

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 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Consistent with this Court's Post-Hearing Order, Diane Dalmy ("Dalmy") submits her Proposed Findings of Fact and Conclusions of Law, as follows.

FINDINGS OF FACT

- Diane Dalmy is an experienced securities attorney, in practice for twenty five years.** ([Q]: "Ms. Dalmy, is it fair to say that you are an experienced securities attorney? [A]: I have been in practice for 25 years.") (Page 15, 3-5.)
- Dalmy has filed approximately ten Form S-1 registration statements in her entire career, and only eight of them by the end of 2012.** ([Q]: "One of the types of filings that you do is called a Form S-1 registration statement; is that correct? [A]: Those are rare. I have probably filed approximately ten in my entire career." [Q]: And as of the end of 2012, how many have you done, Form S-1 registration statements? [A]: Probably about eight.") (Page 16, 1-8.)
- In 2012, Dalmy was familiar with a law firm called "MetroWest."** ([Q]: You are familiar with a law firm called MetroWest Law Corporation, Ms. Dalmy? [A]: Yes, I am.") (Page 18, 17-24.)

4. **Dalmy provided MetroWest a legal opinion regarding Stone Boat mining.** ([Q]: And in July of 2012 you provided a legal opinion into MetroWest regarding a company called Stone Boat Mining, correct? [A]: That's correct." (Page 18, 25; page 19, 1-3.)

5. **In connection with the Stone Boat legal opinion, Dalmy worked for several weeks with John Briner regarding the S1 registration statement, conducting due diligence, revising the S-1 registration statement, working with the auditors regarding the financial statements, reviewed geology reports, reviewed asset purchase agreements, reviewed records from the Nevada Secretary of State, researched the officer's background, reviewed the financial statements, including the footnotes, and had discussions with Briner.** ([Q]: And you consented to the filing of this legal opinion with this Form S-1 registration statement, Exhibit 21, correct? [A] Yes, after several [...] weeks of working with John Briner regarding the S-1 registration statement, revising the S-1 registration statement, engaging in due diligence with respect to the registration statement." "I worked with Briner and I had engaged in a level of due diligence. I had spoken with the auditors regarding the financial statements. I saw that I had reviewed some type of geology report. I reviewed the asset purchase agreements. I had discussions with Briner. I had revisions to the registration statement." "So my testimony with regard to Stone Boat still stands in that I engaged in due diligence. I looked at documentation. There was a process that I went through with Briner with regards to review of the registration statement, comment on all registration amendments. There was a comment letter that we received." "The relevance is that I participated in Stone Boat. I participated in review of the registration statement. I spoke with the auditors. I reviewed the documents. I looked at the Nevada Secretary of State with regards to their website and their offerings. I Googled the officer's name. I asked about the officers and his business acumen as far as involvement in mining, which to me was important. I relied upon the financial statements as far as the auditors. And when I draft registration statements, I also look at their footnotes to ensure that there is consistency in disclosure.") (Page 20, 2-9; 46, 11-19; 107, 3-9; 125, 15-25.)

6. **For the Stone Boat, registration, Dalmy's arrangement was a \$1,750 payment with the understanding she would be participating with regard to comment letters and revisions and responses to the SEC and she would be paid a rate of \$275 per hour. The additional fees would be paid when Stone Boat cleared the SEC.** ("My arrangement with Briner was \$1,750 for the opinion with the understanding that I would be participating with regards to comment letters and revisions and responses to the SEC, and then I would be billing out at \$275 an hour.") (Page 47, 2-6, 16-19.)

7. **Dalmy was not happy with the process involving Stone Boat and told Briner that for the other issuers, her involvement would be much different, and she expected her typical fee, around \$21,000, which she might discount for him.** ("I was very unhappy with the circumstances at hand as far as my involvement with Stone Boat. So when he came back to me in November into early December, he said that he was posturing these various companies. And I told him that my involvement would be much different, on a much different level with regards to any of these particular registration statements that would actually be filed and that I expected my typical fee, which is a round \$21,000, but that I perhaps would discount that for him.") (Page 26, 1-12.)

