Initial Decision Release No. 1226
Administrative Proceeding
File No. 3-17990

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of

Digital Brand Media & Marketing Group, Inc., and
Intellicell Biosciences, Inc.

Initial Decision as to Digital Brand Media & Marketing Group, Inc.
November 16, 2017

Appearances: Kevin P. O'Rourke and Neil J. Welch, Jr., for the Division of Enforcement, Securities and Exchange Commission

Marshal Shichtman, Esq., for Respondent Digital Brand Media & Marketing Group, Inc.

Before: Jason S. Patil, Administrative Law Judge

Summary

This initial decision revokes the registration of the registered securities of Respondent Digital Brand Media & Marketing Group, Inc., due to its failure to timely file required periodic reports with the Securities and Exchange Commission.

Introduction

On May 16, 2017, the Commission issued an order instituting proceedings (OIP) pursuant to Section 12(j) of the Securities Exchange Act of 1934. The OIP alleges that Digital Brand has a class of securities registered with the Commission pursuant to Exchange Act Section 12(g) and is delinquent in its periodic filings.[1]

[1] The OIP made similar allegations against Intellicell Biosciences, Inc. After failing to defend the proceeding, I found that company to be in default and revoked the registration of its registered securities. *Dig. Brand Media & Mktg. Grp.*, Initial Decision Release No. 1145, 2017 SEC LEXIS 1834 (ALJ June 19, 2017).

Digital Brand submitted an answer, in which it did not deny failing to file required reports, but asserted that its failures were caused by a combination of problems with its various auditors and the harsh practices of its lender. It continued to present this narrative of outside forces hampering its ability to file in other briefs and during the hearing, which was held on August 9, 2017, in Washington, D.C.

Post-hearing briefing is now complete.[2]

1. Findings of Fact

I base the following findings of fact and conclusions on the entire record and the demeanor of the witnesses who testified at the hearing, applying preponderance of the evidence as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 100-04 (1981). All arguments and proposed findings and conclusions that are inconsistent with this decision are rejected. I take official notice of Digital Brand's public filings with the Commission in its EDGAR database. *See* 17 C.F.R. § 201.323.

1.1. Digital Brand's Business, Corporate Structure, and Reporting Requirements

Digital Brand is a Florida corporation, located in New York and operating out of the United Kingdom, with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tr. 72-73, 87-88; Div. Exs. 6, 7, 20, 21; RTG Ventures, Inc., Registration of Certain Classes of Securities (Form 8-A) (Oct. 1, 2007).[3] According to Linda Perry, Digital Brand's executive director and chair of both the compensation and audit committees, Digital Brand's business is to consult on clients' online marketing and use social media and search engines to develop their "clients' algorithm[s]" to improve their clients' return on investment. Tr. 76, 144-46, 181. All of its revenue comes from its wholly-owned U.K. subsidiary, Stylar Limited. Tr. 23, 28; Div. Ex. 20 at 4.

According to its annual reports, from 2003 to 2014 Digital Brand has never made a profit, and all of its audits have contained a "going concern" qualification.[4]

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[2] Citations to the hearing transcript are noted as "Tr. __." Citations to other transcripts are identified by the date of the prehearing conference. Citations to the Division's exhibits and Digital Brand's exhibits are noted as "Div. Ex. __" and "Resp. Ex. __," respectively. Citations to the Division's briefs are noted as "Div. Prehr'g Br.," "Div. Post-hr'g Br.," and "Div. Reply." Citations to Digital Brand's briefs are similarly noted.

[3] Until the spring of 2013, Digital Brand was known as RTG Ventures, Inc. Dig. Brand Media & Mktg. Grp., Current Report (Form 8-K) (Apr. 11, 2013).

[4] Dig. Brand Media & Mktg. Grp., Amended Annual Report at 20, 28, F-1–F-5 (Form 10-K/A) (Feb. 19, 2015); Dig. Brand Media & Mktg. Grp., Amended Annual

As of July 28, 2017, Digital Brand's stock was not quoted on the over-the-counter market. Div. Ex. 10.

Although Neil Gray, of the United Kingdom, has—officially—been the chairman and executive director of Digital Brand since April 1, 2010, he has not actually been involved with the company since 2014. Tr. 77-79. Reggie James, also a U.K. national, is a managing director and operates all aspects of the technical side of the business. Tr. 74, 76. His pay accrues monthly, as does Perry's, but neither has ever drawn a paycheck from the company. Tr. 76-77.

