UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16339

In the Matter of:

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

Respondents.

DE JOYA RESPONDENTS' MOTION FOR SUMMARY DISPOSITION OF SEC'S CLAIMS FOR VIOLATION OF SECTION 17(a) OF THE SECURITIES ACT OF 1933

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

Pursuant to Rule 250(a) of the U.S. Securities and Exchange Commission's ("SEC" or "Commission") Rules of Practice, Respondents De Joya Griffith, LLC ("DG" or the "Firm"), Arthur De Joya ("De Joya"), Jason Griffith ("Griffith"), Chris Whetman ("Whetman"), and Philip Zhang ("Zhang") (collectively, "De Joya Respondents") respectfully submit this motion for summary disposition of the SEC's claims that De Joya Respondents violated Section 17(a) of the Securities Act of 1933 ("Section 17(a)"). This motion is supported by undisputed facts and the allegations contained in the SEC's Order Instituting Proceedings dated January 15, 2015 ("OIP"), and the Declarations of Sean T. Prosser ("Prosser Decl.") and Chris Whetman ("Whetman Decl."), attached hereto as Exhibits A and B.

I. PRELIMINARY STATEMENT

The SEC seeks to impose potentially career ending liability upon an entire firm and experienced public accounting professionals, all of whom have unblemished disciplinary records. By the SEC's own admission, De Joya Respondents were lied to and unwittingly brought into an attempted scheme allegedly orchestrated by Respondent John Briner. Nevertheless, the SEC significantly overreaches by asserting Section 17(a) liability where no money was obtained by means of the Firm's allegedly false statements that the audits in question were conducted in accordance with certain professional accounting standards and principles, and where there are no allegations indicating intentional or knowing misconduct by De Joya Respondents. The SEC generically and without factual support asserts that the Firm and four of its partners -- including Whetman, who worked on a single audit that was completed *before* Briner's disciplinary history was known to the Firm, and De Joya and Griffith, who served only as quality review partners -- engaged in a "scheme" and "willfully" violated Sections 17(a)(1), (2), and (3). (OIP ¶ 185.) The SEC is engaging in hindsight second-guessing of the accountants' decisions and judgments that were made in good faith and based on the information known to them at the time. Controlling

case law does not support Section 17(a) liability for outside auditors under these facts and summary disposition is warranted for this part of the SEC's case.[1]

The Section 17(a) claims fail as a matter of law. As explained below, the SEC's allegations fail to establish "misstatement" liability under Section 17(a)(2), and its "scheme" liability claims under Sections 17(a)(1) and (3) are merely an improper repackaging of the failed Section 17(a)(2) misstatement claim. Further, no reasonable fact finder could find that De Joya Respondents acted with fraudulent intent, as required for Section 17(a)(1) liability. Even assuming De Joya Respondents made errors and/or could or should have been more careful and diligent in their audits, there are no actual allegations (much less evidence) indicating they were complicit in Briner's alleged fraud. To the contrary, if the SEC's allegations are true, they were lied to and among Briner's victims.

II. ALLEGATIONS AND UNDISPUTED FACTS

Between late 2011 and early 2013, DG was engaged and audited the financial statements of nine companies. (Order Instituting Proceedings ("OIP") ¶¶ 65-66, 69.) Subsequently, those companies filed Form S-1 Registration Statements that contained the audited financial statements. (OIP ¶¶ 69-70, App. A.) The companies were small development stage companies with minimal purported assets. The audits, therefore, were by nature limited in scope, and the accounting firm was paid a grand total of $37,500 for conducting all of the audits. (*Id.*) None of the registration statements became effective and no securities were sold. (OIP ¶ 38.)

DG is a PCAOB-registered accounting firm founded in 2005. It has more than 20 employees. Currently DG services over 80 clients, with over 35 of them being public entities. (Whetman Decl. ¶ 2.) Development stage companies are only a fraction of the Firm's business, with over 90% of its revenue coming from operating companies with revenue and employees.

[1] The SEC's additional claims -- that De Joya Respondents failed to satisfy the PCAOB's audit standards and engaged in improper professional conduct pursuant to the Commission's Rules of Practice 102(e)(1) -- also are meritless but De Joya Respondents recognize that those issues will require expert testimony at the appropriate time. Consequently, De Joya Respondents do not move for summary disposition as to those remaining claims.

The Firm has multiple clients with over $5 million in annual revenue. (*Id.*) The PCAOB has inspected the Firm three times and has cleared all comments. There have been no restatements for any of the Firm's clients as a result of any PCAOB findings. Further, the Firm is a member of the Canadian Public Accountability Board (CPAB), and has completed 2 inspections with all comments cleared from that agency as well. Additionally, the Firm has participated for many years in the AICPA Peer Review program and received a pass rating each time. (*Id.* ¶ 3.) Neither the Firm nor any of its partners have been sanctioned or disciplined by any agency, government or professional body or organization, including the PCAOB. (*Id.* ¶ 4.)

Respondent Whetman served as the engagement partner for just one of the nine audits in question, La Paz Mining Corp., and De Joya served only as the "review partner" on two of the audits. Respondent Zhang was the engagement partner on eight audits and Griffith was the review partner on seven. (OIP ¶ 67 & Appendix A.)