8. **The plan for the issuers other than Stone Boat was that once it was determined which registration statements actually would be filed then Dalmy would enter an engagement agreement with that issuer, conduct her due diligence, and make necessary revisions to the draft EDGAR-ized registration statement. The fee that likely would be discounted would be at least \$19,000 to \$21,000.** ("And that once we ascertained which registration statements would actually be filed, then I would have an engagement letter with that particular company, start to engage in my due diligence and take that draft EDGAR-ized registration statement, start reviewing that, making revisions. And my fee

for that would probably be discounted since there was a registration statement already drafted, but that it was at least going to be anywhere from 18 to \$21,000.”) (Page 48, 21-25, 19, 1-4.)

9. **Between November 2012 and the end of January 2013, Dalmy provided 17 draft opinions to MetroWest. They were only drafts. Dalmy’s arrangement with Briner is that after Stone Boat, she would consider being counsel to certain companies, and that Briner had an arrangement with the EDGAR agent to EDGAR-ize a number of registration statements and Dalmy would provide draft opinion letters so that he could get the registration statements EDGAR-ized per his arrangement.** ([Q]: Later, beginning in [...] November of 2012 through the end of January 2013, you provided a number of additional legal opinions to MetroWest, correct? [A] That’s correct, and those were draft opinions.” “I supplied draft opinion letters.” “Yes, they were drafts.” “My arrangement with John Briner was that after Stone Boat [...] he came back to me and asked if I would consider being counsel to certain companies, and that he had an arrangement with the EDGAR agent to go ahead and proceed with EDGAR-izing a number of registration statements and would I go ahead and provide opinion [...] draft opinion letters so that he could get all of these registration statements EDGAR-ized per his agreement. From there he was going to proceed determining which of these registration statements would actually be filed [...]” “I told Briner and I had a complete understanding that all these were all drafts.”) (Page 20, 15-20; 21, 10-11; 24, 18-23; 23, 13-24; 39, 5-7.)

10. **There was never a plan to file 17 registration statements. It would be determined which of the lot would proceed with, based on a number of factors.** (“Yes, but not for 17 of them. We were never going to file 17 of them. We were going to determine or he was going to determine from the lot of the filings which companies he would proceed with based on a number of factors.”) (Page 49, 21-25.)

11. **That all of the S-1 registration statements were identical for the 17 issuers reinforced Dalmy’s belief that the registration statements themselves were drafts and Briner had not yet determined which companies would move forward.** “I realized that they were all identical. So that even reinforced my entire belief through this whole process that these were all drafts and that Briner was telling me the truth as far as saying that he was posturing these companies with these particular clients. He didn’t know which companies would be transferred or unrelated third party would transfer which mining claims or assets into the particular company.” (Page 32, 10-18.)

12. **Once it was determined which registrations would actually be filed, and which registration statements that she would conduct due diligence on, she would obtain engagement letters and be paid a fee of at least \$20,000.00 for each of those registration statements. Per Briner’s representations to Dalmy, there were going to be only three or four actually filed over a period of time.** (“Once we determined which registration statements would actually be filed and which registration statements that I would conduct due diligence on and obtain engagement letters and be paid a fee of at least \$20,000.00 for each of those registration statements [...] per my conversations with John Briner, three or four that actually would be filed, but they would be filed over a period of time.”) (Page 25, 2-11.)

13. **The purpose of providing numerous drafts to Briner was because he had a package deal with the EDGAR agent.** (“Because he was pulling together all of these registration statements together with the opinions and other documents, the articles, the bylaws, the exhibits, the asset purchase agreement, mining claims to get all of this in the process of EDGAR-izing. He had a package deal with the EDGAR agent.”) (Page 137, 16-22.)

14. **Dalmy did not provide draft opinion letters for Gold Stream or LaPaz.** ([Q]: “Is this one of those two registration statements for which an attorney other than yourself provided an opinion? [...] La Paz and Gold Stream? [A]: Yes.”) (Page 132, 25; 133, 1.)

