UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16339

In the Matter of	
JOHN BRINER, ESQ., et al.	

DIVISION OF ENFORCEMENT PRE-HEARING BRIEF

Jack Kaufman, Esq.
Jason W. Sunshine, Esq.
Jorge G. Tenreiro, Esq.
Securities and Exchange Commission
Division of Enforcement
200 Vesey Street, Suite 400
New York, N.Y. 10281-1022
212-336-0106
KaufmanJa@SEC.Gov

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The SEC Division of Enforcement ("Division") respectfully submits this pre-hearing brief regarding the May 27, 2015 hearing in this proceeding against Respondents John Briner and Diane Dalmy.

PRELIMINARY STATEMENT

This case concerns Briner's and Dalmy's creation of twenty materially false Form S-1 registration statements ("Forms S-1") for twenty shell companies (the "Issuers"), in violation of Section 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77q ("Section 17(a)"). Briner – a recidivist securities law violator – orchestrated the creation and filing of the false Forms S-1. Dalmy, a securities attorney long associated with Briner, furnished eighteen materially false legal opinions incorporated into eighteen of the Forms S-1.

Regarding the claims against Briner, each Form S-1 falsely stated that:

- the Issuers were solely controlled and governed by a single officer, and that, other than management agreements with the Issuers, those officers had no "other material agreements or proposed transactions, whether direct or indirect, with . . . any promotors" (when, in fact, Briner controlled the Issuers, and the officers were mere figureheads);
- each Issuer had purchased mineral rights from an entity called Jervis Explorations, Inc. ("Jervis") (when, in fact, no such purchases had occurred);[1]
- each officer had paid $30,000 for Issuer stock (when, in fact, the officers paid no money to the Issuers); and
- the Issuers were not "blank check" companies because they did "not intend to participate in a reverse acquisition or merger transaction" (when, in fact, Briner formed the Issuers to enter into business combinations such as reverse acquisitions or mergers).

[1] The Forms S-1 also failed to disclose the material fact that the Issuer's purported mineral rights purchases were with a related party – *i.e.*, Jervis (which Briner controlled).

The evidence will establish that Briner both (1) knowingly or recklessly caused the Forms S-1 to make the above material false statements; and (2) compounded his fraud by creating legal documents designed to hide his fraudulent scheme.

Regarding the claims against Dalmy, her eighteen legal opinion letters state that the Issuer shares were "validly issued, fully paid and non-assessable." In support of this opinion, Dalmy's letters falsely state:

> In connection with this opinion, I have made such investigation 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.

In fact – as Dalmy admitted in her SEC investigative testimony (regarding seventeen of her letters) – Dalmy did not perform the above-claimed "investigations." Dalmy further admitted that she authored all eighteen opinion letters and sent them to Briner's law firm (which, she knew, was handling the Form S-1 filings). Dalmy's only alleged defense is her fanciful claim that she did not *authorize* the filing of her opinion letters with the Forms S-1. That assertion, however, is flatly contradicted by Dalmy's own email exchanges – with both Briner's law firm and the SEC – which plainly indicate that she authorized all eighteen of her opinion letters for filing with the SEC.

TRIAL EVIDENCE

The evidence at trial will establish the following facts against Briner and Dalmy.

I. Briner Fraud – the Form S-1 False Statements

Briner knowingly or recklessly caused the Forms S-1 to make the following material false statements, and he created the following paper trail to attempt to cover up those false statements.

A. Briner, Not the Officers, Controlled the Issuers

The Forms S-1 claim that each Issuer's sole officer (collectively, the "Officers") "controlled" and "governed" the Issuers. To the contrary, the Officers were mere figureheads chosen by Briner, who actually controlled the Issuers.

The Division expects to offer the testimony of several Officers regarding Briner's *de facto* control of the Issuers and the Officers' mere nominal roles. For example, the Division expects those Officers to testify that (1) they had no involvement in the formation of the Issuers; (2) their involvement was limited to signing various Issuer documents that Briner provided and asked them to sign; (3) they dealt almost exclusively with Briner regarding all matters related to the Issuers; (4) they had no expertise or knowledge regarding the Issuers' purported business (mineral exploration); (5) they did not make any substantive business decisions, or have any substantive involvement, regarding purported Issuer transactions (all of which Briner arranged); (6) they did not have any control over Issuer funds (Briner did); (7) Briner, not the Officers, arranged for the Issuers to hire the accounting and law firms (such as Dalmy's) who provided professional services and opinions required for the Forms S-1; (8) the Officers relied almost entirely on Briner in responding to accountant inquiries; and (9) the Officers' employment was to end when each Issuer obtained a market trading symbol. The Division expects the Officers' testimony to be corroborated further by various email exchanges between them and Briner (or his law firm). Thus, the Officers' testimony will establish that Briner hired them solely as

figureheads, to allow him to hide his own involvement, and to do his bidding, regarding the Issuers.

B. The Issuers Did Not Purchase Mineral Rights

To create the false appearance that the Issuers were actual businesses (and, thus, the false appearance that they were not "blank check" companies), the Forms S-1 claimed that each Issuer had purchased certain mineral rights in British Columbia, Canada from an entity called Jervis Explorations Inc. (Jervis). The Forms S-1 also incorporate purported written mineral rights purchase agreements between the Issuers and Jervis. Contrary to the statements in the Forms S-1, however, Jervis never transferred any mineral rights to the Issuers. Furthermore, the Forms S-1 failed to disclose that Briner controlled Jervis and that, therefore, the Issuers' purported mineral rights purchases constituted related-party transactions.

