

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

In the Matter of	:	
	:	
DIGITAL BRAND MEDIA & MARKETING	:	INITIAL DECISION
GROUP, INC., and	:	November 12, 2019
INTELLICELL BIOSCIENCES, INC.	:	

APPEARANCES: Samantha M. Williams, David S. Frye, and Stephan J. Schlegelmilch
for the Division of Enforcement, Securities and Exchange Commission

Maranda Fritz, of Thompson Hine LLP, for Digital Brand Media &
Marketing Group, Inc.

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision concludes that Digital Brand Media & Marketing Group, Inc., violated the reporting requirements of the Securities Exchange Act of 1934 – Section 13(a) and Rules 13a-1 and 13a-13. Digital Brand’s securities are registered with the Securities and Commission pursuant to Section 12(g) of the Exchange Act, and it failed to file required periodic reports with the Commission between 2015 and 2018. It has since filed overdue reports and remained current. No sanction is imposed since neither of the available sanctions – revocation or suspension of the registration of Digital Brand’s securities – is appropriate for the facts in this case.

I. INTRODUCTION

A. Procedural Background

The Commission instituted this proceeding with an Order Instituting Proceedings (OIP), pursuant to Section 12(j) of the Exchange Act, on May 16, 2017.¹ Following an August 9, 2017,

¹ The proceeding has ended as to Intellicell Biosciences, Inc. *Digital Brand Media & Mktg. Grp.*, Initial Decision Release No. 1390 (A.L.J. Nov. 12, 2019).

hearing,² an Initial Decision revoked the registration of the registered securities of Digital Brand. *Digital Brand Media & Mktg. Grp.*, Initial Decision Release No. 1226, 2017 SEC LEXIS 3620 (A.L.J. Nov. 16, 2017).

On August 22, 2018, in light of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Commission ordered a new hearing in each pending proceeding, including this one, before an administrative law judge who had not previously participated in the proceeding, unless the parties expressly agreed to alternative procedures, including agreeing that the proceeding remain with the previous presiding administrative law judge. *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 SEC LEXIS 2058, at *2-3. Accordingly, the proceeding was reassigned to the undersigned. *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264 (C.A.L.J. Sept. 12, 2018). The parties agreed that the case would go forward based on the previous record, with the exception of the November 16, 2017, Initial Decision; oral argument was held on March 21, 2019; the parties also filed motions for summary disposition and responsive filings. *See Digital Brand Media & Mktg. Grp.*, Admin. Proc. Rulings Release Nos. 6315, 2018 SEC LEXIS 3177 (A.L.J. Nov. 9, 2018); 6449, 2019 SEC LEXIS 152 (A.L.J. Feb. 11, 2019).

B. Allegations and Arguments of the Parties

The OIP alleges that Digital Brand's securities are registered with the Commission pursuant to Section 12(g) of the Exchange Act and that Digital Brand had not filed any required periodic reports since filing a report for the quarter ended May 31, 2015. Digital Brand argues that the proceeding should be dismissed since it had submitted timely reports until November 2013, when it was advised that its auditor had been barred from appearing before the Commission such that its Form 10-K for that year had to be redone; it has now filed past-due and current reports; and it intends, and has the means, to continue filing timely reports. The Division requests that the registration of Digital Brand's securities be revoked, noting the company's period of delinquency and arguing that, although the company has now filed the overdue reports, the reports contain deficiencies, the company prioritized other matters over timely filings in using its limited resources, and the company's unchanged parlous financial situation, which has required periodic infusions of outside funding for urgent matters, suggests that the problem will recur in the future.

This Initial Decision is based on the existing record and the Commission's public official records concerning Digital Brand, of which official notice is taken pursuant to 17 C.F.R. § 201.323.³ All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

² Citations to the transcript of the August 9, 2017, hearing will be noted as "Tr. ___." Citations to exhibits offered by the Division and Respondent at that hearing will be noted as "Div. Ex. ___" and Resp. Ex. ___," respectively.

³ The Commission's public official records include Digital Brand's periodic reports, Forms 10-K and 10-Q, that were signed by Linda Perry, Digital Brand's Executive Director, who testified on behalf of Digital Brand at the August 9, 2017, hearing. Tr. 71-137, 144-93.

