

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

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

INITIAL DECISION AS TO DIANE  
DALMY, ESQ.  
September 18, 2015

APPEARANCES: David Stoetling, Jack Kaufman, Jason W. Sunshine, and Jorge G. Tenreiro  
for the Division of Enforcement, Securities and Exchange Commission

Howard J. Rosenberg, for Respondent Diane Dalmy, Esq.<sup>1</sup>

BEFORE: James E. Grimes, Administrative Law Judge

### SUMMARY

In this Initial Decision, I find that Respondent Diane Dalmy willfully violated Section 17(a)(1) and (3) of the Securities Act of 1933 but dismiss the charge that she violated Section 17(a)(2). I order Dalmy to cease and desist from further violations of Section 17(a)(1) and (3) and order Dalmy to pay civil penalties totaling \$680,000.

### INTRODUCTION

Relying on Section 8A of the Securities Act, the Securities and Exchange Commission instituted this proceeding against Dalmy in January 2015, with an Order Instituting

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<sup>1</sup> Mr. Rosenberg withdrew as counsel for Dalmy in May 2015, prior to the hearing in this proceeding, and Dalmy represented herself at the hearing and in post-hearing briefing.

Administrative and Cease-and-Desist Proceedings (OIP). The OIP alleges that Dalmy violated Section 17(a)(1), (2), and (3) of the Securities Act.<sup>2</sup>

I held a hearing in this matter on May 27, 2015, in Denver, Colorado. During the hearing, the Division of Enforcement called two witnesses, including Dalmy. Aside from herself, Dalmy called no witnesses. I admitted fifty of the Division's exhibits and four of Dalmy's exhibits.<sup>3</sup>

## FINDINGS OF FACT

### 1.1 Background

I base the following findings of fact and conclusions on the entire record and the demeanor of the two 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 and proposed findings and conclusions that are inconsistent with this decision are rejected. I find the following facts to be true.

This case concerns legal opinions submitted in connection with certain securities issuers' registration statements. Issuers of securities are generally not permitted to offer their securities for sale "[u]nless a registration statement has been filed [with the Commission] as to [the] security" and "is in effect." 15 U.S.C. § 77e(a), (c). Form S-1 is the form the issuer of a security uses to register new securities under the Securities Act. *See* 17 C.F.R. § 239.11. Schedule A of the Securities Act lists those matters that must be provided in a registration statement. *See* 15 U.S.C. §§ 77g(a)(1), 77aa. Among other matters, a registration statement must be accompanied by "a copy of the opinion or opinions of counsel in respect to the legality of the issue." 15 U.S.C. § 77aa(29); *see* 17 C.F.R. § 229.601(b)(5). The opinion of counsel must "indicat[e] whether [the securities] will, when sold, be legally issued, fully paid and non-assessable, and, if debt securities, whether they will be binding obligations of the registrant." 17 C.F.R. § 229.601(b)(5). Counsel must also consent to the use of his or her opinion in connection with the filing of a Form S-1 registration statement. 15 U.S.C. § 77g(a)(1).

Dalmy is an attorney who lives in Denver, Colorado. Answer at ¶ 8. She received her law degree in 1989. Tr. 15. Dalmy's practice focuses on corporate and securities law, specializing in Commission filings. Tr. 15. According to her website, she "has extensive

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<sup>2</sup> Ten other Respondents were charged in the OIP; proceedings as to the ten others have been stayed. *John Briner, Esq.*, Admin. Proc. Rulings Release No. 2921, 2015 SEC LEXIS 2824 (July 9, 2015); Admin. Proc. Rulings Release No. 2803, 2015 SEC LEXIS 2346 (June 11, 2015); Admin. Proc. Rulings Release No. 2656A, 2015 SEC LEXIS 1823 (May 11, 2015); Admin. Proc. Rulings Release No. 2556, 2015 SEC LEXIS 1429 (Apr. 17, 2015); Admin. Proc. Rulings Release No. 2535, 2015 SEC LEXIS 1381 (Apr. 13, 2015).

<sup>3</sup> Citations to the Division's exhibits and Dalmy's exhibits are noted as "Div. Ex. \_\_\_\_" and "Resp. Ex. \_\_\_\_," respectively. The Division's and Dalmy's post-hearing briefs are noted as "Div. Br. at \_\_\_\_" and "Resp. Br. at \_\_\_\_," respectively.

experience in the preparation and filing of registration statements, including filings on Form[] S-1.” Div. Ex. 97 at 3; *see also* Resp. Br. at 2 (“I am an experienced securities attorney, in practice for twenty five years.”). Since September 2009, she has been listed by OTC Markets as a prohibited attorney.<sup>4</sup> *See* Div. Exs. 101, 104.

### 1.2 *The allegations and John Briner’s background*

In the OIP, the Division alleged that Dalmy provided false opinion letters in support of the S-1 registration statements of eighteen issuers.<sup>5</sup> OIP at ¶¶ 27, 52, 60-64. The first issuer was Stone Boat Mining Corp. As to Stone Boat, Dalmy admits that she provided an opinion letter and authorized its use in connection with the filing of Stone Boat’s Form S-1, but denies that her opinion letter was false. Tr. 20, 46; Resp. Br. at 3-4. As to the remaining seventeen issuers (the post-Stone Boat issuers), Dalmy admits that, contrary to what was stated in the opinion letters, she conducted no investigation into the issuers whatsoever. Tr. 27, 30-31. She asserts, however, that she merely provided the issuers with “draft” opinion letters (1) in preparation for conducting an investigation; and (2) so that the Forms S-1 could be properly formatted for eventual filing with the Commission. Tr. 23-25, 38, 48-49, 136. She denies that she authorized the issuers to use her draft opinion letters in connection with the filing of their Form S-1 registration statements. Tr. 86-87; *see, e.g.*, Resp. Br. at 2, 4. As a result of Dalmy’s litigation position, the factual issues in this case are narrow: (1) whether Dalmy authorized the seventeen post-Stone Boat issuers to use her opinion letters in connection with the filing with the Commission of their Form S-1 registration statements; and (2) whether Dalmy’s opinion letter for Stone Boat’s Form S-1 was false.

To put this matter in context, the OIP included allegations against eleven respondents: John Briner, Dalmy, two accounting firms, and seven accountants. All respondents save Dalmy have since offered to settle; Dalmy was the only respondent at the hearing. In the OIP, the

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<sup>4</sup> In June 2009, Dalmy received a warning letter from OTC Markets (then known as Pink OTC Markets) concerning deficiencies related to attorney letters for fifteen companies listed by OTC Markets. *See* Div. Ex. 102. When OTC Markets notified Dalmy three months later that it had added her to its prohibited attorneys list, OTC markets said “[d]espite [its] warning letter,” it found “that [Dalmy] ha[d] submitted inadequate letters in support of inadequate disclosures for [several] issuers.” Div. Ex. 104 at 2. It added that “[t]he missing information and inconsistencies in both the issuer[s]’ disclosure[s] and your Attorney Letter[s] make it obvious that you did not perform the diligence necessary to continue writing such letters to . . . OTC Markets.” *Id.*

<sup>5</sup> Those eighteen issuers are: Bonanza Resources Corp., Braxton Resources Inc., Canyon Minerals Inc., CBL Resources Inc., Chum Mining Group Inc., Clearpoint Resources Inc., Coronation Mining Corp., Eclipse Resources Inc., Gaspard Mining Inc., Gold Camp Explorations Inc., Jewel Explorations Inc., Kingman River Resources Inc., Lost Hills Mining Inc., PRWC Energy Inc., Seaview Resources Inc., Stone Boat Mining Corp., Tuba City Gold Corp., and Yuma Resources Inc.

Division alleged that Dalmy provided Briner with opinion letters that falsely stated that she “‘investigated’ and ‘examined’” the issuers. *Id.* at ¶ 4. Continuing, the Division alleged that Briner then engaged the accounting respondents who issued false audit reports. *Id.* at ¶ 5. According to the Division, Dalmy violated Section 17(a)(1), (2), and (3) of the Securities Act. *Id.* at ¶ 179; Div. Br. at 18-19.

The evidence presented during the hearing established that, as the Division alleged, Briner was placed on the OTC Markets prohibited attorneys list in 2006. Div. Ex. 101 at 1; *see* OIP at ¶ 77. In 2010, the United States District Court for the Southern District of New York enjoined Briner from violating Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, imposed an officer and director bar, prohibited him from participating in a penny stock offering, and ordered him to pay over \$92,000 in disgorgement, interest, and penalties. Div. Ex. 106 at 1-6 (comprising Final Judgment as to Briner in *SEC v. Golden Apple Oil & Gas, Inc.*, No. 09-cv-7580 (S.D.N.Y. Nov. 3, 2010)). After the judgment was entered in *Golden Apple*, the Commission suspended Briner from appearing before it for five years. Div. Ex. 107 (comprising *John Briner*, Exchange Act Release No. 63371, 2010 SEC LEXIS 3936 (Nov. 24, 2010)).

During the hearing in this matter, Dalmy admitted that she was aware of Briner’s checkered regulatory history. She was aware by December 2012 that Briner was on the OTC Markets prohibited attorneys list. Tr. 96. Dalmy believed that this resulted from Briner’s “involve[ment]” in the *Golden Apple* litigation. Tr. 96. Dalmy also admitted being generally aware that Briner had been the subject of a previous administrative proceeding before the Commission. Tr. 99-100.

### 1.3 *The evidence*

Turning to the specific facts in this case, in July 2012, Stone Boat filed a Form S-1 through the Commission’s EDGAR filing system.<sup>6</sup> Tr. 19; Div. Ex. 21 at 1. The first page of Stone Boat’s Form S-1 stated that “[c]opies of all communication” should be provided to “Diane D. Dalmy[,], Attorney at Law.” Div. Ex. 21 at 1. The first page then listed Dalmy’s address and telephone number. *Id.* Attached to the Form S-1 as exhibit 5.1 was a two-page opinion letter Dalmy prepared. Tr. 19-20; Div. Ex. 21 at 28, 41. In the letter, Dalmy said that she:

made such investigations and examined such records, including: (i) the Registration Statement; (ii) the Company’s Articles of Incorporation, as amended; (iii) the Company’s Bylaws; (iv) certain records of the Company’s corporate proceedings, including such corporate minutes as I deemed necessary to the performance of my services and to give this opinion; and (v) such other instruments, documents and records as I have deemed relevant and necessary to examine for the purpose of this opinion.