As a publicly traded company, Digital Brand was required to file a Form 10-K annually and a Form 10-Q for the first three quarters of each year. 15 U.S.C. § 78m(a); 17 C.F.R. §§ 240.13a-1, .13a-13. Digital Brand filed its last annual report on February 17, 2015, and its last quarterly report on September 24, 2015, meaning that it has failed to file the last two required annual reports and the last six required quarterly reports. Div. Ex. 7; Tr. 15. Marva Simpson, special counsel in the delinquent filer program of the Division of Corporation Finance's Office of Enforcement Liaison, noticed Digital Brand's missing reports when she reviewed the company's EDGAR filing history in February 2017. Tr. 13. On February 27, 2017, she sent Digital Brand a letter notifying it that it could be subject to a proceeding like this one if it did not cure its delinquencies. Tr. 13-14; Div. Ex. 2.

By the time of the hearing on August 9, 2017, the company had not made a timely filing for nearly two years. Digital Brand's annual report for the period ended August 31, 2017, is due by November 29, 2017. *See* 17 C.F.R. § 240.13a-1; Form 10-K, General Instruction A(2)(c), https://www.sec.gov/files/form10-k.pdf.

1.2. Preparation of Audit Support Packages

Until it could no longer pay for his services, Digital Brand used Marc-Andre Boisseau (whom the Division called as a witness) and his firm Boisseau, Felicione & Associates, Inc., to prepare audit support packages, including financial statements,

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Report at 14, F-1–F-6 (Form 10-K/A) (Sept. 24, 2014); RTG Ventures, Inc., Amended Annual Report at F-1–F-7 (Form 10-K/A) (Jan. 7, 2013); RTG Ventures, Inc., Annual Report at F-1–F-7 (Form 10-K) (Dec. 15, 2011); RTG Ventures, Inc., Annual Report at 7, F-1–F-10 (Form 10-K) (Dec. 15, 2010); RTG Ventures, Inc., Annual Report at 6, F-1–F-9 (Form 10-K) (Dec. 8, 2009); RTG Ventures, Inc., Annual Report at 6, F-1–F-9 (Form 10-K) (Jan. 14, 2009); RTG Ventures, Inc., Annual Report at 8, F-1–F-9 (Form 10-KSB) (Dec. 12, 2007); RTG Ventures, Inc., Annual Report at F-1–F-9 (Form 10-KSB) (May 22, 2007); RTG Ventures, Inc., Annual Report at 9, F-1–F-9 (Form 10-KSB) (May 15, 2007); RTG Ventures, Inc., Annual Report at 7, 10-17 (Form 10-KSB) (Jan. 14, 2005); RTG Ventures, Inc., Amended Annual Report at Item 7 & note 1 (Form 10-KSB/A) (Jan. 23, 2004).

consolidated trial balances, roll-forward of accrued interest and derivative liabilities, bank reconciliations, supporting schedules tied to the balance sheet, confirmations for note holders, and usually a first draft of each quarterly report. Tr. 19-20, 22-27. Boisseau gathered material for his audit support from Perry and James. Tr. 27-28. Boisseau accounted for the transactions of the parent company, Digital Brand, and consolidated that information with the accounting information from the U.K. subsidiary, Stylar Limited, which had its own outside accountant. Tr. 23. Boisseau's firm acted as a liaison between Digital Brand and its auditors, and provided its audit support packages to the auditors. Tr. 22, 25-27.

Boisseau's work on the audit support package for the annual report for the period ended August 31, 2015, was completed in January or February 2016, but Digital Brand never had it audited, and the package has remained unused. Tr. 46-47, 98. The Boisseau firm has an outstanding balance of seven or eight thousand dollars due from Digital Brand for its services for the audit support package. Tr. 32. Boisseau issued an internal order at his firm that they would discontinue providing any services to Digital Brand until the balance was settled. Tr. 32.

Boisseau was never instructed by Digital Brand to prepare the audit support for any of its periodic reports due after the annual report for the period ended August 31, 2015. Tr. 34-35.

In May 2017—the same month the OIP was issued—Perry asked Boisseau to provide a written statement as to where Digital Brand stood in terms of the filing of the annual report for the period ended August 31, 2015. Tr. 35-40. The letter states that the audit support package is "ready to be sent to the auditors." Div. Ex. 12.

