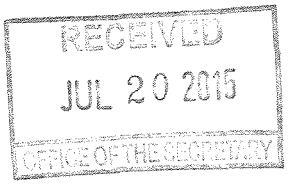
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16339

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

Respondents.



DIANE DALMY'S RESPONSE TO THE DIVISION'S POST-HEARING BRIEF

Following the Post-Hearing Order, I submit this Response to the Division's Post-Hearing Brief:

INTRODUCTION

The Division seeks to persuade this Court by improperly interpreting my communications to meet its theory and by focusing on immaterial discrepancies in order to attack my credibility. This Court should not countenance the Division's tactics.

It makes absolutely no sense that I would commit a fraud, and in all likelihood throw my career away, just for fun. Fraudsters do not do that. Fraudsters want a payday. Yet there is not a shred of evidence that I made any money or planned to make any money off of the course of events that lead to this case. This Court should recognize that I am a victim, not a fraudster.

DISCUSSION

A: The Evidence Shows I did not Violate the Federal Securities Laws.

The Division has attacked me every which way, sometimes taking things out of context, and other times drawing improper conclusions, in an effort to show I did something wrong. I did not. Below I address the Division's assertions.

My Explanation of Events has Never Changed.

The Division claims that my explanations have "evolved over time." That simply is not true. I have maintained from the beginning that I authorized the filing with the SEC of the true and accurate Stone Boat opinion letter that I prepared early in 2012. Similarly, I have maintained from the beginning that I did not authorize the filing with the SEC of the remaining draft opinion letters that I prepared months later.

The Language in the Draft Letters is Meaningless.

The Division repeatedly argues that I did not conduct the investigation that the letters say I conducted. First, that is not true with regard to Stone Boat. With that issuer, I did conduct the necessary investigation. The Division has introduced no evidence otherwise.

Second, the language in the letters is irrelevant with regard to the other issuers. The language in the letters is irrelevant because I did not authorize them to be filed with the SEC. Of course the language in the drafts says I conducted an investigation. Of course the language in the drafts says I authorized their filing. That is because if and when I would have authorized a particular letter to be filed, that language would have been included in the letter. As I have consistently stated, if and when Briner told me that a particular company would be moving forward, at that time I would engage the issuer, conduct the necessary investigation, and authorize the filing of the opinion letter with the SEC. So yes, the letters say I conducted the necessary investigation. And if and when I authorized certain of those letters to be filed with the SEC, such representation would be true.

I Never Authorized the Filing of the Draft Letters with the SEC.

Nobody has contradicted my testimony that I did not authorize the filing of the opinion letters (other than Stone Boat) with the SEC. Without a single witness or any document stating otherwise, the

Division misconstrues my email messages to fit its theory of the case. At the time I communicated with Briner's assistant, I did not communicate with an eye toward Briner taking my draft opinion letters and filing them with the SEC without my consent. I did not communicate with an eye toward the SEC accusing me of fraud and having to defend how I wrote my emails or defend why I did or did not respond to someone else's emails utilizing a sarcastic or benign response at times to suit myself. At the time I trusted Briner. He was a lawyer I worked with before. He told me that there was a volume discount to EDGAR-ize a bunch of documents at once. It simply did not occur to me that he was lying. I did not have the advantage of 20/20 hindsight at the time.

When communications included the word "file," it did not occur to me as anything else than EDGAR-izing, or formatting documents for the EDGAR system. A document can go through multiple drafts once it is EDGAR-ized, or filed with EDGAR. But none of the drafts gets filed with the SEC without specific authorization. I never received one email from either the auditors or the edgar agent. Attorneys spend long nights at the financial printer, in advance of an IPO for example, repeatedly changing details on an EDGAR-ized document in advance of an IPO. Having a document formatted on the EDGAR system is not one in the same with filing it with the SEC. Anyone who has ever been involved with a filing knows that. Certainly the Division knows that. There is nothing in the record at odds with my understanding of the term "file" to mean formatting in EDGAR. None of the communications say "file with the SEC."