The Division will prove Briner's control of Jervis through (1) Jervis' corporate formation documents, which name Briner as Jervis' owner, President, and Director; (2) Briner's signature on at least several of Jervis' mineral rights contracts with certain of the Issuers; and (3) Briner's written admissions to the accountants auditing the Issuers that he was a Jervis Director.

To establish that the purported mineral rights transfers from Jervis to the Issuers did not actually occur, the Division will offer the official British Columbia mineral rights transfer records for Jervis. The Division obtained those records from the British Columbia Ministry of Energy and Mines ("Ministry") official Mineral Titles Online website ("MTO").[2] The Division will offer the Declaration of Mark Messmer, a Ministry official, regarding the process for transferring mineral rights in British Columbia and, more specifically, the particular MTO

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[2] No dispute can exist that MTO contains the official records for British Columbia mineral rights claims. The Forms S-1 themselves state that, "[i]n British Columbia, the acquisition of mineral claims is done using an online application whereby a company or individual can stake a claim online"; and the Forms S-1 also refer to each claim as an "MTO mineral claim."

information concerning Jervis.[3] Mr. Messmer's declaration and the MTO excerpts attached thereto demonstrate that, although Jervis owned the mineral claims at issue (for a certain time period), Jervis never transferred those mineral claims to anyone (much less to the Issuers), and eventually forfeited them.

Thus, the evidence at trial will establish that: (1) contrary to representations in the Forms S-1, Jervis never transferred any mineral rights to the Issuers; (2) Briner knew this, because he controlled Jervis and the Issuers (including the Issuers' cash); and (3) Briner engaged in additional deceptive conduct by nonetheless including in the Forms S-1 written mineral rights agreements between Jervis and the Issuers intended to create the false impression that the phony mineral rights transfers had occurred.

C. The Officers Did Not Pay For Issuer Shares

In several places, the Forms S-1 state that each Issuer's sole Officer paid each Issuer $30,000 for Issuer stock. For example, some of the Forms S-1 state that "the [Issuer] issued 30,000,000 private placement common shares to its [Officer] for cash of $30,000." Contrary to those representations, the Officers did not actually contribute any capital to the Issuers. More specifically, they did not pay anything for their purported purchases of Issuer stock. The Officers are expected to testify that they had no personal involvement in any such transactions and did not pay any of their own money (or borrow any money from a third party) to make any such stock purchases. The Division also expects to offer emails in which Briner himself effectively acknowledges that the Officers did not pay anything for their purported stock

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[3] Briner and Dalmy have stipulated: (1) to the admission of Mr. Messmer's declaration at trial in lieu of his live testimony; and (2) that they waive any argument or objection regarding the reliability, credibility, or weight to be accorded Mr. Messmer's declaration on the ground that he did not testify in person and was not subject to cross-examination. (Also, as Mr. Messmer resides in Canada, his declaration is admissible under SEC Rule 235(a)(2).)

purchases (Briner claims that certain unidentified third parties, unrelated to the Officers, funded the purported stock purchases).

D. The Issuers Were "Blank Check" Companies

The Forms S-1 further falsely state that each Issuer was "not a 'blank check company,' as [it] do[es] not intend to participate in a reverse acquisition or merger transaction." The Forms S-1 further state that "Securities laws define a 'blank check company' as a development stage company that has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person." The Division intends to offer the testimony of at least one Officer who spoke with Briner regarding this topic, and to whom Briner stated (contrary to the Forms S-1) that the Issuer was, indeed, intended to be used for an eventual reverse merger transaction. Moreover, as explained above, the Issuers had no other business purpose (they owned no mineral rights, and their sole Officers knew nothing of the mining business), and they possessed very limited assets.

II. Dalmy's False Legal Opinion Letters

Eighteen of the Forms S-1 – filed from July 27, 2012 through January 31, 2013 – contain Dalmy legal opinion letters. Each of Dalmy's letters state that she had "investigated" the Issuers, including reviewing a number of enumerated Issuer documents. In her SEC investigative testimony, however, Dalmy admitted that she conducted no such investigation concerning seventeen of the Issuers. She further admitted that she authored all eighteen opinion letters and sent them to the Issuers' counsel – Briner's law firm, MetroWest Law Corporation ("MetroWest"). Dalmy nonetheless claims that her letters were "drafts" that she had not authorized for filing with the Forms S-1. The documentary evidence, however, strongly

undermines Dalmy's alleged defense and establishes that, in fact, Dalmy authorized the Issuers to include her false opinion letters in the Forms S-1.

To begin with, nowhere do Dalmy's opinion letters indicate or even suggest that they are mere "drafts." To the contrary, each letter contains Dalmy's electronic signature block and the following express authorization for filing:

> 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'.