1.3. Digital Brand's Auditors

Sherb & Co., LLP, was Digital Brand's original auditor for the year ended August 31, 2012. Dig. Brand Media & Mktg. Grp., Current Report (Form 8-K) (July 3, 2014). On November 6, 2013, Sherb & Co. was barred from practicing before the Commission, and on November 15, 2013, Commission staff notified Digital Brand that its 2012 financial statement would have to be re-audited. Tr. 49-50, 147, 178; Div. Exs. 13, 19. On November 29, 2013, Digital Brand asked for relief from the re-audit requirement, but the Division of Corporation Finance did not grant the request. Tr. 147; Resp. Ex. D; Div. Ex. 19.

On April 17, 2013, Digital Brand engaged RBSM LLP as its auditor for the year ended August 31, 2013. Dig. Brand Media & Mktg. Grp., Current Report (Form 8-K) (July 3, 2014). RBSM took over some of Sherb's former clients, and Perry was told that RBSM would take care of the re-audit of the 2012 financial statement. Tr. 149. Digital Brand paid over $40,500 to RBSM for this work; but, according to Perry, she "was giving the senior partner such a hard time," that RBSM quit as Digital Brand's auditor on June 9, 2014, without completing either year's audit. Dig. Brand

Media & Mktg. Grp., Current Report at 1 (Form 8-K) (July 3, 2014); Tr. 149-50, 165-66, 180. Digital Brand never received a refund from RBSM. Tr. 148-51.

In July 2014, Digital Brand engaged D'Arelli Pruzansky, P.A., as its auditor, and the firm performed audit services for its 2012, 2013, and 2014 fiscal years. Tr. 49, 150-51, 180. D'Arelli Pruzansky's audits relied upon the work of Boisseau. Tr. 50. The last work that D'Arelli Pruzansky did for Digital Brand was its review of the company's quarterly report for the period ended May 31, 2015. Tr. 50. D'Arelli Pruzansky did not receive full payment for its audit work for Digital Brand and is still owed $53,500. Tr. 50, 52. In June 2016, D'Arelli Pruzansky offered to settle the outstanding bill for half of the balance due, but Digital Brand refused the offer. Tr. 50-51.

On May 3, 2017, the audit practice of D'Arelli Pruzansky was acquired by Assurance Dimensions, Inc., which also took all of the employees of D'Arelli Pruzansky and most of the clients that wanted to go to the merged firm. Tr. 48-49, 53-54. Mr. Pruzansky became a partner in Assurance Dimensions. Tr. 48-49. D'Arelli Pruzansky withdrew its registration with the Public Company Accounting Oversight Board, effective August 1, 2017. Tr. 51-52; *see* Div. Ex. 5. Pruzansky did not believe that Digital Brand was going to go forward as an audit client with Assurance Dimensions, and believed that Digital Brand did not have the financial resources to have its audit work completed. Tr. 55-56.

Nevertheless, Digital Brand filed a Form 8-K current report on June 22, 2017, after it was served with the OIP, which stated that Assurance Dimensions was engaged as its auditor. Dig. Brand Media & Mktg. Grp., Current Report (Form 8-K) (June 22, 2017). This was based on a mistaken impression that Digital Brand was one of the audit clients that D'Arelli Pruzansky had sold to Assurance Dimensions. Tr. 61-63. In fact it was not, because Assurance Dimensions' client acceptance procedures for continuing clients had not included Digital Brand. Tr. 61-63. While Michael Naparstek of Assurance Dimensions discussed the firm becoming Digital Brand's auditor, the relationship was never finalized: Assurance Dimensions has never been engaged or retained by Digital Brand for auditing purposes, and Assurance Dimensions has never performed any auditing work for Digital Brand. Tr. 58, 63, 65, 66-68, 69; *see* Tr. 52 (no engagement letter has been signed). Digital Brand never paid Assurance Dimensions to do any audit work. Tr. 52. Thus, it was not accurate for Digital Brand to refer to Assurance Dimensions as its auditor in the Form 8-K and on the firm's website. Tr. 63-65; Div. Ex. 21.

1.4. Asher Enterprises, Inc.

In 2013, Digital Brand "entered into a series of ill-fated convertible instruments with Asher Enterprises, Inc.": a $42,500 note in February 2013, a $37,500 note in April 2013, and a $32,500 note in June 2013. Answer ¶ 2; Tr. 113-

15. Perry knew that Asher Enterprises charged high rates of interest, but it was "the only act in town, and [she] could live with it and did for a couple of years." Tr. 135-36, 176. She made the decision to borrow money from Asher Enterprises "knowing the egregious terms." Tr. 125-26.

