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 PETITION FOR REVIEW

Pursuant to SEC Rule of Practice Rule 410, I submit the following Petition for Review to the Commission, as follows:

## INTRODUCTION

This case originally involved two claims. First, that I lacked a proper basis to issue an opinion letter regarding Stone Boat Mining Corp. ("Stone Boat"). Second, that I authorized seventeen purported "opinion letters" for other issuers to be filed with the SEC. In his Initial Decision ("ID") Judge Grimes correctly dismissed the first claim, but found me liable for the

second. I submit this Petition for two reasons. First, the ID's findings of fact and conclusions of law are clearly erroneous. Second, the penalty is without basis.

## BACKGROUND

John Briner ("Briner"), an attorney who I occasionally worked with in the past, deceived and duped me. (Tr. 117.) In no way was my practice dependent on any referrals from or working with Briner. [redacted] I worked at a national law firm, raised a family and during that time started my own business well over twenty years ago as a sole practitioner. I am accustomed to working hard and not dependent on any one. I have built a viable business as a sole practitioner.

Briner asked me to prepare draft opinion letters for seventeen companies. (Tr. 86-87.) He represented to me that of those seventeen companies, he would move forward with registration statements for three or four of them at a later date. (Tr. 25.) At later dates, it would be determined which of those seventeen companies would move forward with registrations statements. (Tr. 25, 38, 48-49.) Briner told me that because of an incentive provided by the EDGAR agent, it would be less expensive to EDGARize the seventeen registration statements together with exhibits, including the opinion letters, at one time than it would be to EDGARize the three or four registration statements, exhibits and associated opinion letters on an *ad hoc* basis. I provided the seventeen opinion letter drafts to Briner. I expected to eventually discuss with Briner and learn which of the companies would move forward with registration statements. (Tr. 25.) At that time, I would engage the issuers, perform the necessary due diligence and, if satisfied, authorize the filing of the registration statements including my opinion letters with the Commission. (Tr. 25, 38, 48-49.)

It turns out that Briner deceived and duped me. (Tr. 117.) There was no EDGAR agent incentive. Instead, Briner used the drafts I provided and actually filed them with the Commission. In total practical and logical reasoning, at no time did I ever think that Briner would file 17 registration statements. It was not even a thought that crossed my mind. To file 17 registration statements (including 8 in one day) that are identical is beyond reason and logical comprehension. The extraordinary time and effort involved in filing one registration statement together with the involvement of management and auditors is what I have always experienced over 25 years of practice. The time and effort involved in merely responding to SEC comments relating to one registration statement and eventually clearing is extraordinary. I had no reason to even begin to think that Briner would file 17 registration statements.

He did not tell me he filed any of them. (Tr. 45-46, 57, 69, 108.) I later learned of their filing from the Commission's Division of Corporate Finance ("CorpFin"), who contacted me because my name was on the opinion letters. In my communications with CorpFin, I made a mistake. I did not tell CorpFin that Briner filed the registration statements together with my opinions without my authorization. Instead, I confronted Briner, who told me he would withdraw the registration statements. Briner, on behalf of his clients, asked that I provide the Commission with the respective email addresses to receive the comment letters and he would subsequently respond to the comment letters setting forth the basis for withdrawal and the reason they were erroneously filed. Looking back, I should have told Corp Fin that Briner had deceived and duped me. But at the time, I believed Briner would resolve the matter because he represented the clients and advised me as so. The companies were his clients and he advised that he would respond to the comment letters with a basis for withdrawal and it did not matter if the registration statements remained on file - they of course would not clear and there were no sales

of stock to the public. Also, I did not want to raise the curiosity of the Commission in light of the fact that I already was a defendant in a Section 5 case pending in the Northern District of Illinois (*SEC v. Zenergy International, Inc. et al.*, 13-cv-05511). Despite his representations to me, Briner never withdrew the registration statements. The Commission later learned that Briner was in the process of orchestrating a fraud and took action to stop it. I neither knew nor should have known that Briner was using my draft opinion letters in furtherance of his scheme. I committed no fraud. The ID fundamentally misanalyses the facts and draws the wrong conclusions. The Commission should dismiss the claims against me.