Moreover, Dalmy's contemporaneous email exchanges with MetroWest strongly imply that she authorized her letters to be included in the Forms S-1, and at no time does Dalmy withhold such authorization (or even hint at doing so). For example, from December 18 to 20, 2012, Dalmy engaged in the following email exchange with MetroWest employee [redacted] Vargas (non-relevant portions omitted):

- Vargas (December 18): "Would you kindly provide [MetroWest] with legal opinion letters for [Issuers Braxton Resources Inc. and Gold Camp Explorations Inc.]. We are looking to file as soon as possible."
- Dalmy (December 20): "[redacted] – finalizing Gold Camp and will send over shortly. Were the other two registration statements filed?"
- Vargas (December 20): "Not yet. John [Briner] has been out of the office, but will be back today to review the final draft before we send it off for filing."
- Dalmy (December 20): "Thanks -- and let me know if you need me to re-date the opinions re [Issuer] Clearpoint and other one."

The above email exchange strongly implies Dalmy's authorization to MetroWest to file the subject opinion letters with the SEC, and they contain no indication that Dalmy intended to withhold such authorization.

By way of further example, on January 28, 2013, Vargas emailed Dalmy:

> Would you mind sending us your invoice for all of the legal opinion letters you had provided, including the 6 you are working on now. I believe there was a total of 17? Once I receive that we can forward payment to you.

Dalmy responded the same day:

> [redacted] -- 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 Hill Mining
> 5. Yuma Resources
>
> Are we missing one?

It defies common sense that Dalmy would have stated her intention to send MetroWest an "invoice for each" Issuer unless she had provided authorized opinion letters for each. Again, at no time in these exchanges did Dalmy even suggest that her opinion letters were not authorized for filing with the Forms S-1 (and the Division is aware of no other communication between Dalmy and MetroWest withholding such authorization).

In addition, and equally significantly, shortly after the filing of at least ten of the Forms S-1, Dalmy sent emails to the SEC's Corporate Finance Division ("CorpFin") authorizing CorpFin to send Dalmy any comment letters regarding those Forms S-1.[4] For example, the Stone Boat Mining Corp. Form S-1 was filed on July 27, 2012. Four days later, on July 31, Dalmy sent CorpFin the following email:

> Dear [CorpFin official Ronald Alper]: Thank you for your voice mail message today with regards to review of the S-1 registration statement of Stone Boat Mining Corp. Per your request, please find below my email

[4] CorpFin is the SEC Division charged with reviewing filed Forms S-1 and commenting on them, prior to their becoming effective registration statements.

address and the email address of the company. Please send the comment letter when available to me via email.

Similarly, the Chum Mining Corp. Form S-1 was filed on November 30, 2012, and on December 10-11, Dalmy sent CorpFin two similar emails to two different CorpFin employees:

> December 10:
>
> Ron – thank you for your telephone message Friday. The email address of the Chum Mining Group is referenced below. The company has also been copied on the email. We will await receipt of the comment letter from the SEC.
>
> December 11:
>
> [CorpFin official] Tiffany Posil – thank you for your telephone call. As we discussed, the SEC is authorized to send comment letters to the two email addresses below regarding Chum Mining Group Inc.
>
> chumminginggroup@gmail.com
> ddalmy@earthlink.net

Dalmy sent CorpFin at least seven other similar emails shortly after at least seven other corresponding Issuer Form S-1 filings, including (for example) the following one on February 18, 2013 (regarding the January 31, 2013 Bonanza Resources Corp. Form S-1) :

> Tiffany - I hereby authorize the Securities and Exchange Commission to send any all comment letters relating to the registration statement filed on behalf of Bonanza Resources Corp. to the email addresses below:
>
> ddalmy@earthlink.net
> bonanzaresourcescorp@gmail.com

Dalmy's emails to CorpFin demonstrate both that (1) she knew that her opinion letters had been included in each of the Form S-1 filings; and (2) she had authorized them to be included in those filings.[5]

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[5] The Division intends to call at least one of the CorpFin officials who received Dalmy's emails to explain CorpFin's comment process and its interactions with Dalmy.

Furthermore, even if Dalmy somehow could establish that she did not initially authorize her opinion letters to be included in the Form S-1 filings, her subsequent communications with CorpFin constitute her ratifications of those letters shortly after they were filed. *See Orix Credit Alliance v. Phillips-Mahnen, Inc.*, No. 89 Civ. 8376 (THK), 1993 WL 183766, *4-5 (S.D.N.Y. May 26, 1993) ("Ratification is the express or implied adoption, *i.e.*, recognition and approval, of the unauthorized acts of another . . . One may be deemed to have ratified the acts of an agent through silence when there is an opportunity to speak and, under the circumstances, a desire to repudiate would normally be expressed"). If Dalmy truly did not authorize her opinion letters, she had a duty to so inform CorpFin when she learned of the filings (days later). By doing the opposite – *i.e.*, informing CorpFin that she was authorized to accept CorpFin comments regarding the Forms S-1 – Dalmy implicitly ratified her opinion letters. And Dalmy *never* informed CorpFin that her opinion letters were unauthorized (or otherwise sought to withdraw them).

Indeed, the first time Dalmy claimed publicly that her letters were unauthorized was more than a year later, in a February 10, 2014 press release. Dalmy issued that press release only after the Commission had instituted a "stop-order" proceeding against the Issuers (alleging the same false statements in their Forms S-1 at issue in this case).[6] Thus, Dalmy did not attempt to disavow her publicly-filed opinions for over a year.