Asher Enterprises sued Digital Brand on the three notes. Div. Ex. 14. Faced with this litigation, Digital Brand made a deliberate, "easy" choice, based on "an assessment of a continuum of risk," to use available funds to defend that litigation rather than to file its periodic reports on a timely basis. Answer to Mot. for Ruling on the Pleadings ¶ 14; Tr. 123-25. In July 2015, Digital Brand's counterclaim was dismissed and summary judgment was granted in favor of Asher Enterprises, leading to a judgment of $122,801.87 against Digital Brand. Tr. 117-18; Div. Ex. 14. Digital Brand made only one payment, of $25,000, under a settlement agreement that lowered the judgment amount. Tr. 118-20. The court then ordered Digital Brand to turn over all of its shares to Asher Enterprises. Tr. 119-21.

1.5. Post-Hearing Developments

During the hearing, Perry agreed that Digital Brand is "simply unable to catch up with its existing delinquent filings in the near to immediate future," but she testified that she believes Digital Brand can become current within three to six months. Tr. 108, 182-84. Perry based her belief on her claim that she would have enough cash in hand to pay accountants and auditors—$61,000 plus $250,000 from two private parties—by the end of the week of the hearing (that is, August 12, 2017). Tr. 108-09. However, Perry had no documentation to support her claim, Tr. 191-93, and Digital Brand has not provided any indication that such funding was ever received.

On October 16, 2017—after the parties filed their opening post-hearing briefs—Digital Brand filed a Form 8-K stating that it has engaged Liggett & Webb P.A. as its "independent registered public accounting firm." Dig. Brand Media & Mktg. Grp., Current Report at 2 (Form 8-K). In its reply brief, Digital Brand asserts that "capital arrived and was deployed to retain an auditor," but provides no evidence that audit work is underway. Resp. Post-Hr'g Reply at 7.

2. Conclusions of Law

Before discussing the substantive issue of Digital Brand's reporting requirements, I will address the company's procedural arguments.

2.1. The Commission authorized the proceeding against Digital Brand and there was no violation of Commission rules.

Digital Brand contends that this proceeding must be dismissed because the Commission did not authorize it. Resp. Post-Hr'g Br. at 6. In part, Digital Brand

argues that: "In order for Commission staff to appear before a Judge to institute an enforcement action there must be authorization by the Commission; which there is not. The whole proceeding was unlawful as without Commission authorization." *Id.*

I find that the OIP establishes the requisite authority for this action. The OIP, issued by the Commission, provides as follows: "[t]he Securities and Exchange Commission . . . deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 . . . against Respondent[] Digital Brand Media & Marketing Group, Inc." OIP at 1. The OIP reflects the Commission's understanding that the Division of Enforcement's allegations arose "[a]fter an investigation" of Digital Brand, *id.*, and that "[i]n view of the allegations made by the Division of Enforcement," the Commission instituted proceedings and ordered an evidentiary hearing "before an Administrative Law Judge" to determine whether the allegations are true, to afford "an opportunity to establish any defenses to such allegations," and determine whether to suspend or revoke the registration of Digital Brand's registered securities. *Id.* at 2-3. The OIP expressly confirms that the action against Digital Brand took place with Commission authorization. I disagree with Digital Brand's assertion that more than the OIP is required. There is no evidence that the Division required a Formal Order of Investigation prior to the OIP, because the Division did not seek to issue subpoenas prior to the institution of administrative proceedings. Tr. 143.[5]

Digital Brand also conjectures that "the Commission either had to hold an ex-parte hearing before an Administrative Law Judge which was not disclosed to the Respondent which is a judicial anathema in any non-criminal proceeding violating due process rights, or the Commission issued unlawful subpoenas." Resp. Post-Hr'g Br. at 7. But no such ex parte hearing took place, and there is no evidence that subpoenas issued unlawfully. The subpoenas for documents and witnesses in this matter were issued by me under authority specifically delegated by the Commission. 17 C.F.R. § 201.232. Digital Brand does not appear to challenge that authority here. *See* Aug. 2, 2017, Tr. 16 (Digital Brand's counsel: "Your Honor, as far as I'm concerned, I have a subpoena from a lawful court. That's the end of it for me.").