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<sup>6</sup> In the unlikely event that the reader is unfamiliar with EDGAR, it is a system maintained by the Commission for the electronic filing of documents. EDGAR stands for Electronic Data Gathering, Analysis and Retrieval.

I have examined and am familiar with the originals or copies, certified or otherwise identified to my satisfaction, of such other documents, corporate records and other instruments as I have deemed necessary for the preparation of this opinion.

Div. Ex. 21 at 41. Dalmy also said:

I am of the opinion that the shares of Common Stock held by the Selling Shareholders are validly issued, fully paid and non-assessable. I hereby consent to the filing of this opinion as an exhibit to the Registration Statement and to the use of my name in the Prospectus constituting a part thereof in connection with the matters referred to under the caption “Interests of Named Experts and Counsel[.]”

*Id.* at 42 (formatting altered).<sup>7</sup>

Subsequently, between November 30, 2012, and January 31, 2013, the seventeen post-Stone Boat issuers listed in footnote five, *supra*, filed Form S-1 registration statements that listed Dalmy as counsel and included Dalmy’s opinion letter as an exhibit. Each opinion letter contained the same language as that found in Stone Boat’s opinion letter. *See* Div. Exs. 1-10, 14-15, 18-20, 24-25; *see also* Tr. 31-32 (discussing the fact that the opinion letters used standard language and “were all identical”).

Dalmy testified that she authorized the filing of her opinion letter only in connection with Stone Boat’s Form S-1. Tr. 45-46. She said that Briner paid her \$1,750 to provide the Stone Boat opinion, review “his draft of the registration statement,” and provide comments and revisions. Tr. 47. Dalmy asserted that in connection with preparing the opinion letter, she “engaged in a level of due diligence.” Tr. 46. She thus “spoke[] with the auditors” and “reviewed some type of geology report” and “the asset purchase agreements.” Tr. 46. The Division presented no direct evidence to refute this testimony.

Dalmy conceded that she “never . . . communicat[ed] with any of the officers[,] . . . directors,” or auditors of the seventeen post-Stone Boat issuers. Tr. 27. According to her, this was because she never gave permission to Briner or the seventeen other issuers to use her opinion letters. Tr. 86-87. She professed to being flabbergasted that her opinion letters were used in connection with these seventeen other Forms S-1. Tr. 45-46, 57, 69, 108. Dalmy asserted that she had simply provided draft opinion letters for submission to an “EDGAR agent” who was supposed to “EDGARize” the complete Form S-1 package in preparation for filing with the Commission.<sup>8</sup> Tr. 23-24, 136. She testified that the plan was that after she and Briner

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<sup>7</sup> Briner amended Stone Boat’s Form S-1 on September 24 and again on October 17, 2012. Div. Exs. 22, 23; *see* Div. Ex. 95 at 16.

<sup>8</sup> Dalmy testified that an EDGAR agent is someone whose business involves submission of filings via EDGAR. Tr. 135 (“they are the ones who push the button that gets the document

determined which issuers would actually file their Forms S-1, she would take the additional steps of “conduct[ing] due diligence and obtain[ing] engagement letters.” Tr. 25, 38, 48-49. Dalmy asserted that she expected that only “three or four” of the post-Stone Boat issuers’ Forms S-1 “actually would be filed.” Tr. 25. She expected to be paid about \$20,000 per issuer for her involvement in the submission of the post-Stone Boat issuers’ registration statements. Tr. 25, 49.

Dalmy testified that in general, after a registration statement “package” is assembled, the EDGAR agent “go[es] through” a “process” before submitting the package via EDGAR. Tr. 138. Among other things, the agent must circulate the proposed filing to “[e]veryone . . . on [a] distribution list.” Tr. 33. According to Dalmy, the final document is not “filed until everyone on [the] distribution list emails in their consent” to the filing. Tr. 33. Because this process did not take place with respect to the seventeen post-Stone Boat issuers, Dalmy asserted that she was duped by Briner. Tr. 117.

The objective evidence does not support Dalmy’s version of events. Indeed, as detailed below, Dalmy’s own e-mails show that she knew that her opinion letters—letters that she conceded were false because she did not investigate the issuers in question—would be filed in support of the issuers’ Form S-1 registration statements.

Tiffany Posil is an attorney employed by the Commission in its Division of Corporation Finance. Tr. 149-50. At the hearing, she explained the comment process that occurs within the Commission after an issuer files a Form S-1. Ms. Posil explained that attorneys in Corporation Finance are assigned to review registration statements to determine whether the statements comply with federal securities statutes in general and certain disclosure requirements specifically. Tr. 150-53.

If Corporation Finance discovers a deficiency, it will send the issuer written comments for the issuer’s review and then engage in a dialogue with the issuer in hopes of addressing any problems. Tr. 152. Ms. Posil explained that shortly after being assigned to review a Form S-1, the assigned Corporation Finance attorney will typically identify the counsel listed on the first page of the Form S-1 and then contact that counsel in part to inform counsel who within Corporation Finance will be reviewing the Form S-1. Tr. 153. The Corporation Finance attorney will also confirm whether counsel will accept correspondence by e-mail. Tr. 153-54. Once the comment process is complete, the Commission will allow the registration statement to take effect. Tr. 154-55.

Consistent with this process, Corporation Finance attorney Ronald E. Alper phoned Dalmy on July 31, 2012, after reviewing the Form S-1 for Stone Boat. *See* Div. Ex. 96 at 1. Mr. Alper was unable to reach Dalmy and therefore left her a voicemail during which he evidently gave her his e-mail address. *Id.* After listening to the voicemail, Dalmy sent Mr. Alper an e-mail in which she provided her contact information and said “Please send the comment letter when available to me via email.” *Id.* Dalmy was thus familiar with how the Corporation Finance comment process functioned. *See id.*; *see also* Tr. 54.

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electronically filed”). She explained that “EDGARizing” a document involves preparing a document for filing via EDGAR. Tr. 136.

In late November 2012, Briner sent Dalmy an e-mail in which he asked whether she would “be willing to be counsel on [the] S[-]1” for Chum Mining “as well and provide [a] legal opinion.” Div. Ex. 95 at 17. Briner attached to the e-mail a document entitled “g6434.pdf.” *Id.* Fourteen minutes later, Briner sent Dalmy a separate e-mail with a subject line that referenced issuer PRWC Energy. *Id.* at 18. In the second e-mail, Briner informed Dalmy that “[w]e have another client wanting *to file the attached*,” and asked whether she “would . . . be willing to act for this one too?” *Id.* (emphasis added). Attached to the e-mail was a document titled “PRWC - S1 - Draft 5 (2).docx.” *Id.*

The Form S-1 for Chum Mining was filed with the Commission on November 30, 2012. Div. Ex. 5 at 1. The Form S-1 for PRWC Energy was filed on December 6, 2012. Div. Ex. 19 at 1. As with Stone Boat’s Form S-1, the Forms S-1 for Chum Mining and PRWC Energy listed Dalmy as an “Attorney at Law,” provided her contact information, and contained her opinion letter. Div. Ex. 5 at 1, 45-46; Div. Ex. 19 at 1, 44-45.

On Friday, December 7, 2012, Mr. Alper left Dalmy a voicemail message about Chum Mining’s Form S-1. Tr. 59-60; Div. Ex. 96 at 2. Dalmy responded by e-mail on Monday, December 10, 2012. Div. Ex. 96 at 2. In her e-mail, Dalmy did not deny that she had provided her opinion letter to Chum Mining and did not deny that Chum Mining was authorized to use the opinion letter. Instead, she did what one would expect her to have done if she had authorized the use of her opinion letter: she provided an e-mail address for Chum Mining and said “We will await receipt of the comment letter from the SEC.” *Id.*

The next day, Ms. Posil spoke by phone with Dalmy about Chum Mining. Div. Ex. 96 at 3. Once again, Dalmy did not alert the Commission to any problem, did not deny that she had provided her opinion letter, and did not deny that Chum Mining was authorized to use the opinion letter. Instead, in a follow-up e-mail to Ms. Posil, Dalmy said, “[a]s we discussed, the SEC is authorized to send comment letters to the two email addresses below regarding Chum Mining Group Inc.” *Id.* Dalmy then provided her own e-mail address and one for Chum Mining. *Id.*

As noted, Dalmy testified that aside from Stone Boat, she had not authorized Briner to use her opinion letters to support issuers’ Forms S-1 and had not authorized him to list her as counsel on the first page of the Forms S-1. Even assuming the truth of this testimony, by December 10, 2012, at the latest, Dalmy was on notice that Briner was using her name and opinion letters in support of certain Form S-1 registration statements. *See* Tr. 62; Div. Ex. 96 at 2.

As also noted, Dalmy was aware of Briner’s checkered regulatory history. Putting that history together with his purportedly unauthorized use of Dalmy’s opinion letters would have given Dalmy pause *if* she had not authorized his use of her opinion letters. *If* she had not actually authorized his use of those letters, her subsequent actions, discussed *infra*, would be wholly inexplicable. As is discussed, it is partly because of this incongruity that I determine that Dalmy is not credible. In other words, I do not believe her testimony.

The Form S-1 for Eclipse Resources was filed on December 3, 2012. Div. Ex. 8 at 1. At some point between then and December 13, 2012, Corporation Finance contacted Dalmy about Eclipse Resources' Form S-1. Cf. Div. Ex. 96 at 4. On December 13, 2012, Dalmy sent Ms. Posil an e-mail in which she said "[t]his email is being sent to authorize the SEC to send comment letters regarding the S-1 registration statement filed by Eclipse Resources Inc. to the email addresses below." *Id.* Dalmy then listed her e-mail address and an e-mail address for Eclipse Resources before saying "[t]hank you and we look forward to receipt of comment letter." *Id.* Once again, Dalmy did not express any surprise about being contacted regarding an issuer's Form S-1. She also did not deny that Eclipse Resources had her permission to use her opinion letter.