Consistent with Respondent Briner's written representations to the SEC,[2] De Joya Respondents did not know or believe that Briner was acting as SEC counsel for the audit clients in connection with the Form S-1 nor that he was an "architect and primary proponent of [a] fraudulent shell factor scheme" that resulted in the filing of materially false and misleading Form S-1 registration statements. (OIP ¶ 170.) Importantly, the SEC *does not* allege that De Joya Respondent knew or believed that Briner was engaging in these activities. Rather, with respect De Joya Respondents, the SEC alleges that the two engagement partners (Whetman and Zhang only) missed purported "red flags" and "failed to resolve discrepancies" during the audits. (OIP ¶¶ 123-152.) With respect to the review partners De Joya and Griffith, the SEC misleadingly alleges in conclusory fashion that they (along with Whetman and Zhang) "failed to adequately respond to concerns that Briner and Dalmy may have been engaging in fraud." (OIP ¶ 107.) In fact, the SEC's factual allegations reveal only that, in November 2012 (after the La Paz audit had been completed and its Form S-1s were filed), a staff member sent emails to Zhang and

[2] (*See* Prosser Decl., Ex. 1 (email from Briner to SEC denying, among other things, that he controlled the companies).)

Whetman with links to articles that she found about Briner, including that he had been disciplined by the SEC and Canadian regulators. (OIP ¶¶ 113-115.)

But the SEC ignores the uncontested fact that De Joya Respondents did respond to and take the staff member's information seriously. In fact, the staff member, Swanandi Redkar, previously provided the SEC a sworn declaration stating this. Specifically, Ms. Redkar states that she notified Whetman and Zhang, and Zhang told her that he discussed the matter with De Joya. Zhang also advised her that De Joya had told him "to keep an eye on Briner" and to "let him know if any issue comes up with [Briner]." She then discussed the matter further with Zhang before moving forward with the remaining audits. (Prosser Decl., Ex. 2 (Declaration of Swanandi Redkar dated June 14, 2014 ("Redkar Decl.") ¶¶ 2-5).) Moreover, Redkar states that she believed that Zhang and De Joya evaluated the facts involving Briner and took her concerns seriously. (*Id.* ¶ 6.) The SEC ignores Redkar's sworn declaration.

The SEC now claims that the nine audit clients were part of a broader attempted fraud orchestrated by Briner. (OIP ¶ 170.) According to the SEC, the companies never had the assets they purported to have, and their "officers and directors" were merely acquaintances of Briner. (OIP ¶¶ 2-3, 20.)

III. LEGAL STANDARD FOR SUMMARY DISPOSITION

Pursuant to Rule 250(a), a respondent may "make a motion for summary disposition of any or all allegations of the order instituting proceedings." 17 C.F.R. § 201.250(a). The plain language of that rule – *i.e.* "any or all" allegations – permits a motion for summary disposition of some, but not all, allegations of the order instituting proceedings. The motion should be granted when "there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 17 C.F.R. § 201.250(b). Although the facts of the pleadings of the party against whom the motion is made shall be taken as true, they may be modified by, for example, uncontested affidavits. 17 C.F.R. § 201.250(a).

IV. LEGAL DISCUSSION

A. The SEC Fails to Satisfy the Elements of Section 17(a)

The SEC alleges that De Joya Respondents violated Section 17(a), which provides:

> (a) *Use of interstate commerce for purpose of fraud or deceit*
>
> It shall be unlawful for any person in the offer or sale of any securities . . . , 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.

The SEC fails to individually address or distinguish among Section 17(a)'s three prohibitions – it simply accuses all five De Joya Respondents of generally violating each of them. (OIP ¶¶ 183, 185.) The SEC's attempt at generality probably is by design because Section 17(a)'s three prohibitions are nuanced and importantly distinct from each other. *See United States v. Naftalin*, 441 U.S. 768, 769 (1979) ("[E]ach subsection of § 17(a) proscribes a distinct category of misconduct").

It is particularly relevant here that courts distinguish between "misstatement" liability under Section 17(a)(2) and "scheme" liability under Sections 17(a)(1) and (a)(3). *See, e.g.*, *S.E.C. v. St.* Anselm *Exploration Co.*, 936 F. Supp. 2d 1281, 1298-99 (D. Colo. 2013); *S.E.C. v. Kelly*, 817 F. Supp. 2d 340, 345 (S.D.N.Y. 2011). And courts interpret Section 17(a)(1) as including a "scienter" requirement that Sections 17(a)(2) and (a)(3) do not. *Aaron v. Sec. & Exch. Comm'n*, 446 U.S. 680, 697 (1980).

These distinctions matter and the SEC's Section 17(a) claims against De Joya Respondents fail, as a matter of law, for three reasons:

First, the entirety of the Section 17(a) claim is that the Firm "falsely stated" in its audit reports approved by its partners that it "conducted [its] audits in accordance with the standards of [the PCAOB]" and that "the financial statements present the Issuers' financial positions 'in conformity with U.S. generally accepted accounting principles.'" (OIP ¶ 180.) Properly categorized, this is an accusation of "misstatement" liability under Section 17(a)(2). But the SEC cannot prove the elements required for liability under Section 17(a)(2) because it cannot show that De Joya Respondents "obtain[ed] money or property *by means of* any untrue statement of a material fact or any omission to state a material fact . . . ." 15 U.S.C.A. § 77q(a)(2) (emphasis added). So the Section 17(a)(2) claim fails.

Second, claims under Section 17(a)(1) and (3) fail because they amount to nothing more than an improper repackaging of the failed "misstatement" claim under Section 17(a)(2). "[L]iability does not arise [under Section 17(a)(1) or (a)(3)] simply by virtue of repackaging a fraudulent misrepresentation [as] a 'scheme to defraud.'" *St. Anselm*, 936 F. Supp. 2d at 1298-99. In other words, the SEC cannot escape establishing the elements required to prove misstatement liability under Section 17(a)(2) merely by recasting the same alleged misstatements as "scheme" violations under Sections 17(a)(1) or (a)(3).

Third, claims under Section 17(a)(1) fail for the independent reason that no reasonable fact finder could find that De Joya Respondents acted with the requisite fraudulent intent.

In sum, the Section 17(a) claims fail as a matter of law, as described more fully below.