Moreover, Dalmy's February 2014 press release – in which she attempts to distance herself from the Issuers – contains a number of knowing false statements:

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[6] That proceeding ended with a March 20, 2014 default judgment against the Issuers, in which the Court (Murray, C.J.) found that the Forms S-1 contained at least some of the same material false statements and omissions at issue in this proceeding. *La Paz Mining Corp., et al.*, Admin. Proc. File Nos. 3-15715 through 3-15734 (Mar. 20, 2014).

> Upon identification of [the Issuers], Ms. Dalmy stated that she had no knowledge of the use of her name or identity associated with the filing of the registration statements and opinions related thereto. . . . Ms. Dalmy stated, 'I have been very concerned with my name being associated with these mining companies of which I had no general knowledge of the use of my name or opinion until contacted by the Securities and Exchange Commission during 2013. . . . The Law Office of Diane D. Dalmy did not file or authorize the use of its name or opinions with any of these companies or individuals.'[7]

Directly contrary to her February 2014 press release, Dalmy's emails to CorpFin (and MetroWest) establish that, by December 2012, Dalmy knew very well that the Issuers were using both her name and opinion letters in the Forms S-1.

For the reasons set forth above, Dalmy's current (and prior) attempts to walk away from her opinion letters are absurd. Indeed, they serve only to illustrate the fraudulent lengths to which Dalmy will go to attempt to cover up her misdeeds.

BRINER AND DALMY VIOLATED SECURITIES ACT SECTION 17(A)

For the following reasons, the Court should find that, through the actions outlined above, Briner and Dalmy violated Securities Act Section 17(a).

I. Elements of Section 17(a) Liability

Securities Act Section 17(a) makes it "unlawful for any person in the offer or sale of any securities" by use of "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

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[7] Dalmy's reference to the SEC's contacting her in 2013 apparently concerns a set of June 17, 2013 letters the Division sent Dalmy, enclosing courtesy copies of investigative subpoenas that the Division served the same day on the Issuers. Shortly after receiving those letters, Dalmy left a voice mail message for Division counsel claiming, among other things, that she had "no knowledge" of the Issuers.

> (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). The Division discusses each of these elements and subsections in greater detail below.

A. Offer or Sale

Securities Act Section 2(a)(3) defines the term "offer" broadly to "include 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). The Forms S-1 clearly fall within this definition.

The Issuers' Forms S-1 begin by stating:

> The selling stockholder named in this prospectus namely . . . [the Issuer's] sole executive officer and director, is offering 12,000,0000 shares of common stock of [the Issuer] at $0.002 per common share. . . . The selling stockholder has set an offering price for these securities of $0.002 per common share and an offering period of 28 days from the initial effectiveness date this prospectus. This is a fixed price for the duration of the offering. The selling shareholder does not intend to extend the offering beyond the 28 day offering period.

Thus, the purpose of the Forms S-1 was to register the Issuers' stock for "offerings" within the meaning of Section 2(a)(3), and the Division's claims against Briner and Dalmy – which concern false statements in the Forms S-1 – satisfy the Section 17(a) "in the offer" requirement.

The Forms S-1 did not ultimately become effective (due to SEC stop Orders related to the matters at issue in this proceeding), but that fact does not change the analysis. In this regard, the Commission has stated (in the analogous context of Securities Act Section 5):

> Generally speaking, section 5(c) of the [Securities] Act makes it unlawful for any person directly or indirectly to make use of any means or instruments of interstate commerce or of the mails to offer to sell a security unless a registration statement has been filed with the Commission as to such security. Questions arise from time to time because many persons do not realize that the phrase 'offer to sell' is broadly defined by the Act and has been liberally construed by the courts

> and Commission. For example, the publication of information and statements, and publicity efforts, made in advance of a proposed financing which have the effect of conditioning the public mind or arousing public interest in the issuer or in its securities constitutes an offer in violation of the Act. The same holds true with respect to publication of information which is part of a selling effort between the filing date and the effective date of a registration statement.

Guidelines for Release of Information by Issuers Whose Securities are in Registration, Rel. No. 33-5180, 1971 WL 120474, *1 (1971); *see also SEC v. Liberty Petroleum Corp., et al.*, No. C-71-178, 1971 WL 294, *2-3 (N.D. Ohio Sept. 2, 1971) (New York Times advertisement for sale of securities – for which no effective offering circular was on file with SEC, and which stated that it was "neither an offer to sell nor a solicitation" – nonetheless constituted "offer" under Securities Act Section 2(a)(3)). The SEC's interpretation of the federal securities laws is entitled to deference. *See SEC v. Zanford*, 535 U.S. 813, 819-20 (2002) (SEC's reasonable interpretation of Securities Exchange Act Section 10(b) "is entitled to deference"). The Forms S-1 were filed on the Commission's EDGAR database and, thus, were available to the public. Therefore, they constitute "offers" for the purposes of Securities Act Section 17(a).

B. Section 17(a)(1)-(3)

The Division charges Dalmy and Briner with having violated all three subsections of Section 17(a). Citing the Commission's recent decision in *John P. Flannery*, Exchange Act Rel. No. 73840, 2014 WL 7145625 (Dec. 15, 2014) , this Court recently explained the distinctions between those three subsections:

> In *John P. Flannery*, the Commission explained the interplay among paragraphs (1), (2), and (3). First, the Commission confirmed that "[a] showing of scienter is required under Section 17(a)(1), but a showing of negligence suffices under subsections (a)(2) and (a)(3)." It also explained that Section 17(a) does not require that the conduct at issue "itself be 'manipulative or deceptive'" in order to violate the Section's proscription. It then explained that the paragraphs in subsection (a) "are 'mutually supporting rather than mutually exclusive.'" The paragraphs in subsection

(a), therefore, do not "limit[]" or "narrow" the reach of their neighboring paragraphs.