Dalmy's exchange with Ms. Posil demonstrates that *if* Dalmy had any doubt about what Briner was doing with her opinion letters, that doubt was erased by December 13, 2012. As noted, however, Dalmy's subsequent conduct leads to only one conclusion: she had no doubt about what was occurring and no objection to Briner's use of her name and opinion letters in connection with the issuers' Form S-1 registration statements.

On December 18, 2012, Briner's assistant, Sandy Vargas, sent Dalmy an e-mail with a copy to Briner. Div. Ex. 95 at 4. The subject line of the e-mail referenced issuers Braxton Resources and Gold Camp. *Id.* Ms. Vargas attached two documents to the e-mail: "g6480- Gold Camp.pdf," and "6481 - Braxton.pdf." *Id.* In the e-mail, Ms. Vargas asked whether Dalmy would "provide us with legal opinion letters for the above Companies" and said "[w]e are looking *to file* as soon as possible." *Id.* (emphasis added). Ms. Vargas then added by way of "a heads up," that "we are currently awaiting approval from the auditors for 4 other Companies that we will be needing legal opinions for. I will forward them to you upon receipt." *Id.*

Dalmy responded to Ms. Vargas's e-mail that same day. Div. Ex. 95 at 1. At this point, Dalmy had communicated with Corporation Finance at least twice regarding registration statements in which Briner was involved. If, as Dalmy testified, she had not authorized Briner to use her opinion letters, one would reasonably expect Dalmy to respond negatively to Ms. Vargas's e-mail. If Dalmy had concerns about Briner's use of her opinion letters, one would have expected her to raise those concerns. Dalmy, however, raised no concerns and instead said that she would be "available" "throughout the holidays -- so just let me know." *Id.* Shortly thereafter, Ms. Vargas sent Dalmy an e-mail, the subject line of which referenced issuer Clearpoint Resources. *Id.* Ms. Vargas attached to the e-mail the file "g6490-Clearpoint.pdf." *Id.* In the e-mail, Ms. Vargas reported "[w]e have just gotten approval for this one as well." *Id.*

Dalmy sent an e-mail to Ms. Vargas two days later on December 20, 2012, copying Briner. *See* Div. Ex. 95 at 21-22. In her e-mail, Dalmy said that she was "finalizing Gold Camp and will send over shortly. Were the other two registration statements *filed*?" *Id.* at 22 (emphasis added).



Ms. Vargas replied:

Not yet. John has been out of the office, but will be back today to review the final draft *before we send it off for filing*.

Have [I] forwarded you the S1 for Tuba to review yet? I will send it in another window just in case

Thanks for the update!

Div. Ex. 95 at 21 (emphasis added). About fifteen minutes later, Dalmy responded, saying “Thanks -- and let me know if you need me to re-date the opinions re Clearpoint and [the] other one.” *Id.* Separately on December 20, 2012, Ms. Vargas forwarded to Dalmy the Form S-1 for issuer Tuba City Gold for Dalmy’s review. *Id.* at 5.

The Forms S-1 for Braxton Resources, Clearpoint Resources, Gold Camp Explorations, and Tuba City Gold were all filed with the Commission on January 2, 2013. Div. Exs. 2 at 1, 6 at 1, 10 at 1, 24 at 1. These Forms S-1 listed Dalmy as an “Attorney at Law,” provided her contact information, and contained her opinion letter. Div. Exs. 2 at 1, 45-46; 6 at 1, 45-46; 10 at 1, 45-46; 24 at 1, 44-45. Mr. Alper therefore phoned Dalmy about Clearpoint Resources on Monday, January 7, 2013, and about Braxton Resources the next day. Div. Ex. 96 at 5-6. Dalmy responded with nearly identical e-mails in which she provided her e-mail address and the issuers’ e-mail addresses and said “the SEC is authorized to send comment letters regarding review of the S-1 registration statement[s].” *Id.*<sup>9</sup> Once again, Dalmy did not raise any issue related to the use of her opinion letters or her representation of the issuers.

Ms. Vargas sent another e-mail to Dalmy on January 23, 2013, copying Briner. Div. Ex. 95 at 7. The subject line of this e-mail referenced issuers Canyon Minerals and Jewel Explorations. *Id.* Ms. Vargas attached two files to the e-mail: “canyon- g6543-1.pdf” and “jewel g6561-1.pdf.” *Id.* In the body of the e-mail, Ms. Vargas asked Dalmy whether she “[w]ould . . . kindly provide us with Legal Opinion Letters for the above Companies.” *Id.* Later that same day, Ms. Vargas sent a similar e-mail to Dalmy, copying Briner, concerning issuers Coronation Mining and Gaspard Mining. *Id.* at 8. The Forms S-1 for Canyon Minerals, Jewel Explorations, Coronation Mining, and Gaspard Mining were all filed on January 25, 2013. Div. Exs. 3 at 1, 7 at 1, 9 at 1, 14 at 1. Each listed Dalmy as “Attorney at Law,” and included her contact information and opinion letter. Div. Exs. 3 at 1, 46-47; 7 at 1, 45-46; 9 at 1, 44-45; 14 at 1, 45-46.

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<sup>9</sup> The Division did not present any documentary evidence concerning whether anyone from Corporation Finance contacted Dalmy about the Forms S-1 for Gold Camp or Tuba City. Nonetheless, given Ms. Posil’s testimony and the other documentary evidence presented, it is reasonable to infer—and I conclude—that Ms. Posil, Mr. Alper, or one of their colleagues contacted Dalmy about those issuers as well. *See* Tr. 157-58.

Within a few days, Ms. Posil's colleague, Erin Wilson, contacted Dalmy about the Forms S-1 for Gaspard Mining and Jewel Explorations. Div. Exs. 96 at 7-8, 269 at 1. As before, Dalmy responded by providing her e-mail address and an e-mail address for the issuers and by stating that "the SEC is authorized to send comment letters via email to the email addresses reflected below." Div. Exs. 96 at 7-8, 269 at 1. Dalmy did not raise any issue related to the use of her opinion letters or her representation of the issuers.

On Monday, January 28, 2013, Ms. Vargas sent Dalmy three e-mails about five more issuers: Bonanza Resources, CBL Resources, Kingman River Resources, Lost Hills Mining, and Yuma Resources.<sup>10</sup> Div. Ex. 95 at 9-12. That same day, Ms. Vargas sent Dalmy an e-mail, copied to Briner, with a subject line that referenced "[i]nvoices." *Id.* at 13-15. In the e-mail, Ms. Vargas asked whether Dalmy "[w]ould mind sending us your invoice for all of the legal opinion letters you ha[ve] provided, including the 6 you are working on now. I believe there was a total of 17?" *Id.* at 13. She then added, "[o]nce I receive that we can forward payment to you." *Id.*

In a responsive e-mail, Dalmy said:

Sandy -- I will do so. I will send a separate invoice for each company. Also, I am working on only 5 today and you said there were six:

1. Bonanza Resources
2. CBL Resources
3. Kingman River Resources
4. Lost Hills Mining
5. Yuma Resources

Are we missing one?

Div. Ex. 95 at 14. Ms. Vargas responded, "[s]orry, here is the other one," and forwarded a file titled "Sea- g6586.pdf." *Id.* Given the name of the attached file and the fact that the Form S-1 for Seaview Resources was filed three days later, it is apparent that "the other one" to which Ms. Vargas referred was the Form S-1 for Seaview Resources. Div. Ex. 20 at 1. In addition to the Form S-1 for Seaview Resources, the Forms S-1 for the other five firms in Dalmy's January 28, 2013, e-mail were also filed with the Commission on January 31, 2013. Div. Exs. 1, 4, 15, 18, 25.

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<sup>10</sup> Page 9 of Division Exhibit 95 is an e-mail from Ms. Vargas to Dalmy. The subject line simply references "FW: Re[2]: Legal Counsel." Div. Ex. 95 at 9. Next to the subject line are the handwritten annotations "/Bonanza Resources/ CBL Resources/ Kingman." *Id.* In the e-mail, Ms. Vargas asked Dalmy whether she "[w]ould . . . mind preparing Opinion Letters for the attached?" *Id.* A later e-mail from Dalmy confirms that, as the annotations suggest, Ms. Vargas's e-mail concerned Bonanza Resources, CBL Resources, and Kingman River Resources. *See id.* at 14.

At some point during the following two weeks, Ms. Posil contacted Dalmy about Bonanza Resources, CBL Resources, and Kingman River Resources. *Cf.* Div. Ex. 90 at 1. On February 12, 2013, Dalmy sent Briner an e-mail. *Id.* Instead of telling Briner that he was not authorized to use her name or opinion letters in connection with the issuers' registration statements, Dalmy told him that she "need[ed] the email address for . . . the [three] companies so that [she] c[ould] provide the SEC with authorization to send comment letters." *Id.* Once again, Dalmy's own e-mail shows that she had no objection to the use of her name and opinion letters and that she was instead fully aware of what Briner was doing.

Corporation Finance sent comment letters to six issuers on February 26, 2013. *See* Div. Ex. 91 (referencing this fact). In part, this prompted Dalmy to send Briner an e-mail with the subject line "I NEED TO SPEAK WITH YOU." Div. Ex. 91. Briner replied that he would be "back in [his] office" the next day and asked "[w]hat's a good time." *Id.* Dalmy responded:

Yeah. Would 5:30 Denver time work? And what should I call you on?

We need to discuss:

1. All the S-1 registration statements and the first comment re "who prepared this statement" and whether you need assistance -- since you received 6 more comment letters today.
2. All corporate books for [an unrelated entity] so I can proceed with name change. Funds should be in tomorrow.
3. Jasper Exploration -- SEC examiner called me (he's on a couple of pending registration statements). Said he's been trying to get a hold of company and nothing. What is the status with this company?

*Id.* As a factual matter, asking Briner "whether [he] need[ed] assistance" because he received comment letters for six of the issuers is inconsistent with Dalmy's assertion that she had not authorized the use of her name and opinion letters in connection with the filing of the issuers' Forms S-1.