## FACTS

I am an experienced securities attorney in practice for twenty five years. I have worked hard to build a viable practice. (Tr. 15.) Briner is an attorney who I had occasionally worked with in the past and because of his actions as opposing counsel representing his clients in a couple transactions involving my clients, I trusted him. His law firm was called "MetroWest." (Tr. 18.) In retrospect, I should not have trusted him, but I did. Early in 2012, Briner asked me to assist him with one of his clients, Stone Boat Mining. (Tr. 18-19.) I prepared an attorney opinion letter for Stone Boat. The undisputed evidence is that in connection with doing so, I worked for several weeks with Briner regarding the S-1 registration statement, conducting due diligence, revising the registration statement, working with the auditors regarding the financial statements, reviewing geology reports, reviewing asset purchase agreements, reviewing records from the Nevada Secretary of State, researching the officer's background, and reviewing the financial statements, including the footnotes. (Tr. 20, 46, 107, 125.) After the due diligence, I authorized the filing of my Stone Boat opinion letter. (*Id.*)

The agreement for Stone Boat was that I would be paid $1,750.00 with the understanding that I would be participating with regard to comment letters and revisions and responses to CorpFin and I would be paid a rate of $275 per hour. (Tr. 47.) The additional fees would be paid when the SEC cleared Stone Boat. (Tr. 47.)

Later that year, Briner contacted me to do work for some other issuers. I told Briner that for future work, my involvement would be much different than for Stone Boat and that I expected my typical fee, around $21,000, which I might discount for him. (Tr. 26.)

For this work, there were a number of possible issuers, but it would later be determined which of the issuers would be moving forward with the S-1 registration statement. (Tr. 25, 38, 48-49.) In the meantime, Briner asked me to prepare draft opinion letters for each of these 17 companies. (Tr. 87-87.) The reason for doing this, according to Briner, is that he had received a package discount deal from the EDGAR agent. (Tr. 137.) EDGAR stands for Electronic Data Gathering, Analysis, and Retrieval. It is the process by which documents get formatted for, and eventually filed, with the SEC. "EDGARizing," is taking a document and formatting it in the EDGAR system. EDGARizing refers to formatting, and is not the same as filing a document with the Commission. (Tr. 137-38.) Once a document is EDGARized, there is a process afterward that allows it to be filed with the Commission. (*Id.*)

There was nothing suspicious about this arrangement. I would prepare 17 identical opinion letters. (There were also wo other issuers involved in this case, Gold Stream and LaPaz, for which I did not prepare draft opinion letters. (Tr. 132-33.)) When it was determined which issuers would be moving forward with registration, I would enter into an engagement agreement with that particular issuer, conduct the necessary due diligence, and then together with management and the auditors, further revise the existing EDGARized registration statement and

ultimately authorize the EDGAR agent to file the registration statement together with my particular opinion letter with the Commission. (Tr. 48-49.)

Per my agreement with Briner, between November 2012 and January 2013, I prepared 17 draft opinion letters to Briner/MetroWest for EDGARizing and waited for word on which issuers would move forward. (Tr. 20, 21, 23, 39.) There never was a plan to file all 17 registration statements. (Tr. 49.) Indeed, doing so would be absurd. Signing off on a registration statement takes a considerable amount of work. As of the end of 2012, I had only filed approximately eight registration statements during the course of 20 years as a sole practitioner. (Tr. 16.) I could not even fathom doing the work for 17 registration statements at one time. Briner represented to me that there would be much less than 17 issuers that would move forward and which would move forward over a period of time. (Tr. 25.)