The Commission held that because Section 17(a)(1) prohibits the employment of "any device, scheme, or artifice to defraud," it covers "all scienter-based, misstatement-related misconduct." Because a single misstatement qualifies as "a 'device' or 'artifice' to defraud," 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)."

The Commission also clarified in *John P. Flannery* the similarities and differences between the requirements of Section 17(a) and Exchange Act Rule 10b-5. The Commission held that the reasoning in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), does not apply to Section 17(a)(2). In *Janus*, the Supreme Court interpreted Exchange Act Rule 10b-5(b), which makes it unlawful to "*make* any untrue statement of a material fact" in "connection with the purchase or sale of any security." The Court held that because Rule 10b-5(b) used the word "make," only a person with "ultimate authority" over an alleged false statement could be liable for violations of the Rule. Having reviewed the Court's holding in *Janus*, the Commission clarified that in contrast to Rule 10b-5(b), liability under Section 17(a)(2) does not turn on whether a person "has 'made' a false statement." "[L]iability instead turns on whether one has obtained money or property 'by means of' an untrue statement." As a result, liability under subsection (a)(2) may be premised on the *use* of a misstatement even if the user "has not himself made a false statement in connection with the offer or sale of a security."

With respect to Section 17(a)(3), the Commission found significant that, whereas Exchange Act Rule 10b-5(c) premises liability on "any *act*, practice, or course of business," Section 17(a)(3) premises liability on "any *transaction*, practice, or course of business[.]" According to the Commission, "while a misstatement (or misstatement-related activity) may fairly be characterized as an 'act,' a misstatement is not a 'transaction.'" As a result, subsection (a)(3) does not apply to "'acts' . . . that are not 'transactions,' 'practices' or 'courses of business.'"

John Briner, Esq., Rel. No. 2555, Admin. Proc. File No. 3-16339, 2-3 (Apr. 17, 2015)

(Order on Motion for Summary Disposition) (citations omitted).

C. Section 17(a)(1) Scienter

As noted above, only Section 17(a)(1) requires a scienter showing. The Commission in *John P. Flannery* described that scienter requirement as follows:

> Scienter is an "intent to deceive, manipulate, or defraud." It may be established through a heightened showing of recklessness. Extreme recklessness is an extreme departure from the standards of ordinary care, ... 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.

John P. Flannery, 2014 WL 7145625, at *10, n.24 (citations and quotation marks omitted). Thus, under "Section 17(a)(1), [a respondent] may be held liable if he acted with extreme recklessness; he need not have had actual knowledge that his misrepresentations would mislead investors." *Id.* at *22.

II. Briner Violated Section 17(a)

As explained above, the evidence will establish that Briner knowingly or recklessly orchestrated the filing of Forms S-1 containing several material false statements regarding the Issuers and their Officers. Thus, Briner violated Securities Act Section 17(a)(1). The Officers are expected to testify that they did essentially whatever Briner told them to do regarding the Issuers. Thus, Briner knew – contrary to representations in the Forms S-1 – that the Officers did not "control" or "govern" the Issuers (Briner did). Also contrary to the Forms S-1 representation, Briner knew that the Issuers had not purchased any mineral rights from Jervis (because Briner controlled Jervis and had arranged for the bogus executed mineral rights purchase agreements between Jervis and the Issuers). Briner also knew that the Officers had not purchased any Issuer stock, as Briner controlled the Issuers' commingled (purported) bank account, their financial statements, and their accounting (and because Briner himself claimed at the time that the cash for those purported transactions came from unrelated third parties).

Finally, Briner knew that the Issuers were "blank check" companies, as Briner admitted to at least one Officer and which, in any event, was plain from the Issuers' lack of any other purpose.

Regarding Section 17(a)(2) – which has no scienter requirement – Briner obtained money or property by means of the false Forms S-1 and, thus, violated that provision. A November 30, 2012, email exchange between Briner and auditors for certain of the Issuers indicate that his firm (MetroWest) received at least $10,000 for its work related to the Forms S-1 (from unnamed Briner "clients" who apparently were interested in using the Issuer shell companies for some sort of business combination). Thus, Briner obtained "money" by means of preparing the false Forms S-1 and causing them to be filed.

Regarding Section 17(a)(3) (which also has no scienter requirement), Briner engaged in "transactions" and a "course of business" that "operated as a fraud or deceit" on the investing public. Briner's "course of business" was his causing the creation and filing of the twenty false and misleading Forms S-1 described above. Briner's "transactions" that operated as a "deceit" were the bogus mineral rights purchase contracts (between Jervis and the Officers) – and the misleading written stock purchase agreements between the Issuers and the Officers – all designed to create the false impression that the Forms S-1 representations at issue were accurate (when, in fact, those transactions had not occurred).