B. The Section 17(a)(2) Claim Fails Because De Joya Respondents Did Not Obtain Money "By Means Of" Any Untrue Statement or Omission

As discussed above, the SEC's Section 17(a) claim is premised on the allegation that the Firm "falsely stated" in its audit reports approved by its partners that it "conducted [its] audits in accordance with the standards of [the PCAOB]" and that "the financial statements present the Issuers' financial positions 'in conformity with U.S. generally accepted accounting principles.'" (OIP ¶ 180.) To the extent the SEC's "false statement" claim could exist at all, it would be under Section 17(a)(2), which provides in relevant part:

> It shall be unlawful for any person in the offer or sale of any securities . . . directly or indirectly . . .
>
> > (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;

15 U.S.C.A. § 77q(a)(2).

The plain language indicates that an "essential element" for liability under Section 17(a)(2) is that the accused actually "obtain[ed] money or property by means of" an untrue statement or omission of material fact. *S.E.C. v. Syron*, 934 F. Supp. 2d 609 (S.D.N.Y. 2013); *see also In re Gap Stores Sec. Litig.*, 457 F. Supp. 1135, 1142 (N.D. Cal. 1978) ("[Section] 17(a)(2) [does not] state a claim against Powell because he did not 'obtain money or property by means of any untrue statement of a material fact'"); *S.E.C. v. Glantz*, No. 94 CIV. 5737 (CSH), 1995 WL 562180, at *5 (S.D.N.Y. Sept. 20, 1995) ("[P]laintiff must allege that defendant actually obtained money or property by means of the untrue statements").

The only allegations remotely connected to money is the SEC's allegation that the Firm received a total of $37,500 in fees for its audit work. (OIP ¶ 69.) But there is no allegation or evidence that the Firm, much less the individuals, obtained those fees (or any other money or property) "by means of" making the purportedly false statements in the audit reports. More specifically, there are no allegations whatsoever that De Joya Respondents made, or agreed to make, the allegedly false statements in exchange for audit fees or anything else of value. Nor are there any allegations that the Firm's receipt of fees somehow was contingent on making the purportedly false statements. In direct contrast, however, the SEC expressly accuses Respondent Briner of "obtain[ing] money or property by means of" his scheme. (OIP ¶ 174.)

The U.S. Supreme Court's recent decision in *Loughrin v. U.S.*, 134 S. Ct. 2384 (2014), is instructive on this point. In *Loughrin*, the Court considered a provision of the federal bank fraud statute that, very similar to Section 17(a)(2), prohibits "obtain[ing]" a bank's "moneys" or "other property" "*by means of* false or fraudulent pretenses, representations, or promises." *Id.* at 2389

(quoting 18 U.S.C. § 1344(2)) (emphasis added). The Court focused part of its analysis on what it means to obtain money "by means of" a false statement. *Id.* at 2393-94. The Court emphasized that the "by means of" requirement imposes a "relational component" between the false statement and the money obtained. *Id.* at 2393. Thus, it is not enough that the accused made a false statement and obtained money; rather, the "by means of" requirement "demands that the [accused's] false statement [was] the mechanism *naturally inducing* [the victim] to part with its money." *Id.* at 2394 (emphasis added).

The *Loughrin* Court's interpretation of the "by means of" requirement in the federal bank fraud statute applies equally to Section 17(a)(2)'s nearly identical language. Under *Loughrin*, a person obtains money "by means of" a false statement only if that false statement was the mechanism that "naturally induc[ed]" a victim to part with its money. *Id.* Here, even assuming the statements in the audit reports were false, there is no allegation or evidence that those statements "induced" anyone to part with money – no securities were sold, and the Firm received fees *not* because its alleged misstatement "induced" someone to pay the fees, but because it had provided the agreed-to auditing services.

There are no allegations nor evidence that De Joya Respondents obtained money "by means of" any false statement, and the Section 17(a)(2) claims fail as a matter of law.

C. The Section 17(a)(1) and 17(a)(3) Claims are Duplicative of the Section 17(a)(2) Claim and Fail as a Matter of Law

With no explanation, the SEC also accuses De Joya Respondents of violating Sections 17(a)(1) and (a)(3), which provide, in relevant part:

> It shall be unlawful for any person in the offer or sale of any securities . . . directly or indirectly . . .
>
> (1) to employ any device, scheme, or artifice to defraud, 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.A. § 77q(a)(1), (a)(3).

Whereas Section 17(a)(2) concerns "misstatement" liability, Sections 17(a)(1) and (3) concern what courts have called "scheme" liability. *St. Anselm*, 936 F. Supp. at 1298-99; *Kelly*, 817 F. Supp. 2d at 345. The Section 17(a)(1) and (a)(3) "scheme liability" claims fail because they are indistinguishable from the Section 17(a)(2) "misstatement" claim. As the *St. Anselm* court explained:

> [L]iability [under Sections 17(a)(1) or (a)(3)] does not arise simply by virtue of repackaging a fraudulent misrepresentation [as] a "scheme to defraud." Rather, scheme liability requires proof of participation in an illegitimate, sham, or inherently deceptive transaction where the defendant's conduct or role has the purpose and effect of creating a false appearance. The conduct must be "inherently deceptive when performed." Stated differently, scheme liability exists only where there is deceptive conduct going beyond misrepresentations. ***Allegations of a scheme based on the same misstatements that would form the basis of a misrepresentation claim . . . and nothing more are not sufficient.***[3]

936 F. Supp. 2d at 1299 (internal quotes and citations omitted) (emphasis added).

Other courts also conclude that an allegation of "scheme" liability under Sections 17(a)(1) or (a)(3) (or the comparable Rule 10b-5(a) or (c)) must be "based on conduct ***beyond*** misrepresentations or omissions" prohibited by Section 17(a)(2) (or the comparable Rule 10b-5(b)). *Pub. Pension Fund Grp. v. KV Pharm. Co.*, 679 F.3d 972, 987 (8th Cir. 2012) (emphasis added); *see also WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011).