15. **The actual authorization of filing one of Dalmy’s opinions with the SEC goes through an extensive process.** (“So when you authorize any filing such as a 10K or a 10Q or even an 8K, it goes through an extensive process.”) (Page 33, 5-7.)

16. **EDGAR agents know that they are not to file any document with the SEC until they get the approval of every person involved in the filing.** (“So the EDGAR agents know that they are not to be filing any document until they get the approval of every single person involved in that filing.”) (Page 33, 20-22.)

17. **Dalmy would have to approve of the EDGAR agent filing the opinion letter with the SEC. The exception to this process was with Stone Boat, and afterward, she expressed to Briner that she did not want to do that want to repeat that process again.** (“[Q] Okay. And you are one of the people who has to approve it, right? [A]: Yes.” “He sent me an email asking me if he had the consent to file, and I do not recall if it was verbal or what, but it was after my input after revisions to the document and I agreed, you know, to go ahead and file [Stone Boat]. But that was part of the issue that I raised with him after working with him on Stone Boat. I told him I did not like his process of filing, and I did not like my lack of involvement. My involvement was to be at a higher degree, a higher level.”) (Page 33, 23-25; 34, 12-21.)

18. **The fact that the draft registration statements include language of consent to file was based on the understanding with Briner that they were drafts and there would be a later determination which would actually be filed. And from that point, there would be a number of revisions and due diligence.** (“[Q]: That language was included in all of the drafts? [...] [A]: Yes, with the implicit understanding with Briner that, again, these were drafts and there would be a determination made at a later date as to which registration statements would actually be filed; and from there were going to be a number of revisions and due diligence. This was just a draft registration statement.”) (Page 38, 7-15.)

19. **Having an document EDGAR-ized, i.e., filed on the EDGAR system, is not the same as filing a document with the SEC. Once a document is EDGAR-ized, there is a process afterward that allows it to be filed with the SEC.** (“[Q]: Do you perceive a distinction between filing something on EDGAR and filing something with the Commission? [A]: absolutely. [...] There is a huge distinction.”) (Page 137, 2-12; 138, 9-14.)

20. **Dalmy did not mark any of the draft opinion letters as drafts, because she had no idea it would occur to anyone to file them. There is a lot of work involved in filing a single registration statement; it is an extraordinary amount of work to file 17 registration statements.** (“[Q]: Okay. On none of those emails that you provided to the Division did you ever say that the opinion letters you were providing were drafts; is that correct? [A]: When I drafted these emails, I had absolutely no thought that this would ever result in what we are here today for. Because my whole knowledge, my whole understanding, my whole perception was that these were all drafts. Who files 17 registration statements altogether? When you file one registration statement, that is such a huge amount of work. Who is going to file 17 identical registration statements? It is incredulous. I cannot even imagine the amount of work that would be associated with that, much less why you would even do that. So it was never in the forefront of my mind as to why I would need to put a draft stamp on there.”) (Page 45, 13-25; 46, 1-5.)

21. **Dalmy did not believe a written agreement for the draft opinion letters was necessary; she had at least two or three substantive detailed conversations regarding all of what was needed and required and due diligence.** (“[Q]: You never said that in writing anywhere, correct? [A]: I didn’t believe it was necessary. I don’t think so, no, because we had at least two to three substantive detailed conversations regarding all of what was needed and required and due diligence and what he was doing with respect to ascertaining the transfer of assets and the mining claims and looking for geological reports and geologists. There was a lot of work to be done. So the whole scene, the whole situation from my whole reality and perception was that these are all just drafts.” (Page 39, 8-20.)

22. **Dalmy’s correspondence with Briner’s assistant involved just sending over cursory quick emails.** (“Yes, I was just shooting over a cursory quick email.”) (Page 43, 9-12.)

23. **When Briner’s assistant discussed filing, Dalmy understood that to mean file with the EDGAR agents for EDGAR-izing.** (“[Q]: So you understood that the filing was going to occur quickly, correct? [A] With the EDGAR agents. She wanted to get these filed with the EDGAR agents. That is what I took that as.”) (Page 41, 4-8.)