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[5] *See* Office of Chief Counsel, Enforcement Manual §§ 2.3.3–2.3.4 (Oct. 28, 2016), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf; *id.* § 3.2.3 ("a member of the staff can issue subpoenas only after being designated an officer upon the Commission's issuance of a formal order of investigation"); *id.* § 3.2.6 ("Subpoenas for Documents"); *id.* § 3.3.4 ("Voluntary On-the-Record Testimony"); *id.* § 3.3.5 ("Testimony Under Subpoena"). These provisions confirm that the Division may investigate without a formal order, but would lack subpoena power.

But Digital Brand also argues that it never received the subpoenas. It asserts that "the [C]ommission failed to disclose any subpoenas issued, other than the subpoenas issued directly to the respondent, specifically including Marc-Andre Boisseau, Mitchell Pruzansky, and Michael Naparstek, who were witnesses called by the commission, and it it [sic] unknown how many subpoenas were actually issued on this matter." Resp. Post-Hr'g Br. at 7. The only subpoenas in this action were issued by me following the institution of the proceeding, and I am confident that the subpoenas were served on Digital Brand. At the August 2, 2017, prehearing conference, Digital Brand's counsel acknowledged receiving Microsoft Word versions of the witness subpoenas, because he stated that he thought each contained a typographical error regarding the hearing date. Aug. 2, 2017, Tr. at 13. However, Digital Brand's counsel denied receiving "signed subpoenas." Aug. 2, 2017, Tr. at 11. After Division counsel advised him of UPS confirmation that the signed subpoenas were delivered to him, Digital Brand's counsel appeared to acknowledge that was sufficient proof of service. *Id.* at 12-13 ("I think that actual service, if that was in a UPS thing, I'm not going to contest."). However, because Digital Brand's counsel then asserted that he "received UPS containers from the Commission, but they have not contained" signed subpoenas, I ordered the Division to resend scanned copies via email. *Id.* at 13. Shortly after the prehearing conference, in an email to my office and the Division, Digital Brand acknowledged receiving the executed subpoenas.

Furthermore, Digital Brand's argument is based on Rule of Practice 230(a)(1)(i), 17 C.F.R. § 230(a)(1)(i), which requires the Division to make "each subpoena issued" available for inspection and copying. Resp. Post-Hr'g Br. at 7. But this rule applies only to "documents obtained by the Division *prior to* the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings." 17 C.F.R. § 230(a)(1) (emphasis added). Here, as noted above, all of the subpoenas were issued by me *after* the institution of proceedings.

Digital Brand further asserts that "the Commission unlawfully garnered evidence and witnesses, which should be lawfully disregarded as fruit from a poisonous tree, and the matter should be dismissed as violating Digital Brand's rights and basing material points of the Commission's case upon unlawfully procured evidence." *Id.* Beyond the complete absence of proof that any evidence or witness was unlawfully "garnered," the factual allegations in the OIP were derived wholly from information Digital Brand reported, or failed to report, on its required periodic reports. OIP at 1. The Division's review of the company's public filings without a subpoena did not impair Digital Brand's "rights" in any way. *Accord Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.").

Digital Brand also asserts, without explanation or support, that the Division "did not disclose material in violation of Brady." Resp. Post-Hr'g Br. at 7-8. The Division is required to produce documents that contain material exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). A review of the record reflects no evidence that it failed to do so here.

2.2. Digital Brand violated Section 13(a) and Rules 13a-1 and 13a-13.

Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports. Specifically, Rule 13a-1 requires issuers to file annual reports, and Rule 13a-13 requires domestic issuers to file quarterly reports. *See* 17 C.F.R. §§ 240.13a-1, .13a-13. Compliance with these reporting requirements is mandatory. *America's Sports Voice, Inc.*, Exchange Act Release No. 55511, 2007 WL 858747, at *4 (Mar. 22, 2007), *recons. denied*, Exchange Act Release No. 55867, 2007 WL 1624611 (June 6, 2007). Scienter is not required to establish violations of Exchange Act Section 13(a) and Rules 13a-1 and 13a-13. *See SEC v. McNulty*, 137 F.3d 732, 740-41 (2d Cir. 1998); *SEC v. Wills*, 472 F. Supp. 1250, 1268 (D.D.C. 1978). Digital Brand failed to timely file periodic reports. As a result, it violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-13.