Further, regarding the January 28, 2013 email with Briner's assistant, I agreed, in jest, to forward invoices for each issuer. The Division insists I was serious about issuing the invoices. But the Division's claim is undercut by the fact that *I never issued the invoices.* The Division ignores this reality and seems to argue that my email about invoices contradicts the fact that I never sent them. The reality is I never sent any invoices. I was not paid (except for Stone Boat). I had no engagements with any of the issuers.

In Footnote 6, the Division calls my testimony "nonsensical." Once again, the Division misrepresents my testimony. The Division invents a contradiction in my testimony, claiming I first said my response to Briner's assistant was sarcastic, but that I then testified I was going to send an $18,000 invoice for issuer. The reality was that my entire communication was sarcastic. I testified I sent a sarcastic response to Briner's assistant, and as part of that sarcastic response, I considered sending an invoice for $18,000 for each company, but did not. I did not testify that I responded sarcastically and then decided to be serious and send out invoices. In case there is any doubt, I testified:

> When I saw that email, I literally started to laugh and it was more sarcasm that I said I would send a separate invoice for each company, thinking I almost did. I was going to send an invoice for each company for $18,000, but I didn't. I didn't send any invoices to her because I called Briner up and I asked him, I said, what is with her email?"

(Tr. 51.)

The reality is that I received an email that made no sense, so I responded sarcastically and then called Briner. The Division is trying to read more into this than is justified.

As a result of my failure to communicate defensively and my failure to make use of "CYA" emails, the Division accuses me of fraud. Do I now wish I had put some kind of "DRAFT" watermark on the documents? Of course I do. But it did not cross my mind that Briner was playing me. And the failure to recognize that Briner was playing me does not amount to violations of the federal securities laws.

CorpFin Communications are not Evidence of Authorization.

My communications with CorpFin had one underlying purpose. To follow-up with Briner and have him withdraw the registrations. I thought the easiest path to the right result, i.e., withdrawal of the registrations, was for me to handle it directly with Briner. They were his clients and I felt it appropriate that the request for withdrawal came from the respective company. So I did not lay out the history to CorpFin. True, I could have reached the same result by having a robust discussion with CorpFin, setting forth the problem with Briner. But, at the time, I believed that Briner would resolve everything before

CorpFin even had the chance to issue comment letters. I thought, therefore, the easiest and most efficient path to resolve the issue of the improperly-filed opinion letters was to have the person who improperly filed them simply withdraw them. Looking back, I wish that I would have had the discussion with CorpFin. But failing to do so does not mean I violated the federal securities laws.

I Trusted Briner.

The Division argues that I did not really trust Briner. The Division says that I knew he was someone who could not be trusted because I was aware of some of his regulatory history and that I was lying when I testified that I was not aware of the full extent of his regulatory history. This is typical of the Division's arguments against me: if I answer "yes" I'm lying and if I answer "no," I'm lying. The bottom line is that I knew some, but not all, of Briner's regulatory history of which certain regulatory issues against Briner have only arisen recently. I also knew him personally and professionally. Based on that personal and professional relationship, I determined that he was a trustworthy individual, regardless of whether there were prior allegations against him. My conclusion was wrong. I misjudged Briner. But that does not make me a liar or a fraudster.

The Legal Doctrine of Ratification does not Apply.

Likely recognizing the weakness in its case, the Division invents a new legal theory, "fraud by ratification." The one case—an unpublished memorandum opinion—in support of this novel theory, has nothing to do with the Securities Act, the Exchange Act, or any federal or state securities laws or regulations. In fact, it is not even a claim for fraud. In the case the Division cites, an individual was provided a verification letter that expressly stated as follows:

> "[Plaintiff] "relied upon your guaranty" in extending credit to Phillips–Mahnen and that "[i]f there is any discrepancy regarding the enclosed [guaranty] and your understanding of your obligations as guarantor, it is imperative that you immediately advise us as we would not fund the transaction without your guarantee." [Defendant] never contacted [Plaintiff] in response to the verification letter.