The case law makes sense. If a defendant could be liable for a misrepresentation or omission under Sections 17(a)(1) or (a)(3) despite not satisfying the elements required for liability under Section 17(a)(2) – including that the defendant "obtain[ed] money by means of" the misrepresentation or omission – then Section 17(a)(2)'s unique elements would be pointless. As these cases recognize, for Section 17(a)(2) to have any practical meaning, liability under Sections 17(a)(1) or (a)(3) must be based on something beyond "the same misstatements that

---

[3] The *St. Anselm* court addressed "misstatement" and "scheme" liability in the context of both Section 17(a) and the very similar SEC Rule 10b-5 (C.F.R. § 240.10b-5). 936 F. Supp. 2d at 1292, 1298-99.

would form the basis of a misrepresentation claim" under Section 17(a)(2). *St. Anselm*, 936 F. Supp. 2d at 1299.

Here, the SEC's only alleged violation of Section 17(a) is that the Firm misstated that its reports complied with certain standards. (OIP ¶¶ 180, 184.) The SEC does not allege that De Joya Respondents engaged in any "deceptive conduct going beyond misrepresentations." *St. Anselm*, 936 F. Supp. 2d at 1299. Compare, for example, the SEC's allegations against De Joya Respondents to those against Briner. Whereas the SEC accuses Briner of engaging in a laundry list of deceptive conduct – including recruiting acquaintances to serve as sham corporate officers and fabricating mineral claim purchases – the only specific Section 17(a) allegation against De Joya Respondents is that the Firm made false statements in its audit reports. (*Compare* OIP ¶ 170 *with* OIP ¶¶ 180-85.) As discussed, those alleged misstatements are not actionable under Section 17(a)(2) because De Joya Respondents did not obtain any money "by means of" them. Thus thwarted by Section 17(a)(2)'s requirements, the SEC cannot simply recast the alleged misstatements as violations of Sections 17(a)(1) and (a)(3).

The SEC may argue its allegations that De Joya Respondents failed to perform the audits in accordance with recognized auditing standards is conduct supporting "scheme" liability under Section 17(a)(1) or (a)(3). But even assuming they did not meet those standards, such a failure, standing alone, is not "inherently deceptive" conduct. *St. Anselm*, 936 F. Supp. 2d at 1299. Instead, it only could become deceptive (again, assuming the allegation is true for the purpose of this motion only) once the Firm falsely claimed it *had* complied with the audit standards. In other words, although the purported failure to perform audits properly may have rendered subsequent audit reports false for purposes of "misstatement" liability under Section 17(a)(2), such failure was not independently fraudulent conduct for purposes of "scheme" liability under Sections 17(a)(1) or (a)(3). *See St. Anselm*, 936 F. Supp. 2d at 1299.

There are no allegations or evidence that De Joya Respondents engaged in any "deceptive conduct going beyond misrepresentations" and the Sections 17(a)(1) and (a)(3) claims fail as merely mirroring the failed Section 17(a)(2) claim.

D. The Section 17(a)(1) Claim Also Fails Because No Reasonable Fact Finder Could Find that De Joya Respondents Acted With Scienter

The SEC's Section 17(a)(1) claim also fails for the additional and independent reason that the allegations and uncontested evidence do not support a finding that De Joya Respondents acted with scienter. Among Section 17(a)'s three prohibitions, Section 17(a)(1) uniquely requires proof that each respondent acted with scienter. *Aaron*, 446 U.S. at 697. Scienter is "a mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12 (1976). It may be established through proof of "knowing misconduct or severe recklessness." *S.E.C. v. Monterosso*, 756 F.3d 1326, 1335 (11th Cir. 2014). Here, there are no allegations or evidence that De Joya Respondents actually intended to defraud anyone. So the SEC must prove "severe recklessness."

The SEC cannot meet this burden. In *S.E.C. v. Price Waterhouse*, 797 F. Supp. 1217,1 1240 (S.D.N.Y. 1992), the court explained that severe recklessness in a securities fraud action against an accountant is defined as:

> highly unreasonable [conduct], involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.

Id. (quoting *McLean v. Alexander*, 599 F.2d 1190, 1197 (3d Cir.1979)). The standard "requires more than a misapplication of accounting principles." *Price Waterhouse*, 797 F. Supp. at 1240. Rather, the SEC must prove that the accounting practices were so deficient that the audit "amounted to no audit at all." *Pub. Employees' Ret. Ass'n of Colo. v. Deloitte & Touche LLP*, 551 F.3d 305, 314 (4th Cir. 2009) (quoting *Price Waterhouse*, 797 F. Supp. at 1240).

The SEC attempts to model its allegations on this standard by alleging in conclusory fashion that De Joya Respondents' audits "were so deficient that they amounted to no audits at all." (OIP ¶ 5.) But the SEC's actual factual allegations of audit "deficiencies" either (1) are refuted by the undisputed evidence, or (2) amount to little more than hindsight criticisms of De Joya Respondents' compliance with accounting standards – far from enough to support a scienter finding. *See, e.g., Pub. Employees' Ret. Ass'n of Colo.*, 551 F.3d at 314 ("Perhaps [the accountants'] failure to demand more evidence [from their client] was improper under accounting guidelines, but that is not the standard" for proving scienter); *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 270 (2d Cir. 1996) ("Allegations of a violation of GAAP provisions or SEC regulations, without corresponding fraudulent intent, are not sufficient to state a securities fraud claim"); *Zucker v. Sasaki*, 963 F. Supp. 301, 308 (S.D.N.Y. 1997) (allegations of "violations of basic auditing principles" are not enough, standing alone, to prove scienter).