In fact, Briner did need assistance. On March 12, 2013, Briner forwarded to Dalmy a comment letter he received from Corporation Finance concerning Seaview Resources.<sup>11</sup> Div. Ex. 95 at 19. The next day, Briner sent Dalmy an e-mail to which he attached Corporation Finance comment letters for Bonanza Resources, CBL Resources, Kingman River Resources, Lost Hills Mining, and Yuma Resources. *Id.* at 20. In the e-mail, Briner asked whether Dalmy would "mind helping with the attached." *Id.* He added that "they will be very similar to the last one I sent," referring his e-mail sent the day before. *Id.* No evidence was submitted reflecting how or whether Dalmy responded to Briner's e-mail. Her February 26, 2013, e-mail to Briner, however, shows that she continued to be a willing participant in the comment process related to

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<sup>11</sup> Ms. Posil explained that when personnel in Corporation Finance send comment letters via e-mail, the subject line is automatically generated. Tr. 160-61. The format of the subject line of the e-mail Briner sent to Dalmy on March 12, 2013, is consistent with the format of an e-mail Ms. Posil explained was automatically generated. *See* Tr. 160-61; Div. Ex. 95 at 19-20.

issuers' registration statements. And the fact that Briner forwarded comment letters on March 13, 2013, shows that Dalmy did not object after receiving the comment letter the day before for Seaview Resources.

On June 17, 2013, the Division of Enforcement sent subpoenas to all seventeen post-Stone Boat issuers. *See* Div. Ex. 85. Dalmy received courtesy copies of all seventeen subpoenas and cover letters sent to the issuers. *Id.* The subpoenas got Briner's and Dalmy's attention.

On June 25, 2013, Clearpoint applied to withdraw its registration statement. *Clearpoint Res. Inc.*, Securities Act Release No. 9411, 2013 SEC LEXIS 1949 (July 3, 2015). The next day, Braxton Resources also applied to withdraw its registration statement. *Braxton Res. Inc.*, Securities Act Release No. 9410, 2013 SEC LEXIS 1948 (July 3, 2013).

On June 27, 2013, Dalmy called Division counsel and left a voicemail message. *See* Div. Exs. 86, 87. In the message, she said:

Hi [Division counsel], My name is Diane Dalmy, and I'm telephoning you with regards to La Paz Mining Corp, uh, NY dash 8922. Well, with regards to the several copies of subpoenas that I received for about, I think, sixteen or seventeen different companies. I wanted to let you know that I am not counsel to any of these companies, um, I have never entered into to any type of engagement relationship, engagement letter. I have never been paid any legal fees. Uh, I did provide draft opinions in connection with, uh, certain registration statements; however, *I was not even aware that some of these registration statements had even been filed.*

Um, so, I have no knowledge of any of these companies. They're not my clients. Uh, actually they're John Briner clients, and, um any other questions you might have, please give me a call: 303 985 9324. Otherwise, I have also uh, certainly, advised John Briner of the fact that I received these courtesy copies of the subpoenas, um, but I have never, I haven't even received a response from him. So, thank you very much. Bye.

Div. Ex. 87 (emphasis added). As the prior recitation of the facts shows, the above emphasized language was false or seriously misleading.

The Commission denied Braxton Resources' and Clearpoint Resources' applications to withdraw their registration statements on July 3, 2013. *See Clearpoint Res. Inc.*, 2013 SEC LEXIS 1949; *Braxton Res. Inc.*, 2013 SEC LEXIS 1948. Two days later, Dalmy e-mailed Briner. Resp. Ex. 1. In her e-mail, she said:

John – this ALL needs to be remedied immediately as it is putting me in very difficult circumstances.

1. Received fax from SEC stating that Braxton and Clearpoint withdrawals are denied. I have no association with these companies and concerned.
2. Sync2 – need those items listed in last email especially the resignation and the waiver/settlement from Moore. Tim is beyond furious right now and understandably so.

*Id.*

Between July 5 and July 8, 2013, fourteen of the remaining issuers—all but Stone Boat and Canyon Minerals—applied to withdraw their registration statements. The Commission denied all of those applications on July 17, 2013.<sup>12</sup>

In February 2014, the Commission instituted proceedings against all of the issuers, including Stone Boat. *See La Paz Mining Corp.*, Admin. Proc. File Nos. 3-15715 through 3-15734, 2014 SEC LEXIS 1009, at \*1 (Mar. 20, 2014). Within a week, Dalmy issued a press release in which she said she planned to “pursue civil action against” Briner and asserted “that she had no knowledge of the use of her name or identity associated with the filing of the [issuers’] registration statements and opinions related thereto.” Div. Ex. 88 at 1. She also said she “had no general knowledge of the use of my name or opinion until contacted by the . . . Commission during 2013.” *Id.*<sup>13</sup>

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<sup>12</sup> *See Bonanza Res. Corp.*, Securities Act Release No. 9422, 2013 SEC LEXIS 2057 (July 17, 2013); *CBL Res. Inc.*, Securities Act Release No. 9423, 2013 SEC LEXIS 2058 (July 17, 2013); *Chum Mining Group Inc.*, Securities Act Release No. 9424, 2013 SEC LEXIS 2059 (July 17, 2013); *Coronation Mining Corp.*, Securities Act Release No. 9425, 2013 SEC LEXIS 2060 (July 17, 2013); *Eclipse Res. Inc.*, Securities Act Release No. 9426, 2013 SEC LEXIS 2061 (July 17, 2013); *Gaspard Mining Inc.*, Securities Act Release No. 9432, 2013 SEC LEXIS 2067 (July 17, 2013); *Gold Camp Explorations Inc.*, Securities Act Release No. 9427, 2013 SEC LEXIS 2062 (July 17, 2013); *Goldstream Mining Inc.*, Securities Act Release No. 9428, 2013 SEC LEXIS 2063 (July 17, 2013); *Jewel Explorations Inc.*, Securities Act Release No. 9429, 2013 SEC LEXIS 2064 (July 17, 2013); *Kingman River Res. Inc.*, Securities Act Release No. 9430, 2013 SEC LEXIS 2065 (July 17, 2013); *Lost Hills Mining Inc.*, Securities Act Release No. 9431, 2013 SEC LEXIS 2066 (July 17, 2013); *Seaview Res. Inc.*, Securities Act Release No. 9419, 2013 SEC LEXIS 2054 (July 17, 2013); *Tuba City Gold Corp.*, Securities Act Release No. 9420, 2013 SEC LEXIS 2055 (July 17, 2013); *Yuma Res. Inc.*, Securities Act Release No. 9421, 2013 SEC LEXIS 2056 (July 17, 2013).

<sup>13</sup> Dalmy testified that these last two sentences quoted from her press release were true because, as of the day each Form S-1 was filed, she did not know the issuers were using her name and opinion letters and did not find out until contacted by Corporation Finance. Tr. 84-86. I do not believe Dalmy’s convenient interpretation of her press release. The evidence shows that she knew what Briner was doing.

On March 20, 2014, the Commission's Chief Administrative Law Judge issued an initial decision suspending the registration statements of all eighteen issuers whose Forms S-1 were supported by Dalmy's opinion letters. *See La Paz Mining Corp.*, 2014 SEC LEXIS 1009, at \*9-11. The initial decision was based on the determination that the issuers' registration statements contained "untrue statements of material fact and omitted to state material facts necessary to make the statements not misleading." *Id.* at \*9. The Commission issued a final order suspending the registration statements on May 2, 2014. *La Paz Mining Corp.*, Securities Act Release No. 9582, 2014 SEC LEXIS 4548, at \*1-2.

The Commission issued Dalmy an investigative subpoena in April 2014, requiring her to appear for testimony the following month. Div. Ex. 89 at 3. I discuss relevant portions of Dalmy's subsequent investigative testimony below. *See* Div. Ex. 92.

#### *1.4 Dalmy authorized Briner to use her name and opinion letters*

As noted, the primary factual question in this matter is whether Dalmy authorized Briner to use her name and opinion letters for the seventeen post-Stone Boat registration statements. For several reasons, I resolve that question against Dalmy.

Dalmy's own words and omissions show that she authorized the use of her name and opinion letters with regard to the seventeen post-Stone Boat issuers. First, despite multiple opportunities, Dalmy never raised any concern during any communication with Corporation Finance staff. To the contrary, she repeatedly said that the Commission was "authorized to send comment letters" to her. Div. Ex. 96. If Dalmy had not actually authorized the use of her opinion letters, there is no legitimate reason that she would have done this, over and over again.

Second, Dalmy repeatedly communicated with Ms. Vargas via e-mails on which Briner was copied. She never complained about the use of her opinion letters, even though she knew they were being used. Instead, she repeatedly offered her assistance. In this regard, two exchanges are particularly telling.

The first occurred on December 18, 2012, which was after Dalmy had been contacted by Corporation Finance staff about the Forms S-1 for several issuers. On that day, Ms. Vargas asked Dalmy about "provid[ing] . . . opinion letter[s] for" Braxton Resources and Gold Camp. Div. Ex. 95 at 4. Ms. Vargas also gave Dalmy "a heads up," that the need for opinion letters for four more issuers would soon arise. *Id.* Rather than complain, Dalmy helpfully responded that she would be "available" "throughout the holidays" and that Ms. Vargas should "just let [Dalmy] know." *Id.* at 1.

The second telling exchange happened on January 28, 2013. On that day, Ms. Vargas sent Dalmy a number of e-mails about various issuers, *see* Div. Ex. 95 at 9-12, before asking whether Dalmy "[w]ould mind sending us your invoice for all of the legal opinion letters you ha[ve] provided," *id.* at 13. Dalmy quickly responded that she "w[ould] do so. I will send a separate invoice for each company." *Id.* at 14. She then helpfully listed the issuers for which she was preparing opinion letters before asking whether she was "missing one?" *Id.*

If Briner had actually filed the issuers' Forms S-1 with Dalmy's opinion letters without Dalmy's permission, Dalmy would not have reacted in the above manner in response to Ms. Vargas's e-mails. She certainly would not have responded positively. She would not have actively assisted Briner and Ms. Vargas in filing more registration statements, nor would she have any reason to believe she was entitled to payment. I therefore do not believe the Dalmy did not authorize Briner's use of her name and opinion letters.