The fact that all of the registration statements for each of the 17 potential issuers were identical reinforced the fact to me that they could be nothing but drafts. (Tr. 32.) The draft opinion letters all contained my signature block and my consent to file. But that does not mean I actually consented for them to be filed with the Commission when I provided them to Briner. Any draft would have that signature block and consent because that language would ultimately be in any final version. There still would need to be further drafting and revising of the registration statement and sufficient due diligence before I would actually authorize the filing of any of them. (Tr. 38.)

The actual authorization of filing one of my opinions with the Commission goes through an extensive process. (Tr. 33.) EDGAR agents know that they are not to file any document with the Commission until they get the approval and authorization of every person involved in the filing, i.e., lawyers, management and auditors. (*Id.*) This is the standard protocal and practice

for every EDGAR agent I have ever worked with involving the filing of an 8-K to a 10-K to a registration statement -- acting with complete good faith and professionalism within the EDGARizing process.

## DISPUTED FINDINGS AND CONCLUSIONS

The ID's findings and conclusions that I knew Briner would file my draft opinion letters is clearly erroneous. The purported evidence the ID cites, supports neither ID's findings or conclusions.

### A. The ID Misconstrues my Communications with CorpFin.

It is accurate that I did not inform anyone at CorpFin that I had not authorized the filing of my draft opinion letters. Looking back, I should have. But at the time, I did not want to bring further attention to myself in light of the Zenergy case nor insert myself into any kind of a problem. Instead, I confronted Briner, who told me he wanted to receive the respective comment letters and would then withdraw the registration statements by responding to the comment letters and providing a basis for such withdrawal and an explanation for such erroneous filing. Looking back, I should have told CorpFin that Briner had deceived and duped me. But at the time and since the issuers were Briner's clients, I believed Briner would resolve the matter and I did not want to raise the curiosity of the Commission in light of the fact that I already was a defendant in the Zenergy case. My belief was that Briner would withdraw the registrations and the issue would be resolved without any potentially complicated communications with CorpFin. (Tr. 57, 61, 62, 65, 115.) So yes, I communicated with CorpFin advising CorpFin that it was authorized to send the comment letters to certain respective email addresses. But I did so knowing that Briner was going to respond to the comment letters with the basis for withdrawal

and reason the registration statement was erroneously filed. I regret my actions, but that is not fraud.

The ID found that had I been truthful, the issue over Briner's filing of my drafts, coupled with his regulatory history should have given me pause. That is based on speculative 20/20 hindsight. It did not give me pause. I knew Briner personally and found him to be trustworthy person based on his actions regarding involvement as opposing counsel. In light of my regard for him, his actions did not give me pause to think he might be committing fraud and using me in the process. I simply thought there was a problem and that he would get it fixed.

**B. The ID Misunderstands my Emails with Briner's Office.**

The ID cites to the lack of an indication in my emails with Briner's assistant that my draft opinion letters were only drafts. The ID fails to comprehend that my correspondence with Briner's assistant involved cursory, quick emails. (Tr. 43.) The ID notes the word "file" in the correspondence. Yes, the word is in the correspondence. But again, operating in real time, without thinking that someday someone would accuse me of fraud, I did not consider that the word "file" meant anything more than formatting the draft opinion letters with the EDGAR system, or "EDGARizing," them. (Tr. 41.) Same with the word "final." Operating in real time, I did not see the word "final" as anything other than finalizing a document for EDGARizing, as one of many further steps that one undertakes when filing a registration statement with the SEC. (Tr. 42.) Briner's assistant had no authority whatsoever to file anything with the SEC, so I was not overly focused on the possible multiple meanings of a couple of words in the correspondence. (Tr. 43.) To file the registration statements with the SEC, I would expect direct communication from the EDGAR agent and the auditors. (Tr. 108.) I never received any

communication from either the EDGAR agent nor any of the auditors. Therefore, I had no reason to think anything ever was filed.