II. FINDINGS OF FACT

Digital Brand (CIK No. 1127475),⁴ is a Florida corporation with its principal place of business in London, England,⁵ with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Digital Brand filed a Form 10-K for the fiscal year ended August 31, 2014, on February 17, 2015, as amended February 19, 2015 (2014 Form 10-K). Then, after filing Forms 10-Q for the first three quarters of fiscal year 2015, Digital Brand did not timely file periodic reports for more than two years. It filed a Form 10-K for fiscal years 2015, 2016, and 2017, on May 31, 2018, as amended April 24 and October 1, 2019 (Super 10-K). It also filed a Form 10-K for fiscal year 2018, on December 14, 2018, as amended April 23 and October 1, 2019 (2018 Form 10-K). Digital Brand's business is online marketing consulting.⁶ Tr. 145; 2018 Form 10-K at 4.

Linda Perry, Digital Brand's Executive Director testified on behalf of Digital Brand at the August 9, 2017, hearing. Tr. 71-137, 144-93. Perry has been listed as CEO or Executive Director in, and signed, all of Digital Brand's periodic reports since at least January 23, 2003.⁷ A reverse merger during 2003 led to the company's current configuration.⁸

As of the May 16, 2017, date of the OIP, the company was delinquent in its periodic filings with the Commission, having not filed any periodic reports since its Form 10-Q for the period ended May 31, 2015, filed on September 24, 2015. Digital Brand's then most recent audited financial statements, contained in the 2014 Form 10-K reported sales for the year of \$417,607, a net loss of \$739,534, an accumulated deficit of approximately \$11,600,000, and a working capital deficit of approximately \$1,900,000. The auditor's report included a "going concern" statement, indicating substantial doubt about the company's ability to continue as a going concern. The audited financial statements contained in the 2018 Form 10-K also contained a "going concern" statement and reported for the year ended August 31, 2018: sales of \$536,501; a net loss of \$456,410, an accumulated deficit of \$13,812,485; and a working capital

⁴ The CIK number is a unique identifier for each corporation in the Commission's EDGAR database. The user can retrieve filings of a corporation by using its CIK number.

⁵ Digital Brand has a "virtual" presence in New York City. Tr. 72-73.

⁶ Digital Brand's business has been described as "somewhat esoteric, and appear[ing] to require interpersonal relationships with existing and prospective clients." *Asher Enters., Inc. v. Digital Brand Media Mktg. Grp., Inc.*, No. 0600717/2014, 2016 N.Y. Misc. LEXIS 5146, at *5 (N.Y. Sup. Ct. entered Aug. 5, 2016).

⁷ Perry testified that she was first associated with the company "about 2006 and '7." Tr. 72.

⁸ Since then, the only other signatories to the periodic reports were Barrington Fludgate (through Form 10-Q for the quarter ended February 28, 2010) and Dominic Hawes-Fairley (through Form 10-Q for the quarter ended May 31, 2011).

deficit of approximately \$3.3 million. The financial statements in the company's periodic reports throughout its history, to date, have contained "going concern" statements.

OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc. discontinued the display of quotes for Digital Brand's stock (symbol "DBMM"); OTC's website currently displays a Caveat Emptor warning, illustrated with a skull and crossbones, for DBMM common stock. See OTC Markets, DBMM, <https://www.otcmarkets.com/stock/DBMM/overview> (last visited October 30, 2019), of which official notice is taken pursuant to 17 C.F.R. § 201.323. Cf. *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *1 n.1 (Apr. 18, 2013), *pet. denied*, 575 F. App'x 1 (D.C. Cir. 2014).

Prior to Digital Brand's delinquency, its auditor was Sherb & Co., LLP. See, e.g., Digital Brand's Forms 10-K for the fiscal years ended August 31, 2004 through 2012. Sherb & Co. was denied the privilege of appearing and practicing before the Commission as an accountant, as of November 6, 2013. *Sherb & Co., LLP*, Exchange Act Release No. 70823, 2013 SEC LEXIS 3479 (Nov. 6, 2013). As a result, Digital Brand had to have its financial statements for the 2011, 2012, and 2013 fiscal years re-audited. Tr. 149. Perry engaged a successor auditor, to which she paid \$40,509, but she never received the audit. Tr. 149-50. Eventually, in July 2014, she engaged a different firm. Tr. 150. On September 24, 2014, Digital Brand filed its amended Form 10-K for the year ended August 31, 2013,⁹ as well as amended Forms 10-Q for the quarters ended November 30, 2013; February 28, 2014; and May 31, 2014. Tr. 116, 150-51, 154. The cost of the re-audits and amended filings was over \$100,000, some of which was still owing as of the August 9, 2017, hearing. Tr. 154-59. Perry had arranged mezzanine financing for the project, but it fell through. Tr. 154. Around the same time Digital Brand paid attorneys about \$25,000 for an unrelated matter.¹⁰ Tr. 161-63.