Dalmy attempted to discount the importance of any e-mail she exchanged with Ms. Vargas, saying that Ms. Vargas had no authority to file documents with the Commission. Tr. 43, 52. Dalmy thus would not have "imagine[d]" that Ms. Vargas would have caused documents to be filed with the Commission. Tr. 43. Dalmy made these statements with an air of incredulity, as if it would be impossible to imagine that sending her opinion letters to Ms. Vargas would result in them being filed with the Commission.

Of course, it is easy to imagine—especially because it actually happened—Briner or Ms. Vargas compiling documents and sending them to a third party EDGAR agent who formatted them and filed them with the Commission. *See* Div. Ex. 95 at 5-6. Ms. Vargas's alleged lack of authority to file documents with the Commission is thus a chimera because whether Dalmy thought Ms. Vargas had such authority, Dalmy knew that opinion letters she sent to Ms. Vargas were, in fact, repeatedly filed with Commission in connection with the issuers' Forms S-1.

#### *1.5 Dalmy's denials are inconsistent and contradicted by objective evidence*

The objective evidence notwithstanding, Dalmy claims she had no idea Briner intended to use her opinion letters for the seventeen post-Stone Boat issuers. As noted, Dalmy's primary line of defense was that her letters were drafts and that she had no idea Briner would file her letters in connection with the issuers' Forms S-1. She also says that once she realized what was happening, she phoned Briner and furiously told him to fix the problem. There is little if any evidence to support Dalmy's testimony.

As an initial matter, Dalmy's testimony is the only evidence that she called Briner and angrily told him to withdraw the registration statements. *See* Tr. 57-66. Critically, because no angry conversation occurred via e-mail, there is no objective evidence that supports Dalmy's testimony. This is significant because Dalmy's e-mails contradict her testimony. And Dalmy's testimony on other subjects is inconsistent with the objective, documentary evidence, making her testimony suspect in general.

Moreover, Dalmy could not consistently explain when the allegedly angry conversation occurred. When she gave investigative testimony in May 2014, Dalmy said that February 12, 2013, was when she first realized there was a problem. Div. Ex. 92 at 14-17. She claimed that she was furious and phoned Briner and told him to withdraw the Forms S-1. *Id.* at 14-15. To support this assertion, she pointed to the e-mail she sent *two weeks* later on February 26, 2013, that contained the subject-line "I NEED TO SPEAK WITH YOU." *Id.* at 15; *see* Div. Ex. 91.

During the hearing, Dalmy changed her testimony and said that she realized there was a problem by December 10, 2012. Tr. 58, 60. She testified that her angry conversation with

Briner first occurred in December 2012 instead of in February 2013. Tr. 57, 60. Of course, Dalmy was forced to change her testimony because February 12, 2013, could not have been when she first realized Briner was using her opinion letters. By February 2013, Dalmy had communicated with Ms. Vargas and Corporation Finance personnel too many times to credibly claim she did not know until February 2013 that Briner was using her opinion letters. But this means that, contrary to her investigative testimony, Div. Ex. 92 at 15, her February 26, 2013 “I NEED TO SPEAK WITH YOU” e-mail does not show that she was angry with Briner after having *just* learned that he was using her opinion letters.

This raises another problem that relates to the February 26, 2013 “I NEED TO SPEAK WITH YOU” e-mail. Recall that in this e-mail, Dalmy told Briner that they “need[ed] to discuss” (1) the issuers’ Forms S-1, (2) “the first comment re ‘who prepared this registration statement[,]’” and (3) “whether you need assistance -- since you received 6 more comment letters today [from Corporation Finance].” Div. Ex. 91. As noted, during her investigative testimony, Dalmy said this e-mail showed that she was furious with Briner on discovering what he was doing. Div. Ex. 92 at 15. The e-mail itself, however, does not support this assertion. Instead, it suggests that Dalmy thought she and Briner needed to get their story straight about who prepared the Forms S-1.

Dalmy also testified during the investigation that she was being “sarcastic” in the February 26, 2013 e-mail when she asked whether Briner needed assistance with the additional comment letters. Div. Ex. 92 at 15, 16. During her hearing testimony, Dalmy said instead that she was being “sarcastic” in her e-mail to Ms. Vargas on January 28, 2013, when she said she would “send a separate invoice for each company” for which she provided an opinion letter. Tr. 51; Div. Ex. 95 at 14. Dalmy claimed that she also left Briner a “sarcastic” voicemail wondering what Ms. Vargas was talking about, in light of the alleged fact that Dalmy had no fee arrangement with Briner or the issuers. Tr. 52-53.

But the word “sarcastic” is not a magic wand that can be waved to make words mean other than what one would normally expect. Saying an e-mail was intended to be sarcastic does not make it so and labeling an e-mail as sarcastic does not mean Dalmy can avoid the obvious import of her words. Absent some evidence to support Dalmy’s assertion that she was simply being sarcastic, I cannot credit her weak explanation for what she plainly intended.

In her post-hearing brief, Dalmy says that when she sent her “sarcastic” e-mail in January 2013, she “did not know Briner was involved in a fraud, so it did not occur to [her] to be more circumspect about making flippant sarcastic comments to someone.” Resp. Br. at 6. Dalmy’s claimed lack of knowledge in January 2013 is belied by her testimony that by December 10, 2012, she knew that Briner had used her opinion letters without authorization. Tr. 58, 60. Her claimed lack of knowledge is also belied by her multiple exchanges with Corporation Finance personnel about various issuers’ Forms S-1 and her opinion letters. Even if Dalmy did not initially know what Briner was doing—and given all that transpired, I do not believe that she did not know—it is impossible for her to have been unaware in late January 2013 of what Briner was doing. Dalmy’s continued inability to settle on a date by when she first realized Briner was using her opinion letters only adds weight to my determination that her assertions are not credible.



Dalmy's claim that her opinion letters were drafts is further belied by that fact that the letters bore no indication, such as an electronic watermark, that they were intended to only be used as drafts. *See* Tr. 45. Moreover, neither Briner nor Ms. Vargas ever asked for a draft opinion letter. Instead, they asked for opinion letters and their requests were following shortly thereafter by the actual filing of the relevant Form S-1 together with Dalmy's opinion letter. And saying the letters were intended to be drafts is inconsistent with Ms. Vargas's, Briner's, and Dalmy's references to "*filing*" the Forms S-1. *See, e.g.*, Div. Ex. 95 at 16, 18, 21-22.

In response to this point, Dalmy says that she and Ms. Vargas used the term "file" idiomatically. According to Dalmy, when they used the term "file," they were referring to submission to the "EDGAR Agent" who would then submit the document via EDGAR. Tr. 43-45. I do not believe this aspect of Dalmy's testimony. First, it is nonsensical that there would be a "filing" with an agent prior to a "filing" with the Commission. Second, the fact that Briner repeatedly caused the issuers' Forms S-1 to be filed with the Commission would have led Dalmy to reexamine her belief as to the definition of this term, if she honestly held it. Third, during her testimony, Dalmy repeatedly used the terms "file" or "filed" in relation to the submission of documents to the Commission. *See* Tr. 58, 62-63, 65.

Fourth, Dalmy's course of conduct with Ms. Vargas and Briner shows that Dalmy's claim could not be true. In late November 2012, Briner sent Dalmy two e-mails in quick succession. In the first, which concerned Chum Mining, he asked her to serve as counsel and provide an opinion letter. Div. Ex. 95 at 17. The second e-mail concerned PRWC Energy's Form S-1. *Id.* at 18. In that e-mail, Briner attached a draft Form S-1, told Dalmy that "[w]e have another client wanting to *file* the attached," and asked whether she "would . . . be willing to act for this one[,] too?" *Id.* (emphasis added). Consistent with what common sense suggests the term "file" means, Briner then caused PRWC Energy's Form S-1 to be filed with the Commission about a week later. Div. Ex. 19 at 1. If Dalmy actually thought "file" meant only submission to the EDGAR agent, the fact that PRWC's Form S-1 was filed with the Commission would have alerted her that she was mistaken. In the very least, it should have caused her to inquire of Briner.

Dalmy, however, asked for no clarification on December 18, 2012, when Ms. Vargas asked for opinion letters for Braxton Resources and Gold Camp because she and Briner were "looking to *file* as soon as possible." Div. Ex. 95 at 4 (emphasis added). Two days later, Dalmy said in an e-mail that she was "finalizing Gold Camp and [would] send [it] over shortly. Were the other two registration statements *filed*?" *Id.* at 21-22 (emphasis added). Ms. Vargas replied that the other two Forms S-1 had "[n]ot yet" been filed, because Briner had "been out of the office." *Id.* at 21. She added, however, that on his return, Briner would "review the final draft before we *send it off for filing*." *Id.* If filing actually meant sending a document to the EDGAR agent but not having the agent submit the document to the Commission, Ms. Vargas would not have said "before we send it off for filing." Instead, she would have said "before we file it." "[S]end[ing] it off for filing" suggests submission to a third party in order to have the third party file it.

When Dalmy replied shortly thereafter to Ms. Vargas's e-mail, Dalmy asked whether Ms. Vargas "need[ed] [Dalmy] to re-date the opinion[ing]" letters for two of the issuers. Div. Ex. 95 at

21. If Dalmy actually thought she was submitting drafts for submission to the EDGAR agent, this latter comment would not make sense. She testified that she would only take the additional, presumably time-consuming steps of “conduct[ing] due diligence and obtain[ing] engagement letters” after she and Briner decided which issuers would file Forms S-1. Tr. 25, 38, 48-49. There would therefore be no need to re-date anything unless Dalmy thought the Forms S-1 would be filed with the Commission in the near future.

Even if Dalmy once thought the term “file” referred only to submission to the EDGAR agent—and I do not believe she ever thought that—she could not reasonably have retained that belief in dealing with Ms. Vargas and Briner. Their use of the word “file” was followed by actual filings with the Commission.

Dalmy’s credibility was also hurt because her story about what the term “filing” meant forced her to be intentionally vague during her testimony about the concept of filing documents with the Commission via EDGAR. During her testimony, Dalmy said that she “[a]bsolutely” “perceive[d] a distinction between filing something on EDGAR and filing something with the Commission.” Tr. 137. Division counsel attempted to clarify Dalmy’s testimony. On re-direct, the following colloquy occurred:

Q I am going to try to clarify what I think might be confusion. I am hoping that I can.