24. **Dalmy’s use of the term “finalizing” and “filed” to mean that she was “finalizing” her draft opinion based on her cursory review, and statements were “filed” with the EDGAR agent for EDGAR-izing.** “No. I was giving each of these registration statements a cursory review, and I was finalizing my draft opinion based upon my cursory review. And when I say were the other two registration statements filed, meaning with the EDGAR agent. Again, my whole perception was that there was a lot of, a number of them that were all to be filed and so I was curious as to whether she was getting all of these filed with the EDGAR agent so that I would receive back EDGAR-ized or we would go from there as far as ascertaining which registration statements we would be working with.”) (Page 42, 1-21.)

25. **Briner’s assistant had no authority to file something with the SEC, so it did not occur to Dalmy that she might file something.** (“[Q]: So you understood if you said something was fine, that she might understand that it was ready for filing? [A]: She would have no authority to make any type of filing with the SEC. That would be the last thing that I would imagine.”) (Page 43, 15-20.)

26. **Regarding the 17 registration statements, Dalmy never received any communication directly from the EDGAR agent or the auditors, so she had no reason to believe they were being filed.** (“So with respect to these registration statements, the drafts, the draft opinions, at no time did I ever receive any communication directly from the auditors. At no time did I receive any emails directly from the EDGAR agent. At no time did I know these respective registration statements had been filed at the time that they were filed. (Page 108, 11-19.)

27. **When Briner’s assistant asked for separate invoices, Dalmy responded sarcastically. Dalmy then spoke with Briner and Dalmy and Briner discussed that Briner’s assistant did not know what she was doing.** (“No. When I saw that email, I literally started to laugh and it was more sarcasm that I said I will 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? His explanation was, she does not know what is going on. She has no idea what she is doing. So my response to her is, again, in this case a thoughtless but sarcastic in my mind because you do not know what was going on in my mind when I sent this email. Sure, I will send a separate invoice and here are these other draft opinions.” “[Q]: Getting back to Exhibit 95, page 14, just to be clear, when you say Sandy, I will do so, I will send a

separate invoice for each company, you didn't mean that to be true? You are saying that was sarcastic? [A]: Yes, I was. Yes.”) (Page 51, 6-20; 53, 3-7.)

28. **Dalmy never sent an invoice for any of the 17 companies at issue and never received any payment related to any of those companies.** (“I never sent any invoice with respect to any of these companies.” “[Q]: Did you receive any money for any of the other draft opinion letters? [A]: Absolutely not. I never invoiced and I never received a penny. I have proven that to the Commission.” “I sent no invoices. I received no payment for any of these registration statement opinions other than Stone Boat.”) (Page 53, 15-16; 112: 13-15; 138, 20-24.)

29. **When CorpFin contacted Dalmy regarding the registration statements other than Stone Boat, she was caught off guard because she did not know the registration statements were filed. She complained to Briner and he responded that three or four were inadvertently filed, which is why CorpFin called Dalmy. Briner asked Dalmy to accept the comment letters from the SEC, but in the meantime, he would withdraw the registration statements.** (“With respect to the other filings, when I received the call, which totally caught me off guard because I didn't know that the registration statements had been filed, that is when I telephoned John Briner and left a scathing voice mail message basically laced with profanities that I did not really want to put in an email asking him why I was getting calls from the SEC with respect to the filing of certain registration statements. He told me that -- I don't recall when I had this conversation, but he told me that three, approximately three or four, whatever had been inadvertently filed during the holiday season or during whatever time, and that is why I was getting these calls. And I asked him at that point in time, I said, well, we need to withdraw these. He said, well, we will do so.”) (Page 57, 2-19; 61, 7-21; 62, 21-25; 65, 6-11; 115, 3-7.)