3. Sanction

Exchange Act Section 12(j) empowers the Commission to either suspend (for a period not exceeding twelve months) or permanently revoke the registration of a class of securities "if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder." Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act to file periodic and other reports with the Commission. Exchange Act Section 13(a) is a cornerstone of the Exchange Act, establishing a system of periodically reporting core information about issuers of securities. The Commission has stated:

> Failure to file periodic reports violates a central provision of the Exchange Act. The purpose of the periodic filing requirements is to supply investors with current and accurate financial information about an issuer so that they may make sound decisions. Those requirements are "the primary tool[s] which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities." Proceedings initiated under Exchange Act

> Section 12(j) are an important remedy to address the problem of publicly traded companies that are delinquent in the filing of their Exchange Act reports, and thereby deprive investors of accurate, complete, and timely information upon which to make informed investment decisions.

Gateway Int'l Holdings, Inc., Exchange Act Release No. 53907, 2006 WL 1506286 at *6 (May 31, 2006) (quoting *SEC v. Beisinger Indus. Corp.*, 552 F.2d 15, 18 (1st Cir. 1977)).

The Commission may exercise its authority to revoke or suspend where it is "necessary or appropriate for the protection of investors." 15 U.S.C. § 78*l*(j). The Commission's determination of which sanction is appropriate "turns on the effect on the investing public, including both current and prospective investors, of the issuer's violations, on the one hand, and the Section 12(j) sanctions on the other hand." *Gateway,* 2006 WL 1506286, at *4. In making this determination, the Commission has said it will consider, among other things: (1) the seriousness of the issuer's violations; (2) the isolated or recurrent nature of the violations; (3) the degree of culpability involved; (4) the extent of the issuer's efforts to remedy its past violations and ensure future compliance; and (5) the credibility of the issuer's assurances against future violations. *Id.*; *see also Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) (setting forth the public interest factors that informed the Commission's *Gateway* decision). The Commission has viewed the "recurrent failure to file periodic reports as so serious that only a strongly compelling showing with respect to the other factors we consider would justify a lesser sanction than revocation." *Impax Labs., Inc.*, Exchange Act Release No. 57864, 2008 WL 2167956 at *8 (May 23, 2008).

3.1. Seriousness

Digital Brand has not filed any periodic reports since it filed a quarterly report for the period ended May 31, 2015. This lack of reporting undercuts a central provision of the Exchange Act for the protection of its existing and potential investors. *Gateway*, 2006 WL 1506286 at *6. Instead, Digital Brand devoted its resources to litigating against Asher Enterprises. Tr. 123-25; Answer to Mot. for Ruling on the Pleadings ¶ 14. An issuer's attempt to blame others and a variety of mishaps is not a defense for failure to file. *See Eagletech Commc'ns, Inc.*, Exchange Act Release No. 54095, 2006 WL 1835958, at *1 (July 5, 2006) (revoking registration of issuer who blamed "two separate manipulations by third parties" for "financial decline of the company" and lack of funding for audits); *Gateway*, 2006 WL 1506286, at *5 (revoking registration of issuer who "blame[d] its reporting violations on . . . subsidiaries [that] prevented it from obtaining necessary financial information to perform the requisite audits").

3.2. Recurrence

Digital Brand's violations are not isolated, but continuous. Digital Brand has failed to file any of its periodic reports since the period ended May 31, 2015. Thus, Digital Brand has failed to file two annual reports and six quarterly reports. Digital Brand has attempted to recast its violations as "an isolated occurrence because being behind in the multiple filings stemmed from one directive of the Commission to refile its financial statements due to the disbarring of [its] prior auditor," and "are in accord one act." Answer to Mot. for Ruling on the Pleadings ¶ 15. This same argument was made by Impax Laboratories, which also had missed eight periodic reports but argued that while "each failure to file a required report is technically a separate violation," the "violations are isolated to the extent that they resulted solely from 'the Company's inability to complete an unfortunately long and cumbersome process of developing a new accounting method for recognition of revenues.'" *Impax Labs.*, 2008 WL 2167956 at *7. The Commission found Impax Laboratories' violations to be recurrent, not isolated. *Id.* The same conclusion is appropriate here.

3.3. Culpability

For many of the same reasons that Digital Brand's violations were long-standing and serious, they suggest a high degree of culpability. In *Gateway*, the Commission found that the respondent in an Exchange Act Section 12(j) proceeding—a delinquent issuer—"evidenced a high degree of culpability," because it "knew of its reporting obligations, yet failed to file" its periodic reports. 2006 WL 1506286 at *4.