Ms. Dalmy, when you approved -- when you submitted the Stone Boat, your Stone Boat opinion and consented to have it filed, you understood that it was going to be electronically filed, correct?

A Yes.

Q And you understood that by that that means it is filed on something called EDGAR, correct?

A When the EDGAR agent actually submits it.

Q But you understood that by filing with the SEC, that is the same thing as filing on EDGAR? That is the same thing?

A Yes, *that is the end result.*

Q I think --

A When the EDGAR agent pushes that button or whatever they do and it gets filed, it is electronically filed on the EDGAR database.

Q Okay. There is no other filing with the SEC, it is on the EDGAR database and that means it is filed with the SEC?

A That’s correct.

Tr. 139-40 (emphasis added). Although Dalmy appeared to relent on questioning by Division counsel, in her post-hearing brief, Dalmy again attempts to suggest that there is a distinction where none exists. Resp. Br. at 2 (“I prepared drafts and transmitted those drafts for submission to EDGAR to be formatted—not for filing with the SEC.”). Given that Dalmy “has extensive experience in the preparation and filing of registration statements, including filings on Form[] S-1,” Div. Ex. 97 at 3, her attempts to obfuscate support my determination that her testimony was not believable.

In response to the obvious question of why, if Briner lacked authorization to use Dalmy's opinion letters, she failed to alert Ms. Posil or Mr. Alper to any problems, Dalmy testified that she did not feel she had the authorization to withdraw the issuers' registration statements. Tr. 114. But whether she had such authorization is irrelevant. She did not require anyone's authorization to tell Ms. Posil there was a problem with her having been listed as the attorney for the issuers and responsible for the registration statements' opinion letters. If Briner actually lacked Dalmy's permission to use her opinion letters, telling Corporation Finance of this fact would have been the only reasonable thing to do. By saying she lacked authorization to withdraw the Forms S-1, Dalmy was simply setting up a straw man.

Further, it is significant that Dalmy told Corporation Finance personnel that she was authorized to receive comment letters. If the issuers' use of her opinion letters was a fraud and the issuers were not her clients, it is inexplicable why Dalmy would tell Ms. Posil or Mr. Alper that they could send comment letters to her. Dalmy was surely aware that by responding in the manner that she did, she was intimating that the issuers' use of her opinion letters was authorized and legitimate.

Dalmy testified that she was "caught . . . off guard" when she was contacted by Corporation Finance personnel in December 2012. Tr. 57. She said she phoned Briner, who told her that three or four registration statements were "inadvertently filed during the holiday season." Tr. 57. According to Dalmy, she told Briner to withdraw the registration statements and he agreed to do so. Tr. 57. She said that in the meantime, he asked her to "go ahead and on behalf of the compan[ies] get the comment letter[s]." Tr. 57; *see* Tr. 61. Dalmy testified that Briner told her that he planned to withdraw the registration statements "based upon receipt of the comment letter[s]." Tr. 65. Dalmy said that she agreed with Briner's request and provided "perfunctory response[s] to" Corporation Finance in order "to get the comment letters." Tr. 62.

None of Dalmy's e-mail exchanges with Briner and Ms. Vargas support this version of events. To the contrary, the e-mails show Dalmy was a willing participant in Briner's scheme. On December 18, 2012, Ms. Vargas sent Dalmy an e-mail asking for opinion letters for Braxton Resources and Gold Camp because "[w]e are looking to file as soon as possible." Div. Ex. 95 at 4. Ms. Vargas also said she would need opinion letters for four other issuers. *Id.* If Dalmy actually believed that three or four registration statements were "inadvertently filed" and was simply going along with Briner's request as to those already-filed registration statements, this would have been the time for her to stop the bleeding. Indeed, without her opinion letters, no additional registration statements could be "inadvertently filed." Instead of putting a stop to the "inadvertent[] fil[ings]," however, Dalmy responded to Ms. Vargas that she would be "available" "throughout the holidays . . . so just let me know." *Id.* at 1. Dalmy was effectively saying that she knew Briner and Ms. Vargas had filed registration statements supported by her opinion letters and that she was ready to help them by providing more opinion letters so they could file more registration statements. And a month later, Dalmy was happily working on opinion letters for six more issuers. *See id.* at 14. Dalmy's testimony that she was "caught . . . off guard" and was simply going along with Briner's request is thus not believable. Tr. 57; *see generally* Tr. 57-65.

Finally, Dalmy notes that with the exception of Stone Boat, there was no evidence that she ever sent invoices for work on any of the issuers' registration statements. Resp. Br. at 6. She argues that this shows she was being sarcastic with Ms. Vargas in January 2013, and was not a party to Briner's fraud. *Id.* Dalmy's argument is unconvincing because her January 28, 2013 statement that she would send invoices to Ms. Vargas is evidence that she later sent invoices. *Cf. Mut. Life Ins. v. Hillmon*, 145 U.S. 285, 295-96 (1892) (a declarant's statement of intent to take a particular action constitutes evidence that the declarant later took the action). Additionally, Dalmy testified that she did not remember when she was paid for her work on Stone Boat but that it might have been "a couple of months after the filing." Tr. 48. If that was the case, it is not difficult to imagine why there would be no documentary evidence that Briner paid Dalmy for the seventeen other issuers. By the time she might otherwise have been paid, it was clear that the issuers had a problem with the Commission.

In light of the foregoing, I conclude that Dalmy is not credible. I also conclude that she authorized Briner to use her name and opinion letters in connection with the Form S-1 registration statements of all eighteen issuers.

*1.6 There is insufficient evidence that Dalmy failed to adequately investigate Stone Boat*

The second factual issue concerns whether Dalmy adequately investigated Stone Boat before issuing her opinion letter. This is a close question. Were the standard something less than a preponderance of the evidence, I would rule in the Division's favor based on Dalmy's lack of credibility and Briner's regulatory history. Applying preponderance of the evidence, I find that the Division failed to carry its burden.

The Division did not present any evidence concerning the legitimacy of Stone Boat's Form S-1 or Dalmy's opinion letter. At least with respect to the other seventeen issuers, Dalmy admitted that she conducted no investigation. Her opinion letters for those issuers, therefore, had to be false. But with regard to Stone Boat, there was no evidence that Stone Boat's Form S-1 or Dalmy's opinion letter were fraudulent. Additionally, Dalmy testified that she conducted an investigation and that she authorized the use of her opinion letter. Tr. 20, 46.

The Division argues that because Dalmy was not credible as to the seventeen post-Stone Boat issuers, I should infer, based on Dalmy's admitted failure to investigate those issuers, that she similarly failed to investigate Stone Boat. Div. Br. at 20 n.18. The drawing of reasonable inferences lies at the core of a factfinder's job. *See Siewe v. Gonzales*, 480 F.3d 160, 167 (2d Cir. 2007). "[D]rawing . . . a fair inference inevitably entails some measure of speculation." *Id.* An inference crosses the line into mere speculation, however, "when there is a complete absence of probative facts to support" a given conclusion. *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). Such is the case here. Absent some affirmative evidence, I have no basis to conclude that the Stone Boat opinion letter was false.

It is true that the Commission has suspended the effectiveness of Stone Boat's registration statement. *La Paz Mining Corp.*, 2014 SEC LEXIS 1009, at \*9-11. That suspension, however, resulted from a proceeding in which Stone Boat defaulted. *Id.* at \*3. I

therefore cannot give the Commission's decision weight with respect to the determination of whether Dalmy committed a violation. *Cf. Don Warner Reinhard*, Exchange Act Release No. 61506, 2010 SEC LEXIS 1010, at \*14 (Feb. 4, 2010) (noting that "the Supreme Court has held that '[i]n the case of a judgment entered by . . . default, none of the issues is actually litigated. Therefore [issue preclusion, or collateral estoppel] does not apply with respect to any issue in a subsequent action.'" (quoting *Arizona v. California*, 530 U.S. 392, 414 (2000))). I therefore conclude that the Division did not carry its burden to show that Dalmy failed to investigate Stone Boat before issuing her opinion letter.

## **ISSUES**

1. Section 17(a)(1) bars "employ[ing] any device, scheme, or artifice to defraud" "in the offer or sale of any securities." Section 17(a)(3) prohibits "engag[ing] in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser" "in the offer or sale of any securities." Filing multiple false opinion letters in support of registration statements can fall within the terms of Section 17(a)(1) and (3). Dalmy submitted seventeen false opinion letters in support of the seventeen post-Stone Boat registration statements. Did Dalmy violate 17(a)(1) and (3)?

2. In addition to prohibitions on fraudulent conduct found in Section 17(a)(1) and (3), Section 17(a)(2) prohibits "obtain[ing] money or property by means of any untrue statement of a material fact" "in the offer or sale of any security." While Dalmy received money for the Stone Boat opinion letter she submitted, the Division never showed that the Stone Boat opinion letter was false. Did Dalmy violate Section 17(a)(1), (2), or (3) when she submitted the Stone Boat opinion letter?

## **DISCUSSION AND CONCLUSIONS OF LAW**

### *2.1 Legal Principles*

The OIP charges Dalmy with violations of Section 17(a)(1), (2), and (3) of the Securities Act. 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 instruments of transportation 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 Dalmy 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. *Id.*

Section 17(a)(1), which prohibits the employment of “any device, scheme, or artifice to defraud,” covers “all scienter based, misstatement-related misconduct.” *John P. Flannery*, 2014 SEC LEXIS 4981, at \*58. Because a single misstatement qualifies as “a ‘device’ or ‘artifice’ to defraud,” *id.* at \*62, anyone “who (with scienter) ‘makes,’” “drafts[,] or devises” “a material misstatement in the offer or sale of a security has violated Section 17(a)(1),” *id.* at \*58-59. “[L]iability” under Section 17(a)(2) “turns on whether one has obtained money or property ‘by means of’ an untrue statement.” *Id.* at \*33. Finally, Section 17(a)(3) premises liability on “any transaction, practice, or course of business.” 15 U.S.C. § 77q(a)(3). “[W]hile a misstatement (or misstatement-related activity) may fairly be characterized as an ‘act,’ a misstatement is not a ‘transaction.’” *John P. Flannery*, 2014 SEC LEXIS 4981, at \*61. As a result, subsection (a)(3) does not apply to “‘acts’ . . . that are not ‘transactions,’ ‘practices’ or ‘courses of business.’” *Id.* at \*61-62.