The reason for the delay in filings was a lack of funds. Tr. 98-103, 108-12. Digital Brand had borrowed money and became involved in litigation with the lender, Asher Enterprises, concerning repayment, that resulted in a judgment ordering Digital Brand to pay Asher Enterprises \$122,801.87.¹¹ Tr. 113-28, 164-66, 170-78. In February 2016, Perry had \$25,000

⁹ As originally filed, on December 16, 2013, after the disqualification of Sherb & Co., the Form 10-K lacked audited financial statements.

¹⁰ The unrelated matter was a deposit chill imposed on Digital Brand stock by the Depository Trust Company; DTC lifted the chill on November 8, 2013. Tr. 159-63; Resp. Ex. E. For an explanation of "deposit chill," see SEC Office of Investor Education and Advocacy, DTC Chills and Freezes, https://www.sec.gov/oiea/investor-alerts-bulletins/ib_dtcfreezes.html. The evidence as to the reason for the chill is unclear; Perry believes that it resulted from the actions of a non-insider stockholder. Tr. 159-61, 179.

¹¹ Perry knew that Asher Enterprises was a toxic lender charging high rates of interest, but had successfully repaid borrowings that started in 2010 until going into the default on 2013 loans that led to the litigation. Tr. 113-15, 125-26, 176, 190. In November 2013, Perry learned that Curt Kramer, an affiliate of Asher Enterprises, had been sanctioned by the Commission. Tr. 166; See *Curt Kramer*, Securities Act Release Nos. 9485, 2013 SEC LEXIS 3745 (Nov. 25, 2013); 10239,

and decided to devote it to paying Asher Enterprises rather than to paying Digital Brand's auditor. Tr. 172. Perry believed that to be in the best interest of Digital Brand's shareholders. Tr. 125. Perry considers that she and Digital Brand were victimized by Asher Enterprises. Tr. 176. Alternative financial sources did not want involvement until the Asher Enterprises matter was settled.¹² Tr. 125, 180. As of August 9, 2017, the date of the hearing, Perry had reached an agreement (which had not yet been formalized) for funding from parties whom she would not identify to finance the then-overdue filings. Tr. 108.

Since filing the overdue reports from the period of delinquency, Digital Brand has filed periodic reports timely. Form 10-Q for the period ended February 28, 2019, was filed on April 9, 2019, and Form 10-Q for the period ended May 31, 2009, was filed on July 12, 2019.

As Digital Brand represented in a letter dated October 3, 2019,¹³ all deficiencies identified by the Division of Corporation Finance (CorpFin) have been cured with the filing of amended Forms 10-K of the Super 10-K and the 2018 Form 10-K on October 1, 2019.¹⁴ Although those two consolidated reports do not cure the registrant's violations of having failed to file periodic reports timely, CorpFin generally accepts such filings:

Generally, the Division of Corporation Finance will not issue comments asking a delinquent registrant to file separately all of its delinquent filings if the registrant files a comprehensive annual report on Form 10-K that includes all material information that would have been included in those filings.

Financial Reporting Manual § 1320.4, <https://www.sec.gov/files/cf-financial-reporting-manual.pdf>.

III. CONCLUSIONS OF LAW

By failing to timely file required annual and quarterly reports, Digital Brand violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-13.

2016 SEC LEXIS 4032 (Oct. 27, 2016) (imposing sanctions, by consent, on Kramer and various companies with which he was affiliated); *see also Myriad Interactive Media, Inc.*, Exchange Act Release No. 775791, 2015 SEC LEXIS 3599, at *12 (describing Kramer as “a promoter of ‘toxic’ microcap financing”).

¹² The Asher Enterprises litigation ended in June 2018. 2018 Form 10-K at 6.

¹³ The Division responded, and Digital Brand replied, on October 23 and 28, 2019, respectively.

¹⁴ The Division suggests that Digital Brand has not complied with Florida law requiring it to elect at least one third of its directors annually. Opp. at 9 & n.8. However, this is outside the allegations in the OIP and no evidence concerning it was introduced at the hearing.

IV. SANCTION

The Division requests that the registration of Digital Brand's securities be revoked.¹⁵ Digital Brand urges that the proceeding be dismissed. While Digital Brand's violation calls for a sanction, neither of the *available* sanctions – revocation or suspension of the registration of its securities – is “necessary or appropriate for the protection of investors,” as required by Exchange Act Section 12(j), pursuant to which this proceeding was authorized.