Orix Credit Alliance v. Phillips-Mahnen, Inc., No, 89 Civ. 8376 (THK) 1993 WL 183766, *2.

There, the plaintiff relied on the lack of a response to a verification letter in extending credit. (*Id.*) The court held that where an individual ratifies his unauthorized signature by another on a guaranty, he becomes liable on that guaranty. (*Id.*, *4.) The case the Division relies on involved a contractual guaranty, not a fraud claim.

Under the Division's logic, any time a person does not deny something that s/he did not do, they will automatically be legally treated as if they did it. In reality, ratification involves a particular set of circumstances that are not applicable here. Certainly this Court can consider the fact that I did not lay out the accurate history for CorpFin, but it can also consider my reasons for not doing so. My failure to tell CorpFin that I did not authorize the filings with the SEC does not legally mean that I did retroactively authorize their filing.

B: The Division's Claims of a Cover-Up are Fictitious.

Without any witness to contradict my testimony, the Division attacks me personally. To do so, it claims I engaged in some sort of a "cover up," to obscure my relationship with the issuers. I did no such thing. The evidence bears that out. There are no communications between me and the issuers, no correspondence between the issuers and me, no transaction of funds between the issuers and me, and no agreements between the issuers and me. The Division tries to distract from this lack of evidence by claiming that somehow I covered it all up. That claim is absurd.

My Voice Mail Message was True.

The Division calls my voice mail message to Jason Sunshine at the Division "highly misleading, if not outright false." In reality, my message was true and accurate. Yes, it contradicts the Division's theory of the case, but that is because the Division's theory is false. I told Sunshine that I only prepared draft opinion letters, did not represent the issuers, was not paid, was unaware that the some of the statements were filed, and that Briner represented the issuers. There is nothing false, or even close to misleading about that statement. The Division claims I'm being untruthful by citing my communications with CorpFin after the fact. But I have already explained why I had certain

communications with CorpFin. Those communications do not serve to invalidate the reality of my voice mail message. If the Division is so positive I represented those issuers, how come there are no communications between them and me, no correspondence between them and me, and no exchange of funds? My message to Sunshine was true. It is unfair and inaccurate for the Division to claim it was false or misleading.

The Division Correctly Cites My July 5, 2013 Email to Briner.

The Division mentions my July 5, 2013 email to Briner. That email conveys the situation accurately. I wish I had communicated more frequently and more explicitly via email, as opposed to via telephone. But that email is telling. Consistent with my testimony, after I confronted Briner, he told me that he would withdraw the registrations. But the withdrawals were denied and the record listed me as counsel to companies that I had no association with. Accordingly, I conveyed that concern to Briner.

My Press Release is Accurate.

The Division claims that My February 2014 press release "contains a number of knowing false statements." The Division's claim is false. I had a press release prepared because I recognized that there was a problem that could draw the public's attention. Briner filed my draft opinion letters with the SEC. When I confronted him about it, he said he would withdraw them. They were not withdrawn and the SEC instituted public Stop Order proceedings against the issuers. I issued the press release because I needed to make a statement to the public, given that my name improperly was associated with the registrations.

I issued the press release to let the public know that I did not authorize the filing of the opinion letters that contain my name. The Division claims I am a liar because my press release says I did not know about it until 2013, when it in fact it was December 2012. What difference does that make? It was a mistake on my part that is ancillary and immaterial to the point of my press release. The Division claims that I am involved in some kind of a "cover up" because I wrote 2013, when I should have written

December 2012. That is not a cover up. That is irrelevant, and the Division's focus on it displays how truly thin its claims against me are.

C. My Testimony was Truthful.

The Division continues to attack me by claiming my testimony was not credible. I testified truthfully and nothing contradicts my testimony.

Stone Boat was the Exception.