For example, the most prominent "red flag" the SEC identifies is evidence concerning Respondents Briner and Dalmy's "negative background" with the SEC, which a Firm staff member brought to De Joya Respondents' attention during the course of the audits. (OIP ¶¶ 112-121.) The SEC alleges that, after receiving this evidence, Respondents Zhang and De Joya "continued with the audits without adjusting any audit procedures or taking any additional precautions in light of the facts they learned about Briner and Dalmy." (OIP ¶¶ 118-120.)

The uncontroverted evidence refutes that allegation. In the first place, the allegation does not relate to Griffith or Whetman at all. Further, as to Respondent Whetman, the evidence concerning Briner and Dalmy's "negative background" did not even come to light until months *after* Whetman completed his audit of La Paz Mining (his only audit in question). (Whetman Decl. ¶¶ 5-6.) Thus, Whetman could not have ignored that "red flag" because he did not know about it when the audit was ongoing or before the audit opinion was issued. To establish "severe recklessness" for scienter purposes in a securities fraud action, the defendant "must have been aware of the problems at issue *before* a misleading statement was made." *In re Constellation*

Energy Grp., Inc. Sec. Litig., No. CIV. CCB-08-02854, 2012 WL 1067651, at *5 (D. Md. March 28, 2012) (emphasis added). As to Respondents Zhang and De Joya, it is not accurate that they "continued with the audits" without making any adjustments or taking additional precautions after learning information from the staff member. In fact, the uncontroverted evidence is that Zhang and De Joya assessed the situation, reached the reasoned conclusion that Briner was not acting as a securities attorney before the SEC in violation of his suspension but was instead acting as a consultant on business and financial issues. Only then was it decided to proceed with the remaining audits, while committing to "keep an eye on Briner." Further, De Joya instructed that he be notified if any further issues come up regarding Briner. (*See* Redkar Decl. ¶¶ 2-5.) Moreover, the staff member that the SEC relies upon, Ms. Redkar, believes that Zhang and De Joya *did* take her concerns seriously, and she would not hesitate to raise similar issues to them in the future. (*Id.* ¶ 6.)

While the SEC now, in hindsight, questions that judgment, there are no factually supported allegations indicating that De Joya Respondents were complicit in Briner's fraud. Rather, if the SEC is correct, they were deceived by Briner. *See Pub. Employees' Ret. Ass'n of Colo.*, 551 F.3d at 314 ("With perfect hindsight, one might posit that [the defendant accountants] should have required stronger evidence . . . . Nonetheless, the evidence as a whole leads to the strong inference that defendants were deceived . . . .").

The SEC's other criticisms only suggest that De Joya Respondents could have been more careful. For instance, the SEC claims De Joya Respondents "failed to sufficiently question or otherwise investigate the Issuers' management." (OIP ¶ 77.) Another example is that the SEC says Respondent Whetman did not adequately resolve certain inconsistencies in the audit evidence supplied by Briner. (OIP ¶¶ 125-136.) It asserts by way of example that Whetman should have obtained better copies of bank statements than the "screen shots" Briner provided at the audit team's request. (OIP ¶ 128.) But those allegations necessarily admit that (1) Whetman's audit team had affirmatively *requested* bank statements, accounting support, and

other backup documentation, and (2) Briner deceived Whetman and his team by manipulating documents to "make [them] consistent" with each other. (OIP ¶¶ 126-28, 131.)

Thus, the SEC's admission that the Firm's audit team made affirmative efforts to support the audits with backup documentation belies its allegation that De Joya Respondents acted with intent to defraud and that the audits "amounted to no audits at all." (OIP ¶ 5.) Likewise, the SEC's conclusory claim that De Joya Respondents somehow were complicit in Briner's scheme to defraud cannot be reconciled with the fact – admitted by the SEC – that Briner sought to deceive *the auditors themselves*. (*See* OIP ¶¶ 128, 131; Prosser Decl., Ex. 1.) In short, while it may be argued that De Joya Respondents could have been more careful in the audits, that does not mean they were reckless to the degree that their "mental state embrac[ed] intent to deceive, manipulate or defraud," as required for scienter under Section 17(a)(1). *See Aaron*, 446 U.S. at 697; *Hochfelder*, 425 U.S. at 193 n. 12; *Pub. Employees' Ret. Ass'n of Colo.*, 551 F.3d at 316 (although "plaintiffs point to ways that [the accountants] could have been more careful[, . . .] plaintiffs cannot escape the fact that [the accountants' clients] went to considerable lengths to conceal the frauds from the accountants"); *Chill*, 101 F.3d at 270 ("Allegations of a violation of GAAP provisions or SEC regulations, without corresponding fraudulent intent, are not sufficient to state a securities fraud claim").

Finally, an important consideration in evaluating whether De Joya Respondents acted with scienter is whether they had a plausible motive to commit fraud. They did not and none is alleged. The SEC offers no explanation for why De Joya Respondents would risk their careers to help Briner carry out his fraud. The fees at stake were minimal – only $37,500 for auditing nine small start-up companies. And in any event, courts have repeatedly held that an accountant's motive to obtain fees for accounting or auditing services is insufficient to support an inference of fraudulent intent. *See, e.g.*, *Price Waterhouse*, 797 F. Supp. at 1242 ("It is highly improbable that an accountant would risk surrendering a valuable reputation for honesty and careful work by participating in a fraud merely to obtain increased fees."); *DiLeo v. Ernst & Young*, 901 F.2d

624, 629 (7th Cir. 1990) ("An accountant's greatest asset is its reputation for honesty, followed closely by its reputation for careful work. Fees for two years' audits could not approach the losses E & W would suffer from a perception that it would muffle a client's fraud."); *In re Health Mgmt., Inc. Sec. Litig.*, 970 F. Supp. 192, 202 (E.D.N.Y. 1997) ("It is unreasonable to believe that BDO would willingly condone Health Management's fraud by risking its entire reputation . . . to preserve a fee which may be a large account in the Mitchel Field office but may be minute in comparison to all its accounts.").