III. Dalmy Violated Section 17(a)

As explained in the preceding section, Dalmy knowingly issued at least eighteen false legal opinions as part of the Forms S-1 and, thus, violated Section 17(a)(1). Dalmy admitted in her SEC investigative testimony that: (1) she authored each opinion; (2) she submitted them with her electronic signature block to MetroWest (the Issuers' agent); and (3) did not conduct the "investigation" of seventeen of the Issuers described in her opinion letters. Thus, the only issue

for trial is Dalmy's claim that she did not authorize the Issuers to file those seventeen opinion letters. However, as explained above, Dalmy's claim is fatally undermined by her contemporaneous email exchanges with MetroWest and CorpFin, which plainly establish that she authorized the filing of her opinion letters with the SEC.[8]

Because the investing public can be expected to rely on such legal opinion letters – *i.e.*, that the Issuers' offered shares were "validly issued, fully paid and non-assessable" – Dalmy's eighteen opinion letters contained knowing material false statements, in violation of Securities Act Section 17(a)(1). *See SEC v. Spectrum, Ltd.*, 489 F.2d 535, 542 (2d Cir. 1973) ("In the distribution of unregistered securities, the preparation of an opinion letter is too essential and the reliance of the public too high to permit due diligence to be cast aside in the name of convenience"); *SEC v. Greenstone*, No. 10 Civ. 1302 (MGC), 2012 WL 1038570, *5-7 (S.D.N.Y. Mar. 28, 2012) (attorney opinion letter relied upon by stock transfer agent satisfied materiality requirement for securities fraud); *SEC v. Czarnik*, No. 10 Civ. 745 (PKC), 2010 WL 4860678, at *5 (S.D.N.Y. Nov. 29, 2010) (same).

Regarding Section 17(a)(2), Dalmy admitted in testimony that she received at least a $1,500 legal fee for her Stone Boat opinion letter (one of her own trial exhibits indicates that the fee was $1,700). Thus, at least with respect to that legal opinion, Dalmy received "money" by means of a false statement, in violation of Section 17(a)(2).

Regarding Section 17(a)(3), Dalmy engaged in a "course of business" that "operated as a fraud or deceit" by authoring and issuing eighteen materially false legal opinions for eighteen

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[8] Dalmy admits that she authorized the filing of her July 2012 Stone Boat opinion letter, but claims (as to only that letter) that she conducted the investigation described therein. In light of Dalmy's admitted failure to conduct the Issuer investigations described in her seventeen other opinion letters (and given Dalmy's general lack of credibility), her starkly different claim regarding her Stone Boat letter lacks credibility, and the Division will ask the Court to find that Dalmy's Stone Boat opinion letter likewise was knowingly false.

Issuers. Indeed, the evidence against Dalmy in this case will show that she ran an illegal "opinion-mill" – readily issuing materially-false legal opinion letters for a fee.

REQUESTED RELIEF

The Division expects the evidence to support the following relief against Briner and Dalmy: (1) orders requiring Briner and Dalmy to cease and desist from any future violations of Securities Act Section 17(a); (2) disgorgement of both of their ill-gotten gains; (3) civil money penalties against both; (4) an officer and director bar against Briner; and (5) a penny-stock bar against Briner.

I. Cease and Desist Orders

Section 21C of the Exchange Act, 15 U.S.C. § 78u-3, authorizes the Commission to order a person to cease and desist from violating, or causing any future violation of, any securities law or rule that the person has been found to have violated. *Rita J. McConville*, Admin. Proc. File No-3-11330, 2005 WL 1560276, at *15 (Jun. 30, 2005). In considering requests for such orders, the Commission considers the following factors:

> the risk of future violations, . . . the seriousness of the violation, the isolated or recurrent nature of the violation, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, the respondent's state of mind, the sincerity of assurances against future violations, recognition of the wrongful nature of the conduct, opportunity to commit future violations, and remedial function to be served by the cease-and-desist order in the context of any other sanctions sought in the proceeding.

Id. While the Commission will only impose a cease-and-desist order where it determines that a risk of future violation exists, the degree of such risk required to support a cease-and-desist order "is significantly less than that required for an injunction." *Id.* at *15 n.66.

Virtually all of these factors militate in favor of cease and desist orders against Briner and Dalmy. Their violations were recurrent (multiple false Forms S-1 and opinions), and involved

serious, recent, material false statements. Furthermore, if left unchecked, Briner and Dalmy will be able to continue their fraud partnership, and neither have accepted any responsibility for their illegal activities. To the contrary, Briner did not testify during the investigation and, in his Answer, denied all of the OIP's allegations concerning him. Dalmy's testimony is so farfetched as to undermine any assurances she might give either that she did not violate Section 17(a) or against future such violations. Furthermore, Dalmy's attempts to cover up her illegal activity with incredible testimony and false public statements strongly indicate that she will violate Section 17(a) again. Also, although the Division cannot point to actual investor harm, that is only because the Division sought (and obtained) SEC administrative stop-orders against the Issuers before the Forms S-1 could become effective.