As I testified, for the Stone Boat registration I had a particular arrangement with Briner. (TR. 47.) I also testified that after I concluded my Stone Boat work, I told Briner that I was not happy with the Stone Boat arrangement and did not want to handle an arrangement like that in the future. (Tr. 26.) As I testified, it was my practice to consent to SEC filings in writing by sending an email to the EDGAR agent. (Tr. 32-34.) As I testified, I did orally authorize the Stone Boat filing with the SEC, but was the anomaly. One anomaly does not disprove the fact that in my prior filings, I provided written authorization to file with the SEC. The Division presents no evidence otherwise.

File means File

The Division says that when the word "file," or similar words were used in correspondence, it meant "file with the SEC." The problem for the Division is that nowhere does it ever say "file with the SEC." So the Division contorts the meaning to fit its claims. "File with the SEC" was never in any of the correspondence. When I saw the word "file," I understood it to mean filing with EDGAR. As discussed above, before a document can be filed with the SEC, that document is formatted for the EDGAR system, or EDGAR-ized through a financial printer or EDGAR agent. Once EDGAR-ized, it can still be revised. Only when the revisions are complete and final and all parties sign off, do such documents get filed with the SEC.

No Evidence Contradicts My Description of My Arrangement with Briner.

I testified that after preparing the draft opinion letters, Briner would tell me which issuers would be moving forward. This was the agreement I had with Briner after my Stone Boat work was completed, but before I prepared any of the draft engagement letters. The Division points to an email where Briner provides me the name of an issuer and asks for me to prepare what would be a draft opinion letter, and then, shortly thereafter, Briner files the letter. The Division claims that because Briner filed the letter, my testimony was false. But that is exactly the point. Briner played me. He told me that he would move forward only with certain issuers and only after I was further engaged, but he went ahead and filed the registration statements with the SEC anyway. The fact that Briner lied to me and did something he said he would not do, does not contradict my testimony.

Briner Failed to Withdraw the Registrations.

That Briner failed to withdraw the registrations does not mean he never told me he would do so. It means he lied to me when he told me he would do so. I never testified that Briner needed 30 days to withdraw the registrations. The Division misrepresents my testimony. I testified that essentially there was a thirty day window between filing and the time CorpFin would issue a comment letter, and it was during that window of time that Briner could get the registrations withdrawn. That time window was supported by the Division's witness, Tiffany Posil, who testified that CorpFin's goal is to provide comments in 27 days. (Tr. 170.) It was my hope and expectation that he would have done so. But he did not.

A Minor Difference in Time is Immaterial.

When I learned what Briner had done, I called him and told him how upset I was. When I testified before the Division in late May, 2014, the Division showed me a document from February 2013. Seeing that document led me to believe that I called Briner in February 2013. At the Administrative Proceeding, the SEC showed me a document dated December 2012. Sitting in the Division's testimony more than a year and a half later, I did not recall the exact date of when I called Briner. At my testimony before the Division, the Division prompted my memory with a document from

February, so to the best of my recollection, I made the telephone call in February. At the Administrative Proceeding, the Division promoted my memory with a document from December, so I realized that I had made the telephone call in December.

The Division now claims this means I am a liar. The Division is wrong. I did not have a perfect independent recollection of the dates. I made my best possible recollections about dates relying on what the Division showed me during my testimonies to refresh my recollection.

I did not Control Briner.

When, in December 2012, I learned of the filings with the SEC, I called Briner to tell him to withdraw the registration statements. Briner did not, however, attempt to withdraw the registrations for several months. The Division claims, therefore, that I must not have said anything to Briner for several months.

That argument assumes a false premise: that I controlled Briner. The reality is that I told Briner to withdraw the registrations. He said he would, but he lied to me and did not. The date that Briner finally filed the registrations does not indicate the date that I told him to withdraw them. I told him to withdraw them as soon as she learned about them, but Briner took months to follow my demand.