Even accepting all of the SEC's allegations as true, no reasonable fact finder could find that any of De Joya Respondents, much less all of them, acted with the "intent to deceive, manipulate, or defraud" required to establish a violation under Section 17(a)(1). *See Aaron*, 446 U.S. at 697; *Hochfelder*, 425 U.S. at 193 n. 12. That said, however, this question does not even need to be reached because, as discussed above, the Section 17(a)(1) "scheme" claim fails for the independent reason that it is merely a repackaging of the Section 17(a)(2) "misstatement" claim.

V. CONCLUSION

The SEC's Section 17(a) claims against De Joya Respondents fail as a matter of law. These claims are premised on the allegation that De Joya Respondents made false statements in audit reports. But there is no evidence that they obtained any money or property "by means of" the alleged misstatements – which means they cannot be liable under Section 17(a)(2). Nor can they be liable under Sections 17(a)(1) or (a)(3), as the SEC's allegations under those sections simply mirror the Section 17(a)(2) allegations. Finally, no reasonable fact finder could find that De Joya Respondents acted with the deceitful intent required for Section 17(a)(1) liability. Indeed, De Joya Respondents were victims, not perpetrators, of the alleged fraud.

For these reasons, De Joya Respondents respectfully request that the SEC's Section 17(a) claims be dismissed.

Dated: March 30, 2015
San Diego, California

Respectfully submitted,

PERKINS COIE LLP

By: _____

Sean T. Prosser
11988 El Camino Real, Suite 350
San Diego, CA 92130
Telephone: 858.720.5700
Facsimile: 858.720.5799
Email: sprosser@perkinscoie.com

Attorneys for Respondents
DeJoya Griffith, LLC, Arthur DeJoya, CPA, Jason Griffith, CPA, Chris Whetman, CPA and Philip Zhang

EXHIBIT A

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16339

In the Matter of:

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

Respondents.

DECLARATION OF SEAN T. PROSSER IN SUPPORT OF DE JOYA RESPONDENTS' MOTION FOR SUMMARY DISPOSITION OF SEC'S CLAIMS FOR VIOLATION OF SECTION 17(a) OF THE SECURITIES ACT OF 1933

I, Sean T. Prosser, hereby state:

I am an attorney at law licensed to practice in United States federal courts and all courts of the State of California. I am a partner in the law firm of Perkins Coie LLP, counsel of record for De Joya Griffith, LLC (the "Firm"), Arthur De Joya, Jason Griffith, Chris Whetman and Philip Zhang (collectively, "De Joya Respondents"), Respondents in the above-captioned matter. I make this declaration in support of De Joya Respondents' Motion for Summary Disposition of the U.S. Securities and Exchange Commission's ("SEC") Claims for Violations of Section 17(a) of the Securities Act of 1933, filed concurrently herewith. I have personal knowledge of the matters set forth herein, and if called to do so I could and would testify competently thereto.

1. Attached hereto and incorporated herein as Exhibit 1 is a true and correct copy of an email from Respondent John Briner to SEC counsel Jason Sunshine with a copy to SEC counsel Lara Mehraban dated June 13, 2014, which was produced to me by the SEC in conjunction with discovery in the above-referenced matter.
2. In the email described above, among other things, Mr. Briner states to the SEC that he "had no ownership or control interest in any of [the] companies, either directly or indirectly, and no one was a 'nominee' for [him] or anyone affiliated with [him] or [his] law firm with respect to stock ownership." He also states that he "did not have the ability to control a director or stockholder . . . ." Further, Mr. Briner states that he did not "practice before the Commission" in conjunction with the companies' Form S-1 filings and hired separate counsel to handle those matters. In sum, Mr. Briner describes his role regarding the companies' documents and data as "formatting, liaising, and secretarial in nature."
3. Attached hereto and incorporated herein as Exhibit 2 is a true and correct copy of the Declaration of Swanandi Redkar dated June 12, 2014. Ms. Redkar is a Certified Public Accountant employed by the Firm. This Declaration was previously provided to the SEC as part of De Joya Respondents' Wells Response letter dated June 12, 2014.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I have executed this Declaration on the 30th day of March, 2015 in San Diego, California.

Sean T. Prosser

PROSSER EXH 1

[redacted]

From: John Briner <jdbriner@gmail.com>
Sent: Friday, June 13, 2014 2:17 PM
To: Sunshine, Jason
Cc: Mehraban, Lara
Subject: RE: In the matter of La Paz Mining Corp. NY-8922

Dear Mr. Sunshine,

I am in receipt of your letter of May 23,2014, requesting more information and confirmation of my involvement with La Paz Mining, et al. Thank you as well for the additional time in order to provide you with this response.

Firstly, I wish to make it perfectly clear that I had no ownership or control interest in any of these companies, either directly or indirectly, at any period in time. I never owned any stock or other securities issued by any of the companies, either directly or indirectly, and no one was a "nominee" for me or anyone affiliated with me or my law firm with respect to stock ownership. I did not hold any options, either directly or indirectly. I did not have the ability to control a director or stockholder and never did other than strictly through legal advice, and whether they followed that advice or not is even something over which I had no control.