When Briner's assistant asked for invoices, it struck me that she was clueless, so I responded sarcastically that I would do so. There were NO invoices ever sent with the exception of Stone Boat, which the ID dismissed. That is because there were never any specific registration statements identified to move forward with. (Tr. 51, 53.) I did not know Briner was involved in a fraud, so it did not occur to me to be more circumspect about making flippant sarcastic comments to someone. I then spoke to Briner and discussed with him that his assistant did not know what she was doing. (*Id.*) I certainly wish I had created a written record at the time. But I trusted Briner and it did not occur to me to do so.

I also wish I had not make the sarcastic remark to Briner's assistant, but I did. I cannot take that back. But that is not evidence of me authorizing him to file the draft opinion letters. The true evidence is that I never did send any invoices and did not get paid for any of these issuers. (Tr. 53, 112, 138.) Those facts completely undermine the allegations against me. (Tr. 53, 112, 138.) The ID remarks that I could have sent invoices at a later date. But that is pure speculation. There is no evidence whatsoever that I did sent an invoice or that I ever intended to send an invoice.

On the other hand, I did send an urgent email to Briner, noting "I NEED TO SPEAK WITH YOU." (Div. Ex. 91.) That email demonstrated the urgency with which I needed to speak with Briner. My comment in the body about Briner needing assistance with the comment letters was written out of frustration and related to our prior conversations wherein he stated he would advise the Commission per responses to the comment letters that the issuer was withdrawing the registration statement, the basis for withdrawal and the reason for the erroneous

filing. The ID interprets this to mean I needed to speak with Briner "to get [our] story straight about who prepared the Forms S-1. (ID 16.) There is no reading of that email that can support such a conclusion. The interpretation is pure speculation with no support in the evidence. And certainly I was concerned about that because the registration statements filed were identical.

**C. My Voice Mail Message and Press Release were Accurate.**

The ID cites to one sentence from my June 27, 2013 Voice Mail message to Division counsel (Div Exs 86, 87) where I said "I was not even aware that some of these registration statements had even been filed." The ID notes that I was aware at the time of my message. But that is not what the plain reading of my message says. It does not say "I am not aware." It says "I was not aware." Meaning that at the time they were filed, I was not aware that they had been filed. It does not mean I never became aware. How could I be aware of the filing of a registration statement when there were NO emails from the EDGAR agent nor the auditors to me? The ID misinterprets the plain meaning of that sentence and it should not be used to support any conclusion of wrongdoing. The same applies to my March 2014 press release. I did not know that the draft opinion letters were filed with the SEC until afterword. The plain meaning of the press release supports this interpretation.

**D. Testimony About Oral Communications Should be Considered.**

When I learned what Briner had done, I called him and confronted him. (Tr. 57-66.) The ID belittles my testimony about my angry confrontation with Briner about filing the draft opinions without authority. The ID found that if such oral confrontation occurred, it would be reflected in written documents as well. The reality is that when I get angry, I pick up the phone. I did not spend the time to prepare an email record of my frustration. Looking back, I should have prepared such a record. But at the time, I was not considering how people would view my

written correspondence after the fact. There are only two people in the world who participated in my conversations with Briner: me and Briner. I testified truthfully and Briner, now subject to criminal charges in Vancouver, has defaulted in this case. There was not a single witness who controverted my testimony.

The ID cites to the fact that I was not clear on the date of my call with Briner to claim my testimony was not credible. That is unfounded. 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 Division 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. In all truthfulness, I made phone calls to Briner when I realized a number of registration statements had been filed (December) and then again when I received calls from the SEC regarding comment letters for another batch of registration statements that had been filed. At that point (February), I was livid because a large number of registration statements had been filed. It was after March or so that Briner "went dark". It was very difficult getting in contact with him.

The discrepancy shows only that I did not have a perfect independent recollection of the dates. I made my best possible recollections about dates based on what the Division showed me during my testimonies. The discrepancy cannot support a finding that I was not truthful.