Digital Brand made a deliberate choice not to file its reports on a timely basis. Tr. 123-25; Answer to Mot. for Ruling on the Pleadings ¶ 14; *see Absolute Potential, Inc.*, Exchange Act Release No. 71866, 2014 WL 1338256, at *4 (Apr. 4, 2014) (company highly culpable where it "knew of, yet repeatedly disregarded, its reporting obligations"). Because Digital Brand knew of its reporting obligations and nevertheless failed to file periodic reports, it has shown more than sufficient culpability to support revocation.

3.4. Remedial Action

Digital Brand has made no efforts to remedy its past violations by filing any of its delinquent periodic reports. Nor can one accept its representations that it will comply in the future, because it lacks the resources to do so. According to its annual reports, from 2003 through 2014 Digital Brand never made a profit. There is no

evidence that Digital Brand has made a profit since 2014.[6] Those ongoing losses impair its ability to hire and pay for the bookkeeping services provided by Boisseau and hamper the retention and payment of an auditor. Although Digital Brand has engaged a new auditor, its assurances against future violations are unrealistic. Its new auditor has nothing to audit because the evidence is that Digital Brand's bookkeeper, Boisseau, has not prepared the books for Digital Brand past the period of the annual report for the period ended August 31, 2015. Tr. 34-35. Moreover, Digital Brand has not hired any other firm to prepare pre-audit accounting packages for the delinquent reports. Tr. 105. Digital Brand cannot remedy its violations until it obtains the resources to pay for Boisseau or some other bookkeeper's services, and to pay an auditor to audit the bookkeeper's financial statements for the company. Digital Brand offered no credible evidence that it has obtained, or even has a path to obtaining, sufficient resources in the immediate future.

Further, it is too late for Digital Brand to catch up on its multiple delinquent periodic reports—even if it could—and avoid revocation. In *Absolute Potential*, the Commission found, among other things, that even where the delinquent issuer became current in its periodic reports during summary disposition briefing, the public interest still required revocation of its securities registration as a deterrent to other issuers that might become delinquent. 2014 WL 1338256, at *3-8; *see Citizens Capital Corp.*, Exchange Act Release No. 67313, 2012 WL 2499350, at *2-7 (June 29, 2012) (revoking registration despite issuer's efforts to become current); *Calais Res. Inc.*, Exchange Act Release No. 67312, 2012 WL 2499349, at *2-7 (June 29, 2012) (same); *see also Law Enf't Assocs. Corp.*, Initial Decision Release No. 487, 2013 WL 2039311, at *2, *4 (ALJ May 15, 2013) (issuer revoked even though it filed all delinquent reports after Section 12(j) proceeding was instituted).

[6] If Digital Brand *has* made a profit since 2014, it made a deliberate choice not to put those profits toward satisfying its reporting obligations, making it even more culpable.

3.5. Hardship Exemption[7]

Digital Brand contends that the Commission should grant it a hardship exemption based on a "thread of events" of "epic bad luck." Resp. Post-Hr'g Br. at 3-5; Answer ¶ 10; Answer to Mot. for Ruling on the Pleadings ¶ 11. As discussed in the Findings of Fact, Digital Brand's "epic bad luck" consisted of (1) various problems with multiple auditors, requiring a re-audit of the company's financial statements, and (2) fallout from loans from a high-interest lender that went bad. Resp. Post-Hr'g Br. at 3-4.

Digital Brand is not entitled to a hardship exemption under the plain language of the regulation. The "continuing hardship exemption," 17 C.F.R. § 232.202, provides that an electronic filer may apply in writing for a hardship exemption if a filing required to be submitted in electronic format cannot be *electronically* filed without undue burden or expense. As provided by the regulation, such written application shall be made at least ten business days before the required due date of a filing (or within such shorter period as may be permitted). 17 C.F.R. § 232.202(a). And notably, the exemption is from electronic filing only. If the exemption is granted, the filer "shall submit the document or group of documents . . . *in paper format on the required due date* specified in the applicable form, rule or regulation." 17 C.F.R. § 232.202(c)(1) (emphasis added). Digital Brand's request that a hardship exemption now be granted as to all of its delinquent filing not only ignores the very specific timing requirement that a written application must be made at least ten business days before the required due date, but also ignores the simple fact that the exemption still requires the filer to submit the report in paper format. There is no evidence that it was the electronic filing requirement that prevented Digital Brand from complying with its reporting obligations, and Digital Brand never applied for the hardship exemption for any filing until well after the fact. Based on the language of 17 C.F.R. § 232.202, there is no authority to grant the instant request.