I acted solely in a legal capacity providing legal advice to these various companies through my law firm, Metrowest Law Corporation. My law firm was hired by the clients, and we took instructions directly from them and/or advised them as we thought necessary. Prior to filing each registration statement we outsourced the filing to US counsel; on some files, Diane Dalmy, and on other files, Fred Bauman. We took this step to ensure that we did not provide our opinion on the S1 as well as making sure that the filing was reviewed by US counsel prior to its submission. We felt this was necessary so that it could not be said that our firm was attempting to "practice before the Commission", as we had no intention whatsoever of attempting to breach or circumvent the terms of our settlement agreement with the SEC from 2010. Our firm, and primarily my staff at the time, acted as liaison between the clients, the auditors and lawyers, and the directors. The clients provided us with the names of the directors for the companies, and in three instances asked if we knew anyone who was interested in serving as a director. In those cases, we offered the names of three individuals that we felt were experienced in serving on the boards of public mining companies, and who we understood could use the employment. We feel our role was more formatting, liaising, and secretarial in nature. In other words, we formatted the data, but didn't create it. From time to time we have referred potential directors to clients and non-clients who were seeking to hire competent management with public company experience. As such, we are referring potential management candidates, and not seeking out "nominees" on behalf of a client. Nor are we in a position to control their placement on the board; it is ultimately the client's decision.

Our arrangement was to bill the clients for each company after we were finished with our engagement. As none of the registration statements were successful in becoming effective, we did not bill the clients. We are no longer in contact with these clients.

Finally, I would like to reiterate that we were not in a control position with these companies. We acted exclusively in a legal capacity providing legal advice to clients. We were not an undisclosed control person or a promoter for any of the companies referred to in your letter. All of the legal work that required "practice before the Commission" we were careful to refer to licensed attorneys who were capable and qualified to review the registration statements and provide an opinion to the SEC.

I trust this is helpful to you,

John Briner

PROSSER EXH 2

DECLARATION OF SWANANDI REDKAR

I, Swanandi Redkar, hereby declare as follows:

1. I am a certified public accountant licensed by the State of Nevada. I have been employed by De Joya Griffith, LLC (FKA De Joya Griffith & Company, LLC) (the "Firm") since January 2, 2007. My current position is Audit Manager. The following is within my own personal knowledge and I could and would testify competently thereto under oath if called upon to do so.

2. I was the Manager on the Firm's audit of La Paz Mining Corp. ("La Paz"). The Audit Partner was Chris Whetman. On or before September 25, 2013, the Firm completed its audit of La Paz, and La Paz then filed a Form S-1/A with the U.S. Securities and Exchange Commission ("SEC"), which included an Auditor Consent from the Firm. Subsequently, and during the course of another audit, on or about November 5, 2013, one of my staff brought to my attention information on the internet regarding John Briner, including an SEC action against him, which I then reviewed. Mr. Briner was a consultant to some of the companies that we had been auditing and we had interacted with him to obtain information and documents regarding the companies. I did not believe that Mr. Briner was acting as an SEC attorney for the companies at the time. The information on the internet stated that Mr. Briner had been "suspended from appearing or practicing before the SEC as an attorney for five years." I sent links to this information by email to Philip Zhang, the audit partner for the engagements that I was then working on. I also cc'd Chris Whetman.

3. Mr. Zhang responded that he would discuss the matter with Arthur De Joya and Chris Whetman and get back to me. I do not recall him saying that he would discuss the matter with the other partners, Jason Griffith and Marlene Hutcheson.

4. The following day I spoke with Mr. Zhang. He told me he had discussed the matter with Mr. De Joya. Mr. Zhang said they had discussed the types of activities Mr. Briner was engaging in and the type of information he was providing to us in connection with our audit. Mr. Zhang said they agreed that Mr. Briner did not appear to be acting as an SEC attorney. Rather, it appeared to them that he was acting as a consultant on business and financial issues. Nevertheless, Mr. Zhang said that Mr. De Joya told him "to keep an eye on Briner" and to "let him know if any issue comes up with him [Briner]."

5. Mr. Zhang and I then discussed the matter further. Mr. Zhang expressed that he agreed with Mr. De Joya that Mr. Briner did not appear to be acting as an SEC attorney. He also told me that "as long as we completed the audit with appropriate and sufficient audit evidence" it should take care of any concerns.

6. I believe that Mr. Zhang and, in turn, Mr. De Joya took my questions regarding Mr. Briner seriously. To me, it appears that they looked at the issue, evaluated our interactions with Mr. Briner, and came to a conclusion that he was not acting as an SEC attorney. Further, based on my experience with the Firm's partners, I would not hesitate to raise similar questions in the future and I would expect that they would listen and consider them.

7. While I did copy Mr. Whetman on some emails regarding Mr. Briner, I do not recall speaking directly with him regarding the issue. I also do not recall specifically discussing Mr. Briner with Jason Griffith, another Firm partner.

8. On May 7, 2014, I was asked to speak by telephone with SEC attorneys who were conducting an investigation that I now know is titled *In the Matter of La Paz Mining Corp., File No.* [redacted] I did not have an attorney to help me prepare or to understand the SEC testimony process. I also did not have one present with me during the testimony. During the telephonic testimony, the SEC also did not tell me that I had the right to have an attorney. Now that the Firm

has engaged an attorney, I understand that a transcript of my testimony was prepared and I have reviewed it carefully. While I tried my best to be cooperative and readily answer all of the SEC's questions, some of my statements in the transcript are not consistent with on my current recollection.

9. For example, the SEC asked about Mr. Zhang's response to my question regarding Mr. Briner. I responded, "He was going to discuss it with the partners and speak with me about that" and then, in response to the SEC's question, I said "I believe he was going to speak with all of the partners." The SEC then asked me to list all of the partners. (S. Redkar Testimony Transcript ("Ts. Tr."), at 14:10-20.) I do not recall Mr. Zhang saying he would speak to *all* of the partners. Nor did he later tell me that he had done so. What I recall about this topic is accurately stated above in paragraphs 3-5.