## 2.2 *With respect to the seventeen post-Stone Boat issuers, Dalmy violated Section 17(a)(1) and (3)*

Dalmy violated paragraphs (1) and (3) of Section 17(a) with respect to the seventeen post-Stone Boat issuers.<sup>14</sup> As an initial matter, the Division met the threshold requirements in Section 17(a) that the conduct in question occur “in the offer or sale of any securities” and involved an instrumentality of interstate commerce or the mails used “directly or indirectly” to commit the actions described in paragraphs (1) through (3). 15 U.S.C. § 77q(a).

An offer “include[s] every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.” 15 U.S.C. § 77b(a)(3). This definition applies broadly and does not require “injury . . . to a purchaser.” *United States v. Naftalin*, 441 U.S. 768, 773 (1979). Because the definition applies broadly, “omissions and misstatements made in securities registration statements” fall with the ambit of the term “in the offer or sale of any securities.” *SEC v. Brown*, 740 F. Supp. 2d 148, 163 (D.D.C. 2010); *see SEC v. Benson*, 657 F. Supp. 1122, 1130 (S.D.N.Y. 1987). False statements in an opinion letters filed with a registration statement are therefore “in the offer or sale of any security.”

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<sup>14</sup> The Division does not claim that Dalmy violated Section 17(a)(2) with respect to the seventeen post-Stone Boat issuers. *Cf.* Div. Br. at 22. To show liability under Section 17(a)(2), the Division would have been required to show that Dalmy “obtain[ed] money or property by means of any untrue statement of a material fact or any omission.” 15 U.S.C. § 77q(a)(2). It presented no evidence that Dalmy received money or property in connection with her post-Stone Boat opinion letters and Dalmy denied being paid for those opinion letters. Tr. 138.

Dalmy used e-mail to send her opinion letters from her office in Denver to Briner and Ms. Vargas in Vancouver. This alone was sufficient to meet the interstate commerce requirement. See *United States v. Napier*, 787 F.3d 333, 345 (6th Cir. 2015); *United States v. Barlow*, 568 F.3d 215, 220-21 & n.18 (5th Cir. 2009). Additionally, Briner or Ms. Vargas also forwarded Dalmy's opinion letters with the Forms S-1 to a third party who electronically transmitted them through EDGAR to the Commission in Washington, D.C. These actions also satisfied the interstate commerce requirement. See *Rita J. McConville*, Exchange Act Release No. 51950, 2005 SEC LEXIS 1538, at \*38 & n.41 (June 30, 2005). Finally, Dalmy later communicated with Corporation Finance personnel via phone and e-mail about the Forms S-1 as part of the comment process leading toward the possible effectiveness of the Forms S-1.<sup>15</sup> The interstate commerce requirement is thus met.

Because the threshold requirements have been met, the question for purposes of subsection (a)(1) is whether by providing Briner with opinion letters, Dalmy "employ[ed] any device, scheme, or artifice to defraud." Because a single misstatement qualifies as "a 'device' or 'artifice' to defraud," *John P. Flannery*, 2014 SEC LEXIS 4981, at \*62, any single misstatement in Dalmy's opinion letters could potentially violate Section 17(a)(1). Here, Dalmy admitted that she conducted no investigation into the seventeen post-Stone Boat issuers. She thus made six false statements in each of the opinion letters when she said that she (1) "ha[d] acted as special legal counsel for [the issuer] in connection with the preparation of a registration statement on Form S-1"; (2) had conducted an investigation and examined certain listed corporate records; (3) had "reviewed the corporate proceedings of [the issuer] with respect to the authorization of the issuance of the shares of Common Stock"; (4) had "relied . . . upon representations and certificates of the officers of the [issuer]"; (5) was "providing [her] opinion . . . in accordance with Item 601(b)(5) of Regulation S-K . . . under the Securities Act"; and (6) was "of the opinion that the shares of Common Stock held by the Selling Shareholder are validly issued, fully paid and non-assessable."<sup>16</sup> *E.g.*, Div. Ex. 1 at 50-51.

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<sup>15</sup> 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). As a result, the Division "'need not"' show that Dalmy'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)). Instead, that use "may be entirely incidental to" the scheme. *Id.* Because participation in the comment process was more than incidental to Dalmy's part in the scheme, but rather was a central feature of her part of the scheme, her communications with Corporation Finance personnel via phone and e-mail, which are both instrumentalities of interstate commerce, suffice to meet the interstate commerce requirement. *Cf. United States v. Brown*, 555 F.2d 336, 340 (2d Cir. 1977) (holding that "send[ing] confirmation slips" after securities were purchased was enough "to support federal jurisdiction").

<sup>16</sup> Having conducted no investigation, Dalmy had no "reasonable basis" for her opinion. *Weiss v. SEC*, 468 F.3d 849, 855 (D.C. Cir. 2006). Her stated opinion that the issuers' shares were "validly issued, fully paid and non-assessable" was therefore false. See *id.*

In making these false statements, Dalmy acted with scienter. I have resolved, adverse to Dalmy, the factual dispute about whether she authorized Briner's use of her opinion letters. She did. Dalmy knew she had not done the things she asserted she had done. She thus knew she had no basis for making the statements in her opinion letters because she had conducted no investigation, not reviewed any corporate documents, and not communicated with any officers of the issuers. The Division has therefore shown that Dalmy acted with scienter with respect to the seventeen post-Stone Boat issuers.

Dalmy's false statements were material. A misstatement is material if "there [is] a substantial likelihood that the disclosure of the omitted fact would have been viewed by [a] reasonable investor as having significantly altered the "total mix" of information made available.'" *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). The point of having an attorney submit an opinion letter in support of a registration statement is for investors to rely on that opinion. Indeed, an opinion letter is required in order to file a registration statement. 15 U.S.C. § 77aa(29); 17 C.F.R. § 229.601(a)(1), (b)(5). And until a registration statement becomes effective, the issuer cannot publicly sell its shares. 15 U.S.C. § 77e(a).

In sum, Dalmy made multiple material misstatements with scienter in the offer of seventeen securities. She therefore violated Section 17(a)(1) with respect to the seventeen post-Stone Boat issuers. *See John P. Flannery*, 2014 SEC LEXIS 4981, at \*58-61.

With respect to paragraph (3) under Section 17(a), the question is whether Dalmy "engage[d] in any transaction, practice, or course of business which operate[d] or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(3). While "Section 17(a)(3) does not encompass those 'acts' . . . that are not 'transactions,' 'practices' or 'courses of business,'" "repeatedly mak[ing] or draft[ing] [material] misstatements over a period of time may well" be conduct that would qualify as "a fraudulent 'practice' or 'course of business.'" *John P. Flannery*, 2014 SEC LEXIS 4981, at \*61-62.

My finding of liability under subsection (a)(1) largely resolves the question of Dalmy's liability under subsection (a)(3). Dalmy acted with scienter and her false statements were material. Had Dalmy authored only one false opinion letter, it might be that she could argue that she is not liable under subsection (a)(3). *But see John P. Flannery*, 2014 SEC LEXIS 4981, at \*63 ("a transaction that itself operated or would operate as a fraud certainly could serve as the basis for primary liability"). But Dalmy authored seventeen opinion letters containing material false statements as part of a scheme involving seventeen issuers. By "repeatedly mak[ing] or draft[ing] [material] misstatements over a period of" two months, Dalmy engaged in "a fraudulent 'practice' or 'course of business.'" *Id.* at \*62. She is therefore liable under Section 17(a)(3) with respect to the seventeen post-Stone Boat issuers.

### 2.3 *The Division did not carry its burden with respect to Dalmy's Stone Boat opinion letter*

As a factual matter, I determined that the Division did not show that Dalmy failed to investigate Stone Boat or that the Stone Boat opinion letter was illegitimate. *See supra* § 1.6.



This means that it failed to demonstrate that Dalmy made a material misstatement as to the Stone Boat Form S-1, and thus failed to show that Dalmy is liable under Section 17(a)(1), (2), or (3) with respect to Stone Boat.

## SANCTIONS

The Division requests a cease-and-desist order, disgorgement of \$1,750, and civil monetary penalties totaling \$1,350,000. Div. Br. at 21-28. As is discussed below, Dalmy is ordered to cease-and-desist from committing or causing violations of Section 17(a)(1) and (3) of the Securities Act and is ordered to pay third-tier penalties totaling \$680,000.

### 3.1 Sanction Considerations

In determining the appropriateness of any remedial sanction in this proceeding, I am guided by 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, at \*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." *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," *Christopher A. Lowry*, Investment Company Act of 1940 Release No. 2052, 2002 SEC LEXIS 2346, at \*20 (Aug. 30, 2002), *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), *penalty modified, pet. otherwise denied*, 547 F.2d 171 (2d Cir. 1976). In assessing an appropriate sanction, I may consider matters outside the scope of the OIP. *See Calais Res. Inc.*, Exchange Act Release No. 67312, 2012 SEC LEXIS 2023, at \*29 n.40 (June 29, 2012).

By submitting seventeen false opinion letters over a two-month period, Dalmy engaged in repeated fraudulent conduct. Misconduct involving fraud ordinarily warrants a severe sanction. *See Toby G. Scammell*, Advisers Act Release No. 3961, 2014 SEC LEXIS 4193, at \*25 (Oct. 29, 2014) (“Fidelity to the public interest requires a severe sanction when a respondent’s misconduct involves fraud because the securities business is one in which opportunities for dishonesty recur constantly.” (internal quotation marks omitted)). Dalmy’s actions were not isolated. She was sanctioned by OTC Markets for deficient opinion letters but did not learn from the experience. Moreover, doing something seventeen times is necessarily not a one-time event.

For several reasons, Dalmy’s actions were egregious. Attorneys occupy a special position in the registration process. Without an opinion letter, a registration statement cannot take effect and securities cannot be offered for sale to the public. An attorney tasked with providing an opinion letter is thus in a position to prevent fraud. Dalmy, however, cast that role aside in favor of playing an active role in a scheme.

