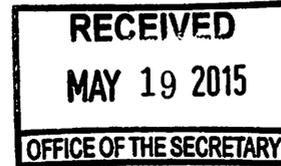


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16339



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In the Matter of :
:
JOHN BRINER, ESQ., et al. :
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**DIVISION OF ENFORCEMENT’S MOTION FOR AN ORDER
REQUIRING RESPONDENT JOHN BRINER TO SHOW CAUSE WHY
A DEFAULT JUDGMENT SHOULD NOT BE ENTERED AGAINST HIM**

Pursuant to SEC Rule of Practice 155(a), the Division of Enforcement (“Division”) respectfully requests that the Court issue an Order requiring *pro se* respondent John Briner to show cause by 3:00 p.m. ET on Tuesday May 19, 2015, why a default judgment should not be entered against him in this proceeding.

BACKGROUND

The SEC instituted this administrative proceeding on January 15, 2015. By Order dated April 10, 2015, the Court determined that “Briner was served with the OIP on January 20, 2015.”¹ Briner filed an Answer on or about March 2, 2015.²

The Court’s February 18, 2015 scheduling Order (as amended April 23) required the parties, among other things, (1) to submit by May 4 their exhibit and witness lists (and to

¹ The Court noted that, for the purpose of its April 10 Order, Briner “mistakenly thought he was not served until February 25, 2015, and was not obligated to file an Answer until after that date.” The Court further cautioned Briner “that any future failure to comply with the Rules of Practice or the scheduling order I entered on February 18, 2015, may result in the entry of a default.”

² Briner’s Answer essentially denies all of the allegations against him, without explanation.

exchange exhibits); (2) to submit by May 11 any objections to exhibits or witnesses; and (3) to file by May 11 any pre-hearing briefs. Briner has not submitted an exhibit or witness list, and has filed no objections to the other parties' witness and exhibit lists. Furthermore, Briner has not submitted a pre-hearing brief.

In its February 18 Order, the Court also scheduled a pretrial telephonic conference for May 19, 2015. At that time, the Commission anticipated a several-week trial, against eleven respondents. However, the Division and nine respondents have since reached settlement agreements-in-principal, leaving respondents Briner and Diane Dalmy for trial (anticipated to be, at most, five days). By email on May 6, 2015, the Court inquired whether the parties believe that the May 19, 2015 telephonic conference is still necessary. That same day, the Division responded in the affirmative (by email), citing Briner's *pro se* status and the Division's concern that Briner does not intend to appear and defend this case at the May 27 trial:

The Division of Enforcement believes that a telephonic conference would be helpful, particularly regarding *pro se* respondent John Briner. The Division has some concern regarding whether Mr. Briner intends to appear and defend this matter at the May 27 hearing in Denver, Colorado. Therefore, the Division believes it would be useful to have at least one status conference with the Court prior to the hearing to confirm Mr. Briner's intentions.

The Division copied Briner on its May 6 email. On May 7, the Court scheduled the pre-hearing telephonic conference for 3:00 p.m. EDT on May 19, 2015.³ Significantly, Briner never responded to the Division's May 6 email, or otherwise informed the Court or parties whether he

³ On May 11, 2015, counsel for Dalmy filed a notice of withdrawal, indicating that Dalmy would appear *pro se* at the May 19 conference, and through the trial in this case. Dalmy's new *pro se* status is an additional reason to proceed with the May 19 telephonic conference.

intends to appear and defend this matter at the May 27 hearing.⁴

On May 15, the Division sent Briner an additional email, again asking him whether he intends to appear at trial:

[P]lease let us know as soon as possible whether you will appear in Denver on May 27 and defend this matter. We are expending considerable resources in support of this case, including flying witnesses in from around the country, and would like to avoid unnecessary waste if you do not intend to appear.

Briner once again did not respond to the Division's query regarding whether he intends to appear at trial in this case.

ARGUMENT

For the following reasons, the Division respectfully requests that the Court issue an Order requiring Briner to show cause by 3:00 P.M. EDT on May 19 why a default judgment should not be entered against him in this proceeding.

SEC Rule of Practice 155(a) states:

A party to a proceeding may be deemed to be in default and the Commission or the hearing officer may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true, if that party fails:

- (1) to appear, in person or through a representative, at a hearing or conference of which that party has been notified;
- (2) to answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or
- (3) to cure a deficient filing within the time specified by the Commission or the hearing officer pursuant to Rule 180(b).

Discussing the appropriate procedure regarding a Rule 155(a) default judgment motion,

⁴ Also on May 6, counsel for respondent Dalmy sent Briner an email asking him, among other things, "Are you participating in the Administrative Proceeding at all?" Briner likewise never responded to that email.

the Commission has stated:

We generally consider it prudent practice for a law judge who is considering the issuance of a default order against a respondent to first order that respondent to show cause why a default is not warranted.

Vladislav Steven Zubkis, SEC Release No. 34-51364 , 2005 WL 597022, *2 (February 18, 2005 Commission Order). The Commission further stated that a respondent's "stated unwillingness to participate" in an upcoming hearing is a sufficient basis to issue a default judgment prior to the hearing date, if the ALJ finds that the "futility" of further proceedings is "manifest." *Id.*, at *2, n.13.

As explained above, other than filing his Answer months ago, Briner has failed "to defend this proceeding." He has not submitted any witness or exhibit list, has not objected to any Division witnesses or exhibits and, significantly, has not submitted any pre-hearing brief. Furthermore, and perhaps most significantly, Briner has yet to respond to the Division's May 6 and 15 emails regarding whether he intends to appear and defend this matter at the May 27 hearing. Thus, it appears that Briner does not intend to do so, and a default judgment is warranted.

Moreover, due to the imminence of trial, the Division deems it prudent to request an Order to Show Cause in advance of the Court's May 19 telephonic conference. The Division's anticipated witnesses against Briner (at least three) will have to travel significant distances to attend the May 27 Denver trial, at Government expense. For this and other logistical reasons – related to trying this case as efficiently as possible – the Division respectfully seeks resolution of this issue at the earliest possible date.

CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Court issue an Order requiring Briner to show cause by 3:00 p.m. EDT on May 19 why the Court should not enter a default judgment against him in this proceeding.

Respectfully submitted,

Dated: May 18, 2015



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CERTIFICATE OF SERVICE

I, Jack Kaufman, certify that, on May 18, 2015, I caused the foregoing DIVISION OF ENFORCEMENT'S MOTION FOR AN ORDER REQUIRING RESPONDENT JOHN BRINER TO SHOW CAUSE WHY A DEFAULT JUDGMENT SHOULD NOT BE ENTERED AGAINST HIM, 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 UPS overnight delivery)

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

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Attorney for Respondent Diane Dalmy

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John Briner, Esq.
Pro Se Respondent
(By e-mail: [REDACTED])



Jack Kaufman
Division of Enforcement