Furthermore, there is no limiting principle to Digital Brand's urged atextual interpretation of the hardship exemption, which would allow a company to

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[7] The section of Digital Brand's brief arguing for a hardship exemption bears the heading "The Respondents are Calamity Jane and a hardship exemption should be properly given." Resp. Post-Hr'g Br. at 4. Digital Brand appears to be siding with those who believe nineteenth century American frontierswoman Martha Jane Cannary acquired her nickname due to the calamities that befell her, but it should be noted that this is only one theory behind the nickname. *See, e.g.*, David Thomson, *The truth about Calamity Jane*, *The Independent* (Oct. 2, 2004), http://www.independent.co.uk/arts-entertainment/films/features/the-truth-about-calamity-jane-550827.html. A contrary theory has it that she was so called because of her "habit of exaggerating her troubles." *Id.*

indefinitely avoid its periodic filing requirements provided its string of bad luck continued. Most of Digital Brand's excuses amount to circumstances outside the company's control that prevent it from raising the money to pay for periodic filings, which is undoubtedly a more common "calamity" than Digital Brand claims, especially considering the high number of similar cases against delinquent filers brought by the Commission each year.

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Considering the company's delinquencies, which include more than two years of missed filings, and the absence of a sufficient defense for Digital Brand's repeated violations, it is necessary and appropriate for the protection of investors to revoke the registration of each class of its registered securities.[8]

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[8] Digital Brand's resort to lofty rhetoric does not move me. For instance, Digital Brand quotes former first lady Michelle Obama's remarks about honesty, integrity, and not "tak[ing] shortcuts or play[ing] by your own set of rules," but those admonitions came during a speech about lessons that she and President Obama learned from their parents and were trying to pass on to their children. The White House, Office of the First Lady, *Remarks by the First Lady at the Democratic National Convention* (Sept. 5, 2012) (transcript of speech given by Michelle Obama on September 4, 2012, in Charlotte, North Carolina), https://obamawhitehouse.archives.gov/the-press-office/2012/09/05/remarks-first-lady-democratic-national-convention; *see* Resp. Post-Hr'g Reply at 3. It is far from clear how that quote supports the company's position.

Likewise, a quote from President Theodore Roosevelt, Resp. Post-Hr'g Reply at 4, does not signify what Digital Brand intends. *See* Theodore Roosevelt, Citizenship in a Republic, Address at the Sorbonne, Paris, France (April 23, 1910), http://www.theodore-roosevelt.com/images/research/speeches/maninthearena.pdf. Digital Brand seems to argue that it is not the place of an administrative law court to "point out how the strong man stumbles." *Id.* But Roosevelt was discussing the personal qualities that were necessary for a democratic republic to thrive, and arguing against cynicism. More apropos is a speech Roosevelt made addressing Congress in part about the importance of the recent establishment of the Department of Commerce and Labor and its Bureau of Corporations, where he stated:

> Whenever [a] corporation . . . disregards the law . . . then where the Federal Government has jurisdiction, it will see to it that the misconduct is stopped, paying . . . heed . . . only to one vital fact—that is, the question whether or not the conduct . . . is in accordance with the law of the land. . . . No man is above

Record Certification

Pursuant to 17 C.F.R. § 201.351(b), I certify that the record includes the items set forth in the revised record index issued by the Commission's Office of the Secretary on October 13, 2017, and the parties' post-hearing reply briefs, filed October 20 and 25, 2017.

Order

It is ORDERED that, pursuant to Section 12(j) of the Securities Exchange Act of 1934, the registration of each class of registered securities of Digital Brand Media & Marketing Group, Inc., is hereby REVOKED.[9]

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360, 17 C.F.R. § 201.360. Pursuant to that rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the initial decision, pursuant to Rule 111, 17 C.F.R. § 201.111(h). If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

Also pursuant to Rule 360, this initial decision will not become final until the Commission enters an order of finality. 17 C.F.R. § 201.360(d). The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. *Id.* If any of these events occur, the initial decision shall not become final as to that party. *Id.*

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Jason S. Patil
Administrative Law Judge

> the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor.

Theodore Roosevelt, Third Annual Message (Dec. 7, 1903), http://www.presidency.ucsb.edu/ws/index.php?pid=29544.

[9] This order applies to all classes of Digital Brand's securities registered under Section 12 of the Exchange Act, whether or not such securities are specifically identified by ticker symbol or otherwise in this initial decision.