It is true that no investor suffered losses. *See Div. Br.* at 27 (“Dalmy’s false opinion letters did not result in actual harm to investors.”). If Dalmy’s fraud had not been detected, however, the potential for loss was high. Dalmy is also a recidivist. She was placed on the OTC Markets’ prohibited attorneys list. Yet she clearly did not learn from that experience. In this matter, she again used her status as “an experienced securities lawyer” to commit fraud.

Dalmy acted with a high degree of scienter. She obviously knew she did not do the things listed in her letters. As an experienced securities lawyer, she knew that investors at least could rely on her false statements in deciding whether to invest in the issuers’ securities. Obviously, preparing false opinion letters knowing that one’s false letters could be relied on by investors falls well below any “standard[] of conduct in the securities business.” *Arthur Lipper Corp.*, 1975 SEC LEXIS 527, at \*52.

Dalmy also lied during her testimony. Lying under oath is a serious matter, strengthening the case for a severe sanction. *See* 18 U.S.C. § 1621.

Dalmy has made no assurances against future violations or shown that she recognizes the wrongful nature of her conduct. To the contrary, she says disingenuously that she was duped.

Finally, absent any evidence of contrition, and in light of Dalmy’s failure to learn from her sanction from OTC Markets, I find that there is a high likelihood that her occupation will present opportunities for future violations. Bearing in mind that the determination of what is in the public interest “extends . . . to the public-at-large,” *Christopher A. Lowry*, 2002 SEC LEXIS 2346, at \*20, I am mindful that the scheme in which Dalmy participated was aimed at harming the investing public.

### 3.2 *Cease-and-desist order*

Section 8A(a) of the Securities 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 or

rule under the Securities Act. 15 U.S.C. § 77h-1(a). 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) Dalmy's state of mind; (5) whether she recognizes the wrongful nature of her conduct; (6) the recency of the violations; (7) "whether the violations caused harm to investors or the marketplace"; (8) "whether [she] 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, at \*82-83 (Mar. 7, 2014), *pet. denied*, 786 F.3d 1027 (D.C. Cir. 2015); *see KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 SEC LEXIS 98, at \*101 (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).

Here, a cease-and-desist order is both necessary and appropriate. "Absent evidence to the contrary," a single past violation ordinarily suffices to establish a risk of future violations, and "evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits . . . ordering h[er] to cease and desist." *KPMG Peat Marwick LLP*, 2001 SEC LEXIS 98, at \*102-03. This is especially the case here, where Dalmy has repeated conduct that led to her being placed on OTC Markets prohibited attorney list.

As I have already determined, Dalmy's violations are serious. They involved fraud that, had it not been detected, had the potential to lead to serious losses to investors. If misconduct involving fraud ordinarily warrants "a severe sanction," *Toby G. Scammell*, 2014 SEC LEXIS 4193, at \*25, repeated fraudulent misconduct necessarily calls for serious punishment.

Dalmy committed repeated frauds. Although no investor lost money, that was only the case because of the diligence of Corporation Finance personnel. If Dalmy's and Briner's fraud had not been detected, the fraud could have cost investors substantial amounts of money. Additionally, Dalmy is a repeat offender, having previously been sanctioned by OTC Markets for similar conduct. Dalmy's actions were intentional and she has shown no appreciation for the wrongfulness of her conduct. Although the violations occurred between two and three years ago, it is significant that Dalmy could have continued her fraud had Corporation Finance not unearthed the problem.

Given the foregoing, I conclude that it is necessary and appropriate to order Dalmy to cease and desist from committing or causing violations of Securities Act Section 17(a)(1) and (3).

### 3.3 *Disgorgement*

Section 8A(e) of the Securities Act permits the Commission to order disgorgement, including reasonable interest in cease-and-desist proceedings. 15 U.S.C. § 77h-1(e). 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). "Disgorgement deprives wrongdoers of the profits obtained from their violations." *Montford and Co., Inc. v. SEC*, 793 F.3d 76, 83 (D.C. Cir. 2015) (quoting *Zacharias v. SEC*, 569 F.3d 458, 472 (D.C. Cir.

2009)). As a result, “[t]he touchstone of a disgorgement calculation is identifying a causal link between the illegal activity and the profit sought to be disgorged.” *Id.* at 83-84 (quoting *SEC v. UNIOIL*, 951 F.2d 1304, 1306 (D.C. Cir. 1991) (per curiam) (Edwards, J., concurring)).

Here, disgorgement is not warranted. The Division requests that Dalmy disgorge the \$1,750 she was paid for the Stone Boat opinion letter. Div. Br. at 27. I have determined, however, that the Division failed to carry its burden to show that Dalmy violated Securities Act Section 17(a) with regard to Stone Boat. Because the Division failed to connect the \$1,750 Dalmy received to any violation of Section 17(a), it has not demonstrated that disgorgement is warranted. *See Montford*, 793 F.3d at 83-84.

### 3.4 Civil Penalties

Securities Act Section 8A(g) authorizes the Commission to impose civil monetary penalties against any person where such penalties are in the public interest and the person has violated any provision of or rule under the Securities Act. 15 U.S.C. § 77h-1(g). The statute sets out a three-tiered system for determining the maximum civil penalty for each act or omission. 15 U.S.C. § 77h-1(g)(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. § 77h-1(g)(2).

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 acts or omissions 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 acts or omissions. 15 U.S.C. § 77h-1(g)(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. § 77h-1(g)(2)(B). First-tier penalties may be imposed simply for each violation. 15 U.S.C. § 77h-1(g)(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, LLC*, 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. *See S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 SEC LEXIS 4691, at \*48 (Dec. 5, 2014) (the Commission has “discretion in setting the amount of penalty”); *see also First Secs. Transfer Systems, Inc.*, Exchange Act Release No. 36183, 1995 SEC LEXIS 2261, at \*11 (Sept. 1, 1995) (“Nothing in the language of the statute or its legislative history suggests that the Commission is prohibited from assessing any lesser amount up to the maximum.”).

The statutory requirements for imposition of third-tier penalties are met in this case. As discussed, *supra*, Dalmy’s conduct involved fraud and deceit. Had Corporation Finance not detected the fraud early on, potential investors would have borne a significant risk of substantial losses.

The fact that Dalmy’s conduct involved fraud and deceit also weighs in the public interest calculus. In this regard, although the Exchange Act, Investment Company Act, and Advisers Act

all contain a statutory list of six factors to consider when weighing the public interest in relation to monetary penalties, *see* 15 U.S.C. §§ 78u-2(c), 80a-9(d)(3), 80b-3(i)(3), Section 8A of the Securities Act, under which this proceeding was instituted as to Dalmy, does not contain a list of factors, *see* 15 U.S.C. § 77h-1(g). The six factors that apply in other contexts nonetheless provide a useful framework. I will therefore consider them in determining whether a monetary penalty is in the public interest. The six factors are: (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. §§ 78u-2(c), 80a-9(d)(3), 80b-3(i)(3).

I have determined that Dalmy's offenses involved fraud and deceit. This determination weighs heavily against her. *See Toby G. Scammell*, 2014 SEC LEXIS 4193, at \*25. On the other hand, the lack of harm to others and absence of unjust enrichment weigh in Dalmy's favor. I give these two factors only slight weight, however, because the lack of harm and absence of unjust enrichment did not result from a lack of trying or from Dalmy's attempts to prevent fraud. They instead resulted from the efforts of Corporation Finance. That Dalmy was ultimately unsuccessful does not lessen her culpability and should not inure to her benefit.

Although Dalmy has no prior regulatory history with the Commission, her record is blemished. She is listed on OTC Markets prohibited attorneys list. And she is on that list because she provided deficient attorney letters and failed to heed warnings about her deficient letters. Given the similarity between the basis for this past admonition and the facts underlying the current proceeding, I view Dalmy's history as a significant negative factor. The fact that Dalmy has proved to be a willing recidivist suggests that she is deserving of a severe penalty. *See First Secs. Transfer Systems, Inc.*, 1995 SEC LEXIS 2261, at \*12-13 (determining that "[a] steep monetary penalty" was necessary because "past sanctions . . . have proven ineffective to induce [the respondent] to comply with the law").

The need for general and specific deterrence also weighs in favor of a significant penalty. Attorneys and attorney opinion letters play an important part in the process of registering securities. The Commission and the investing public must be able to rely on attorney opinion letters. If those who produce fraudulent letters are not subject to serious penalties, others will seek to emulate the bad actors' behavior. This would hurt market confidence and thus hinder issuers as they seek to raise capital.

As a final matter, I rely on the evident fact that had Dalmy's scheme not been noticed by Corporation Finance, the result would have been that innocent third party investors would have been harmed. Dalmy occupied a unique position that afforded her the opportunity to act to prevent that possible harm. Instead, she chose to abuse her position.

Considering the foregoing, I conclude that the public interest requires imposing significant, third-tier penalties. It is appropriate to tie that monetary penalty to Dalmy's intended benefit. She testified that she anticipated receiving about \$20,000 for each opinion letter. Tr. 25, 49. Providing seventeen opinion letters at \$20,000 per letter would yield \$340,000. For purposes of deterrence and taking into account the factors noted above, I double that intended

benefit to yield a third-tier penalty of \$40,000 per letter. This results in a total penalty of \$680,000.

### **RECORD CERTIFICATION**

Under 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 Record Index issued by the Secretary of the Commission on August 21, 2015.

### **ORDER**

IT IS ORDERED that, under Section 8A of the Securities Act of 1933, Respondent Diane Dalmy, Esq., shall CEASE AND DESIST from committing or causing any violations or future violations of Section 17(a)(1) and (3) of the Securities Act of 1933.

IT IS FURTHER ORDERED that, under Section 8A(g) of the Securities Act of 1933, Diane Dalmy, Esq., shall PAY A CIVIL MONEY PENALTY in the amount of \$680,000.

Payment of the 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, bank cashier's check, or United States postal money order made payable to the Securities and Exchange Commission and hand-delivered or mailed to the following address alongside a cover letter identifying the Respondent and Administrative Proceeding No. 3-16339: 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 of Practice 360, 17 C.F.R. § 201.360. Under that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. Under Rule of Practice 111, a party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision. *See* 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 order resolving such motion to correct a 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 a 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