterday, at 3:00 p.m. EDT. Counsel for the Division of Enforcement, Mr. Briner, and Ms. Dalmy participated. The Division reiterated its concerns that, absent a prompt finding that Mr. Briner is in default, several witnesses will have to travel to Denver unnecessarily at the government's expense. Mr. Briner stated that he will not attend the hearing and does not contest the entry of a default judgment against him as to his liability; that is, whether he committed the securities law violations alleged in the OIP. Mr. Briner indicated that he does not agree with the sanctions sought by the Division for those violations.

Ordinarily, it is "prudent practice," before finding a respondent in default to "first order that [the] respondent show cause why a default is not warranted." *David Mura*, Exchange

Act Release No. 72080, 2014 SEC LEXIS 1530, at \*9 (May 2, 2014) (quoting *Vladislav Steven Zubkis*, Exchange Act Release No. 51364, 2005 SEC LEXIS 598, at \*7-8 (Feb. 18, 2005)). “The law[, however,] does not require the doing of a futile act.” *Wis. Res. Prot. Council v. Flambeau Mining Co.*, 727 F.3d 700, 710 (7th Cir. 2013) (citation omitted). By declining to defend himself and announcing that will not attend the hearing, Mr. Briner has made it plain that there is no need to issue an order to show cause. Further, forcing the Division to expend resources to bring witnesses to Denver after Mr. Briner has declared that he will not appear would be unnecessarily wasteful. Because Mr. Briner has failed to “defend the proceeding,” 17 C.F.R. § 201.155(a)(2), and has announced that he will not appear at the hearing, I determine that he is in default, *see* 17 C.F.R. § 201.155(a)(1)-(2); 17 C.F.R. § 201.310.

Given the foregoing, Commission Rule of Practice 155(a) authorizes me to deem true the OIP’s allegations as to Mr. Briner. 17 C.F.R. § 201.155(a). In my Initial Decision I will determine whether these allegations, along with the rest of the evidence in the record, are sufficient to support a finding that Mr. Briner committed the violations alleged in the OIP and whether the sanctions sought by the Division are appropriate. The Division should proceed to present whatever evidence at the hearing it deems necessary in light of the foregoing. In other words, the Division should review the OIP’s factual allegations and determine whether the facts alleged in the OIP and taken as true are sufficient to carry its burden of proof and should proceed accordingly.

The hearing will commence as scheduled at 9:00 a.m. MDT on May 27, 2015. With respect to Mr. Briner only, the Division may file a motion for sanctions by June 16, 2015.

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James E. Grimes  
Administrative Law Judge