Finally, Briner is also a recidivist securities law violator with a long and colorful regulatory history:

- on March 15, 2006, the OTC Markets added Briner to its "Prohibited Attorney List";
- on August 31, 2009, the SEC filed a civil enforcement action against Briner in federal district court, alleging his involvement in a "pump and dump" securities fraud scheme involving repeated illegal unregistered offerings of millions of shares of stock. *SEC v. Golden Apple Oil and Gas, Inc., et al.*, 09 Civ. 7580 (S.D.N.Y.);
- on November 3, 2010, the *Golden Apple* court entered a consent judgement against Briner (1) enjoining him from future violations of Securities Act Sections 17(a) and 5(a) & (c), and Section 10(b) of the Securities Exchange Act of 1934; (2) barring him for five years from acting as an officer or director of a public company; (3) barring him for five years from participating in an offering of penny stock; (4) ordering him to disgorge over $50,000 in illicit profits (plus prejudgment interest); and (5) ordering him to pay a $25,000 civil money penalty, *id.*;
- on November 24, 2010, on the basis of his District Court judgment, the SEC barred Briner from practicing before it, with a right to reapply after five years, *John Briner*, Admin. Proc. File No. 3-14138 (Nov. 24, 2010);

- on April 5, 2011, the British Columbia Securities Commission ("BCSC") issued an order barring Briner until November 3, 2015, from: (1) trading in and purchasing securities and exchange contracts; (2) being an officer or director of a public company; (3) being a "registrant, investment fund manager or promoter"; (4) "acting in a management or consultative capacity in connection with activities in the securities market"; and (5) "engaging in investor relations activities";

- on July 18, 2014, the Law Society of British Columbia issued a citation against Briner for "professional misconduct," stating that Briner, among other things, "misappropriated some or all of the $50,439.44 received on behalf of [his] client GK on or about December 8, 2012, or improperly withdrew or authorized the withdrawal of those funds contrary to Law Society Rule 3-56(1)";

- on March 17, 2015, the British Columbia authorities filed an "information" against Briner, charging him with nine counts of having violated his April 2011 BCSC bar order; and

- on April 14, 2015, the U.S. Commodity Futures Trading Commission filed an action in Federal District Court against Briner, alleging that he and others engaged in a number of transactions that were (1) "pre-arranged, fictitious sales, and/or wash sales involving the purchase or sale of commodities for future delivery," in violation of Section 4c(a) of the Commodity Exchange Act; and (2) "illegal, non-competitive transactions to buy and sell futures contracts," in violation of 17 C.F.R. § 1.38(a), *CFTC v. Marcus, et al.*, 15-cv-3307 (N.D. Ill. Apr. 14, 2015).

Briner's long regulatory history renders it more than likely that he will violate the securities laws in the future if not adequately deterred from doing so.

Dalmy also was placed on the OTC Prohibited Attorneys List, on September 25, 2009. Also, in a separate pending District Court action (filed in August 2013), the SEC has charged Dalmy with violating Securities Act Section 5. *SEC v. Zenergy International, Inc., et al.*, 13-cv-5511 (N.D. Ill. Aug. 1, 2013). Thus, and for the additional reasons set forth above, Dalmy too is likely to continue to violate the securities laws.

For the foregoing reasons, the Court should order both Briner and Dalmy to cease and desist from future violations of Securities Act Section 17(a).

II. Disgorgement

The Court enjoys broad equitable power to order respondents to disgorge profits from their illegal activities. *See SEC v. First Jersey Sec.'s Litig.*, 101 F.3d 1450, 1474 (2d Cir. 1996). "The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits." *Id.* The primary purpose of disgorgement is to deprive violators of their ill-gotten gains, thereby maintaining the deterrent effect of the federal securities laws. *Id.* The amount of disgorgement ordered "need only be a reasonable approximation of profits causally connected to the violation," and "any risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created the uncertainty." *Id.* at 1475 (citations omitted).

Here, Briner made at least $10,000, and Dalmy $1,700, through their intentional fraudulent activities. For the reasons set forth above, the Court should require Dalmy and Briner to disgorge those ill-gotten gains.

III. Civil Money Penalties

Section 8A(g) of the Securities Act, 15 U.S.C. § 77h-1(g), permits the Court to impose civil monetary penalties that fall into one of three tiers, which increase with the seriousness of the violation. Under the third and highest tier, the Court may award maximum civil penalties of $150,000 for each illegal "act or omission" by an individual respondent, *see id.*; *see also* 17 C.F.R. §§ 201.1003, 201.1004, if the Court determines that the act or omission involved "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and "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 act or

omission." 15 U.S.C. § 77h-1(g)(2)(C). "Civil penalties are designed to punish the violator and deter future violations of the securities laws." *SEC v. Opulentica, LLC*, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007). "Disgorgement alone is an insufficient remedy, since there is little deterrent in a rule that allows a violator to keep the profits if [he] is not detected, and requires only a return of ill-gotten gains if [he] is caught." *Id.* at 331-32 (citation omitted).

Briner's and Dalmy's egregious and repeated frauds – and the consequent risk of harm to potential investors in the Issuers – warrants the imposition of the maximum-available civil money penalties against them. This is particularly true where, as here, respondents are likely to engage in such fraudulent conduct in the future if not adequately deterred, and where the permissible disgorgement amount is too low to act as a sufficient deterrent.