10. In addition, on pages 18-19 of the transcript, there is a discussion about an email that I sent to Mr. Griffith on November 7, 2013, and which it appears he forwarded to Mr. De Joya. To be clear, I recall discussing Diane Dalmy with Mr. Griffith because our Firm's name showed up in the article. However, as I stated in my testimony, I do not recall discussing concerns about Mr. Briner with Mr. Griffith. (S. Redkar Ts. Tr. at 19:22-24.) As I also stated, I also did not discuss Mr. Briner with Mr. De Joya. (S. Redkar Ts. Tr. at 19:25-20:3.)

11. On page 20 of the transcript, there is a confusing discussion. The SEC asked "what was Mr. Griffith's response to you in response to your concerns?" I responded that "He was going to discuss it with Arthur and get back to me" and then I stated that "He did get back to me" and then "It was basically Philip, who got back to me ...." (S. Redkar Ts. Tr. at 20:4-10.) This discussion is confusing and not consistent with my recollection. As stated above, and as stated elsewhere in my testimony transcript, I do not recall discussing concerns about Mr. Briner with Mr. Griffith. In my testimony, I was referring to my conversation with

Zhang where *Mr. Zhang* said he would speak with Mr. De Joya and get back to me, as I state above in paragraph 3.

12. Finally, on page 21:7-15, the SEC asked if Mr. Zhang said he had spoken with "all of the partners, meaning De Joya, Griffith, Whetman, about both John Briner and Diane Dalmy." I do not recall that he said that. I only recall Mr. Zhang saying that he had spoken with Mr. De Joya.

13. While there were issues and questions that arose during some of the nine audits at issue in the Investigation, by the end of the audits – and before the audit opinions were signed – I was comfortable with our work and believed that the financial statements were properly supported. With respect to all nine of the audits, I believe that we had sufficient audit evidence to support our opinion.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 12th day of June, 2014, at Pune, India.

Swanandi Redkar

EXHIBIT B

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16339

In the Matter of:

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

Respondents.

DECLARATION OF CHRIS WHETMAN IN SUPPORT OF DE JOYA RESPONDENTS' MOTION FOR SUMMARY DISPOSITION OF SEC'S CLAIMS FOR VIOLATION OF SECTION 17(a) OF THE SECURITIES ACT OF 1933

I, Chris Whetman, hereby state:

I am a partner in the accounting firm De Joya Griffith, LLC (the "Firm"). The Firm and four of its partners, including myself, are Respondents in the above-captioned matter. I make this declaration in support of De Joya Respondents' Motion for Summary Disposition of the U.S. Securities and Exchange Commission's ("SEC") Claims for Violations of Section 17(a) of the Securities Act of 1933, filed concurrently herewith. I have personal knowledge of the matters set forth herein, and if called to do so I could and would testify competently thereto.

1. I have over 21 years of experience in both public and private accounting. I also have experience in the private sector, including various management positions in accounting and financial reporting functions. My experience in public accounting includes formerly working at PricewaterhouseCoopers, LLP. I received my Masters of Accountancy from Southern Utah University, and I am a Certified Public

Accountant licensed in the State of Nevada. I am a member of the American Institute of Certified Public Accountants and Nevada Society of Certified Public Accountants.

2. The Firm was founded in 2005 and is registered with the Public Company Accounting Oversight Board ("PCAOB"). It has over 20 employees, and services over 80 clients, with over 35 of them being public entities. Development stage companies are only a fraction of the Firm's business, with over 90% of its revenue coming from operating companies with revenue and employees. The Firm has multiple clients with over $5 million in annual revenue.

3. The PCAOB has inspected the Firm three times and has cleared all comments. There have been no restatements for any of the Firm's clients as a result of any PCAOB findings. Further, the Firm is a member of the Canadian Public Accountability Board (CPAB), and has completed 2 inspections with all comments cleared from that agency as well. Additionally, the Firm has participated for many years in the AICPA Peer Review program and received a pass rating each time.

4. As a partner in the Firm, I am familiar with the qualifications and histories of its partners, including Respondents Arthur De Joya ("De Joya"), Jason Griffith ("Griffith"), and Philip Zhang ("Zhang"). Neither the Firm nor any of its partners, including myself, have been sanctioned or disciplined by any agency, government or professional body or organization, including the PCAOB.

5. I have reviewed the SEC's Order Instituting Proceedings ("OIP") in this matter. As the OIP reveals, I was the engagement partner on only one of the nine audits by the Firm challenged by the SEC, La Paz Mining Corp. ("La Paz") (*See* OIP, Appendix A.) The Firm completed its audit of La Paz's financial statements on or before September 25, 2012 when La Paz filed its Form S-1/A with the SEC.

6. The first time I learned that John Briner had been disciplined by the SEC was on or about November 5, 2012 when it was brought to my attention by a staff member. I

was subsequently informed by that staff member, Swanandi Redkar, that she had discussed the issue with one or more of my partners who were involved with ongoing audits and that they would address what, if anything, needed to be done.

7. At no time prior to the SEC's investigation was I informed or did I believe that Mr. Briner was acting as an attorney "practicing before the Commission" in violation of his sanction imposed by the SEC. In fact, with respect to the only audit I handled, La Paz, the legal opinion was issued by another attorney, Fred Bauman. (*See* La Paz, Form S-1, Ex. 5.1 (Legal Opinion of Fred Bauman, Attorney).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I have executed this Declaration on the 30th day of March, 2015 in Las Vegas, Nevada.

Chris Whetman