D. I did not Violate any Federal Securities Laws.

During the course of events that lead to this case I acted in good faith and did not violate any laws. Briner used and manipulated me. He fraudulently induced me to prepare draft opinion letters with the representation that some of the issuers would move forward with the registration and would then engage me. I believed him. I have known him for many years and found him to be an honorable person. I was wrong.

I certainly did not have any level of scienter sufficient to support a Section 17(a) claim. For the non-scienter portions of the statute, I did not act negligently. I was never paid, other than for my Stone Boat opinion. And for that opinion, there is no evidence of any wrongdoing whatsoever.

I trusted someone. He deceived me. And now I am in danger of losing my career over it. I am hopeful that this Court recognizes this and does not rule in favor of the Division.

E. Strong Sanctions are not Warranted.

I pray that this Court does not rule in the Division's favor. Ruling in the Division's favor likely will end my career. It will make me untouchable to clients. Additionally, in all likelihood, the Division will bring a follow-on case under SEC Rule of Practice 102(e) that will seek to bar me from practicing before the SEC based on a finding against me by this Court. So even if my career somehow were able to survive an adverse ruling by this Court, the Division would seek to kill my career via a 102(e) claim.

Since the events of this case, I am less trusting of others. I am more thorough in assessing a potential risk, whether it be from a client or business partner. There is no risk of a future violation. I am well aware that everything I now do is scrutinized by the SEC. Any misstep will end in significant sanctions.

Moreover, this involved one incident, not repeated incidents. There was one opinion letter that was formatted for multiple issuers. There are not multiple separate events. It was one event that was separated into multiple pieces. Additionally, there was no investor harm whatsoever. The Division claims that it stopped investor harm because of the Stop-Orders. That is false. It is uncontested that Briner attempted to withdraw the registration statements. (The Division admits it on page 14 of its brief, noting that Briner attempted to withdraw the registrations in June 2013.) It was the SEC that rejected the withdrawal so that the Division could commence Stop Order litigation.

Additionally, it is not appropriate to penalize me for contesting and denying the Division's claims. *See SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1229 (D.C. Cir. 1989).

The facts militate against a cease-and-desist order. Moreover, disgorgement is totally inappropriate. The Division seeks to disgorge $1,750 relating to the Stone Boat opinion letter. But as

discussed repeatedly, there is no evidence that anything was improper relating to the Stone Boat letter. Thus disgorgement is not appropriate in this case.

Finally, the Division's civil penalty is inappropriate. If this Court finds against me, the wrongdoing relates to one set of opinion letters. True, there were multiple letters, but it cannot be viewed as multiple separate acts of wrongdoing. It could properly be viewed as a single event, where one letter was reformatted for each issuer. It was one endeavor. The Division cites *SEC v. Jean-Pierre*. But that case is inapposite. There, the defendant had a separate relationship with each issuer and separately charged each separate issuer for each opinion letter. Here, I had no relationship with the issuers. I had no engagements with them. I prepared one set of letters at Briner's request. The analysis does not merit multiple penalties.

Additionally, if this Court seeks to apply multiple penalties, such penalties should be applied only to the registration statements that actually were filed and for which there was no attempt to withdraw.

The Division seeks a maximum second tier penalty, times 18, for a penalty of $1.35 million. This is a penalty for someone who, even under the Division's calculations, made less than $2,000 on the alleged fraud. That number is outrageous. If anything, there was one improper act that involved no level of scienter. The maximum penalty provided by the statute, therefore is $7,500.00.

CONCLUSION

I did not violate the federal securities laws. Briner victimized me, for which I have, and will continue to pay a high price. The Division's charges against me have hurt my career and ability to keep and obtain clients. A finding against me would end my career permanently. I humbly ask that this Court follow the evidence, recognize that the Division has the burden of proof, and find in my favor.

Respectfully submitted,

Diane Dalmy

CERTIFICATE OF SERVICE

I, certify that on July 10, 2015, I caused the preceding document to be served upon the following persons in the manner stated below:

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