IV. Penny Stock Bar

The Division also seeks a penny stock bar against Briner. Exchange Act Section 15(b)(6), 15 U.S.C. § 78o(b)(6), authorizes the Commission to bar a respondent "from participating in an offering of penny stock if he willfully violated federal securities laws while participating in the offering of any penny stock, and the bar is in the public interest." *James Prange*, Rel. No. 724, Admin. Proc. File No. 3-16140, 2014 WL 7211677, at *4 (Dec. 19, 2014 Initial Decision). Section 15(b)(6)(C) of the Exchange Act defines the term "person participating in an offering of penny stock" to include "any person acting as any promoter, finder, consultant, agent, or other person who engages in activities with a . . . issuer for purposes of the issuance or trading in any penny stock."[9]

[9] "Penny stocks are low-priced, highly speculative stocks generally sold in the over-the-counter . . . market and generally not listed on an exchange." *SEC v. Becker*, 09 Civ. 5707 (SAS), 2010 WL 2710613, at *1 (S.D.N.Y. July 8, 2010) (internal quotation marks omitted). "An equity security is considered a penny stock as long as it (1) is not registered and did not trade on a national securities exchange; (2) is not an 'NMS stock,' as defined in 17 C.F.R.

Briner acted as the Issuers' promoter and consultant by, among other things, providing them a (concocted) business plan and purpose, manufacturing the Officers' purported stock purchase and the Issuers' purported mineral rights purchases, creating the Issuers' financial statements, and creating and coordinating the filing of the Forms S-1. Accordingly, Briner may be sanctioned in an administrative proceeding instituted under Section 15(b)(6)(A) of the Exchange Act.

"To determine whether a sanction is in the public interest, the Commission considers the *Steadman* factors: 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 conduct; and the likelihood that the respondent's occupation will present opportunities for future violations." *James Prange*, 2014 WL 7211677, at *4. "The Commission's inquiry into the appropriate sanction to protect the public interest is flexible, and no one factor is dispositive. The Commission also considers the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and the deterrent effect of administrative sanctions." *Id.* (citations omitted). The Commission has "repeatedly held that conduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions under the securities laws." *Id.* at *5.

As explained above, all of these factors support the imposition of a penny-stock bar against Briner.

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§ 242.600(b)(47); (3) has a value less than five dollars per share; and (4) has tangible net assets of less than two million dollars or six million dollars for the last three years." *Id.*

V. Officer and Director Bar

The Division also seeks an officer and director bar against Briner. This Court recently described the standard for issuing an officer and director bar:

> Securities Act Section 8A(f) . . . authorize[s] a bar against a respondent who has violated . . . Securities Act Section 17(a)(1) . . . from acting as an officer or director of any issuer with a class of securities registered pursuant to Exchange Act Section 12 or that is required to file reports pursuant to Exchange Act Section 15(d), "if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer." In line with the reasoning in *Joseph P. Doxey*, Initial Decision Release No. 598, 2014 SEC LEXIS 1668, at *74-78 (A.L.J. May 15, 2014), the so-called *Patel* factors will be applied in addition to the *Steadman* factors in evaluating the appropriateness of this sanction.

John Thomas Capital Mgt. Group LLC, Rel. No. 693, Admin. Proc. File No. 3-15255, 2014 WL 5304908, *32 (Oct. 17, 2014 Initial Decision). "The *Patel* factors are: (1) the egregiousness of the underlying securities law violation; (2) recidivism; (3) the defendant's role or position in the fraud; (4) degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood of recurrence." *Id.* *32 n.41 (citing *SEC v. Bankosky,* 716 F.3d 45, 48 (2d Cir. 2013)) and *SEC v. Patel,* 61 F.3d 137, 141 (2d Cir. 1995)).

As noted above, all of these factors support the imposition of an officer and director bar against Briner. His repeated and varied fraudulent conduct was egregious; he personally orchestrated the fraud; he acted with a high degree of scienter; and he is a recidivist securities law violator with a long history of regulatory violations (in both the United States and Canada). Indeed, Briner's future violation of the federal securities laws is virtually guaranteed if he is not adequately enjoined from doing so. The Court should bar Briner from serving as an officer or director of a public company.

CONCLUSION

For the foregoing reasons, at the conclusion of the trial in this proceeding, the Division will ask the Court to find respondents Briner and Dalmy liable for violating Securities Act Section 17(a) and to award the relief requested above.

Respectfully submitted,

Jack Kaufman, Esq.
Jason W. Sunshine, Esq.
Jorge G. Tenreiro, Esq.
Securities and Exchange Commission
Division of Enforcement
200 Vesey Street, Suite 400
New York, N.Y. 10281-1022
212-336-9145
kaufmanja@sec.gov

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CERTIFICATE OF SERVICE

I, Jack Kaufman, certify that, on May 11, 2015, I caused the Division of Enforcement Pre-Hearing Brief, to be served upon the following persons in the manner stated below:

Office of the Secretary
Securities & Exchange Commission
100 F Street NE
Mail Stop 1090-Room 10915
Washington, D.C. 20549
(by U.S. Mail and by fax: 202-772-9324)

Office of Administrative Law Judges
Securities & Exchange Commission
100 F Street NE
Washington, D.C. 20549
(by e-mail: alj@sec.gov)

Howard J. Rosenburg, Esq.
Kopecky, Schumacher, Bleakley
& Rosenburg P.C.
203 N. La Salle St., Suite 1620
Chicago, IL 60601
(by e-mail: hrosenburg@ksblegal.com)
Attorney for Respondent Dalmy

John Briner, Esq.
Pro Se Respondent
(By e-mail: jdbriner@gmail.com)

Jack Kaufman
Division of Enforcement