**E. The Absence of a "Draft" Mark is not Evidence.**

The ID notes that I did not mark any of the draft opinion letters as "drafts." I did not do so because it did not occur to me that anyone would just go ahead and file them without my authorization. (Tr. 45-46.) I did not have the advantage of 20/20 hindsight. I had worked with Briner before and trusted him. It did not occur to me that Briner was playing me the whole time. And it is not my common practice to mark registration statements or opinion letters as drafts during the EDGARizing process because everyone, including management, the lawyers and auditors, are all reviewing the document and associated exhibits and financial statements knowing full well that nothing is filed with the Commission until everyone provides their authorization.

**F. The Re-date Comment is Innocuous.**

The ID asks why I would ask about re-dating a draft if I had not planned to file it immediately. (ID 17-18.) I do not recall why I asked about re-dating. But that is an innocuous statement because if re-dating needed to be done, I was not the one who needed to do it. Changing a number in a date is not something for which I was a necessary participant. It could be done by anyone at the time of filing. So the issue of me inquiring about re-dating it is not evidence of me authorizing it to be filed.

**G. There is a Difference Between Filing and EDGARizing.**

The ID notes that filing with EDGAR is the same as filing with the SEC. (ID at 18.) That is a mistake. A document will and does go through multiple drafts once it is EDGARized, or filed with EDGAR. Management, the auditors and the lawyers all review the EDGARized version and there are ALWAYS revisions that are made many times between distribution by the EDGAR agent of the drafts as revised. But none of the drafts gets filed with the SEC without specific authorization from EVERYONE involved, including management, the auditors and the

lawyers. Attorneys used to spend long nights at the financial printer in advance of an IPO, repeatedly changing details on a document in advance of an IPO. The same thing happens here when we are set drafts from the EDGAR agent. The EDGAR agent can easily have the draft on file before actually filing it with the Commission. Having a document formatted on the EDGAR system is not one in the same with filing it with the Commission. 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 Commission."

**H. I Should not be Penalized for not Documenting my Discussions**

Similarly, I did not memorialize my discussions with Briner in writing. Again, I did not have the benefit of 20/20 hindsight. It truthfully never crossed my mind that Briner was attempting to pull off some large scale fraud and was using me as a pawn. He is someone I knew from his days during 2006 as an associate at Devlin Jensen in Vancouver and trusted. So no, I did not memorialize my discussions with Briner. But as I testified, I did have multiple substantive conversations with Briner where we discussed the plan, what was needed, and the required due diligence. (Tr. 39.)

**I. I Never Invoiced for My Purported Services**

I was never paid for any of the work I purportedly did. I never sought to be paid. There is no evidence to the contrary. Those simple facts support completely the version of events as I have repeatedly explained them. If I authorized the documents to be filed, I would have sought payment. To argue otherwise is to argue that I volunteered to engage in a fraud for no benefit to me whatsoever. It is to argue that I would throw away my career (a career that I have worked so hard in building), my reputation and my ability to support my children for nothing in return. It is illogical and unprecedented.

Confronted with that reality, the ID goes to great speculative lengths to claim that it could "imagine" that I might have delayed sending invoices for a period of time (ID 20.) There is, however, not a single shred of evidence that I delayed sending an invoice.(because there was no invoice to be sent). Nor is there any good reason for why I might have delayed sending invoices. Indeed, when one does work, one seeks to send out invoices in a timely fashion in order to earn a living. Yet the ID hangs its hat on my testimony that I did not remember when I was paid for my work on Stone Boat to claim that I "might" have delayed sending out invoices for the other 17 issuers. But when I was paid is not the same as when I sent an invoice. The reality is that I did not send any invoices. I did not do so because I did not do any billable work. When it was determined which of the three or four issuers would move forward, I would then engage the issuer, do the work and invoice the client for the work. And when I invoice for drafting a registration statement, it is done so in three separate installments based upon the stage of the filing with the Commission. The lack of any invoices is clear evidence in my support, showing that I did not authorizing the filing of the opinion letters. It was completely contrary to the evidence for the ID to find otherwise. The ID's decision was clearly erroneous.