30. **Dalmy personally took no steps to personally withdraw her opinion letters because the issuers were not her clients and she understood Briner would withdraw the registration statements.** (“I did not believe I had authorization to withdraw the registration statements since they were not my clients, and I was relying on Briner to do the right thing based on what he told me, and that was to withdraw the registration statements.” “One, I didn't feel that I had the authorization. I have no engagement letter with these clients. I felt that the request for withdrawal should come from the company itself.”) (Page 73, 24-25, 74, 1-3; 114, 15-18.)

CONCLUSIONS OF LAW

The Division has charged Dalmy with violating Securities Act Section 17(a), which provides:

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

- (1) to employ any device, scheme, or artifice to defraud, or
- (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

To establish liability under Section 17(a)(1) of the Securities Act, the Division must show that

Dalmy “acted with scienter.” *Gregory O. Trautman*, Exchange Act Release No. 61167, 2009 SEC

LEXIS 4173, at *52 (Dec. 15, 2009); *see Aaron v. SEC*, 446 U.S. 680, 695-97 (1980). To establish a

violation of Section 17(a)(2) and (3) of the Securities Act, the Division need only show negligence. *Aaron*, 446 U.S. at 696-97; *Trautman*, 2009 SEC LEXIS 4173, at *52.

“[T]he term ‘scienter’ refers to a mental state embracing intent to deceive, manipulate, or defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

In addition to establishing the requisite mental state, the Division must show that Dalmy “engaged in fraudulent conduct, [and] that such conduct was in connection with the offer, sale, or purchase of securities. *Trautman*, 2009 SEC LEXIS 4173, at *52. To show that Dalmy “engaged in fraudulent conduct,” the Division must show that she:

- (1) made an untrue statement of material fact;
 - (2) omitted a fact that made a prior statement misleading; or
 - (3) committed a deceptive or manipulative act as part of a scheme to defraud.
- 25 *Id.* at *53.

The Division—not Dalmy—has the burden of proof. *Steadman v. S. E. C.*, 450 U.S. 91, 95-96, 101 S. Ct. 999, 1004-05, 67 L. Ed. 2d 69 (1981).

The Division is unable to meet its burden of proof. First, Dalmy prepared draft opinion letters, some of which might be used in a future offering. This does not meet the “in connection with” requirement. Second, Dalmy did not authorize any of the drafts to be filed with the SEC. She understood that at a future date, she might authorize some of the draft documents to be filed with the SEC. In the meantime, the drafts were formatted with the EDGAR filing system. A draft document for possible use is not an untrue statement, a material omission or a deceptive or manipulative act. It is simply a draft document that may or may not eventually be used.

Additionally, the Division cannot meet its burden to demonstrate scienter. The evidence shows that Dalmy was duped by Briner. There is no evidence that Dalmy engaged in any scheme to defraud. Thus the Division fails to meet its burden to demonstrate Dalmy violated Section 17(a)(1).

The Division also cannot meet its burden to demonstrate Dalmy violated Section 17(a)(2). To prove that violation, Dalmy had to obtain money or property in exchange for her activities. Yet there is no evidence that Dalmy received anything. The only funds involved in this case involve a payment of

\$1,750 to Dalmy related to the Stone Boat filing. The Division, however, has failed to demonstrate anything improper relating to the Stone Boat offering. The uncontroverted testimony is that Dalmy conducted extensive due diligence relating to the Stone Boat offering and there is no evidence that there is anything false relating to Dalmy's Stone Boat opinion letter that she permitted to be filed with the Commission.

Finally, the Division cannot meet its burden to demonstrate that Dalmy violated Section 17(a)(3). Dalmy did not engage in a transaction, practice of course of business. All she did was prepare draft opinion letters and permit them to be formatted for possible eventual filing in the EDGAR system. Moreover, there was no fraud or deceit upon the purchaser. There was no purchaser. She did not authorize any of the documents to be filed with the SEC. Thus, there was no purchaser and Dalmy could not have violated Section 17(a)(3).

Respectfully submitted,



Diane Dalmy

CERTIFICATE OF SERVICE

I, Diane Dalmy, certify that on June 26, 2015, I caused the preceding document to be served upon the following persons in the manner stated below:

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Diane Dalmy