## DISPUTED LEGAL ANALYSIS

### A. The In Connection With Requirement is not Met.

I prepared draft opinion letters, some of which might be used in a future offering. The registrations never went effective. With no effective registration, the Division could not meet the "in connection with" requirement. The ID cites to *SEC v. Benson,* to support the conclusion that registration statements are sufficient to meet the "in connection with" requirement. But in that case, the registration statements actually went effective. There was an initial public offering. 547 F. Supp. 1122, 1130 (S.D.N.Y. 1987). There, there was no offering. There was no stock

offered to the public. The ID cites no case where a non-effective registration statement can meet the "in connection with" requirement. Thus, the Division's claims must fail and the ID was wrong to find against me.

**B. The Materiality Requirement is not Met.**

Assuming arguendo, I authorized the release of the opinion letters, the ID is wrong to conclude that my opinion letter was material. The letter says "the shares of Common Stock held by the Selling Shareholder are validly issued, fully paid and non-assessable." Such types of opinion letters are addressed to and relied upon by the *issuer*. There is no investor who cares one way or the other about this issue. It does not make an investor more or less likely to purchase the shares. It simply advises the issuer that it is permitted to sell the shares. There is nothing in the ID, or anywhere else that indicates the purpose of requiring these opinion letters is for the benefit of investors. Whether the letter is accurate is of no interest to a potential investor. Indeed, the investor would actually benefit only if the letter is wrong, because it may give the investor the right to rescind the shares if they lose value. The ID points to no case indicating the opinion is in any way relevant to an actual investor.

## DISPUTED SANCTION

**A. There is no Basis for a Cease-and-Desist Order.**

In light of the erroneous findings and conclusions described above, there is no basis for a cease-and-desist order.

**B. The $680,000.00 Fine is Clearly Erroneous.**

The ID fined me $680,000.00. There is no basis in fact or law to support this enormous fine. First, it lacks any precedent, whatsoever. Not a single investor was harmed in any way. Additionally, this did not involve seventeen separate incidents. Assuming I did authorize the

filing of the opinion letters, it was simply one letter that was duplicated sixteen more times. It must be viewed properly as one single incident.

Further, it is improper to consider the OTC Markets sanction to conclude that I "did not learn from the experience." OTC markets has no due process; I had no ability to present my side of the story. There was no evidentiary hearing. It is improper for the ID to rely on a previous sanction that was imposed without any due process.

Most significantly, the size of the penalty is premised on me anticipating receiving $20,000.00 for each opinion letter. That premise is wrong. I testified that the payment would be based on an engagement agreement with each issuer, conducting due diligence, repeatedly reviewing and revising the registration statements (TR. 49.) The point of my testimony was that had I actually done all of the work required, I would have sought to be compensated for it. Yet the ID finds that I did not actually do the work before authorizing my opinion letter to be filed. Thus, there is no basis for the hypothetical $20,000.00 per letter, as the number was premised on doing the necessary work. Had I not done any work, I hypothetically may have billed $1,750.00 per letter, as I did with Stone Boat. It is all speculative. One thing that is not speculative is the ID's circular reasoning that I committed fraud but that I should be penalized based on what I would have charged had I not engaged in fraud.

Moreover, the ID then took that hypothetical number and doubled it. There is simply no basis for any penalty of that nature. No investors were harmed, I received no payment whatsoever, and there is no evidence that I ever would have received any payment whatsoever. The penalty determination is clearly erroneous. It is improperly high, given the set of facts involved. And I am a sole practitioner -- that amount is beyond any ability to pay.

## CONCLUSION

For the reason's discussed above, I request that the SEC reverse the ID findings, conclusions and sanctions.

Respectfully submitted,

_____

Diane Dalmy

## CERTIFICATE OF SERVICE

I, certify that on October 9, 2015, I caused the preceding document to be served upon the following persons in the manner stated below:

The Honorable James E. Grimes
Administrative Law Judge
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