In proceedings pursuant to Section 12(j) of the Exchange Act against issuers that violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder, the determination “of what sanctions will ensure that investors will be adequately protected . . . 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 Int'l Holdings, Inc.*, Exchange Act Release No. 53907, 2006 SEC LEXIS 1288, at *19-20 (May 31, 2006). The Commission “consider[s], among other things, the seriousness of the issuer's violations, the isolated or recurrent nature of the violations, the degree of culpability involved, the extent of the issuer's efforts to remedy its past violations and ensure future compliance, and the credibility of its assurances, if any, against further violations.” *Id.* at *19-20 (citing *Steadman v. SEC*, 603 F.2d 1126, 1139-40 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)).

The violations were serious in that failure to file periodic reports violates a crucial provision of the Exchange Act. The purpose of the periodic reporting requirements is to publicly disclose current, accurate financial information about an issuer so that investors may make informed decisions:

The reporting requirements of the Securities Exchange Act of 1934 is the primary tool which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities. Congress has extended the reporting requirements even to companies which are “relatively unknown and insubstantial.”

SEC v. Beisinger Indus. Corp., 552 F.2d 15, 18 (1st Cir. 1977) (quoting legislative history); *accord e-Smart Techs., Inc.*, Exchange Act Release No. 50514, 2004 SEC LEXIS 2361, at *8-9 (Oct. 12, 2004).¹⁶

Digital Brand's violations were recurrent in that it did not file any required annual and quarterly reports for more than two years. This followed an earlier period of filings that were delayed because of insufficient financial resources. Concerning the degree of culpability

¹⁵ The only remedies available in this proceeding, pursuant to Section 12(j) of the Exchange Act, to address the company's reporting violations are revocation or suspension for up to twelve months of the registration of its securities.

¹⁶ The Commission has warned that “many publicly traded companies that fail to file on a timely basis are ‘shell companies’ and, as such, attractive vehicles for fraudulent stock manipulation schemes.” *e-Smart Techs., Inc.*, 2004 SEC LEXIS 2361, at *9 n.14. Although Digital Brand's business is “somewhat esoteric” and has never been profitable, it is not a shell company.

involved, there is no evidence that it forwent periodic reports to conceal its parlous financial condition. Rather, Digital Brand devoted its limited resources to what it regarded as more pressing obligations, such as paying a court-ordered judgment to a lender. Concerning the extent of its efforts to remedy its past violations and ensure future compliance, Digital Brand has, to the extent possible after the fact, remedied its past delinquency by providing past and current audited financial information in consolidated Forms 10-K and is compliant with its current reporting obligations. However, investors did not have this information for about two years due to the company's directing its limited resources to what it regarded as more pressing matters and, despite the best intentions, future compliance is affected by the company's financial status and need to rely on obtaining outside financing. The company's continuing losses means it has insufficient revenues to cover all its expenses, which include the expenses of auditing or reviewing its financial statements and filing periodic reports. The need to obtain outside financing, which may or may not be forthcoming, will impact future compliance.

Digital Brand points to external factors as contributing to its delinquency – the need to devote resources to re-audit due to the disqualification of its original auditor, litigation with its creditor, and inability to obtain financing. The Commission has rejected the argument that the contribution of actions of a third party to the delinquency shields an issuer from accountability. *China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 SEC LEXIS 3451, at *74-75 (Nov. 4, 2013); *Cobalis Corp.*, Exchange Act Release No. 64813, 2011 SEC LEXIS 2313, at *20 (July 6, 2011), *recon. denied*, Exchange Act Release No. 65118, 2011 SEC LEXIS 2839 (Aug. 12, 2011); *Eagletech Commc 'ns, Inc.*, Exchange Act Release No. 54095, 2006 SEC LEXIS 1534, at *6 (July 5, 2006).

Digital Brand's filing of past due reports and its continuing to file current reports are mitigating factors as is its response to CorpFin's identification of deficiencies, which it corrected by filing amended Forms 10-K. Thus the company's situation differs from cases in which the Commission determined that revocation was necessary or appropriate. *See Calais Res., Inc.*, Exchange Act Release No. 67312, 2012 SEC LEXIS 2023, at *23 (June 22, 2012) (frowning on the issuer's "troubling willingness . . . to ignore clear staff directives regarding reporting obligations"); *Absolute Potential, Inc.*, Exchange Act Release No. 71866, 2014 SEC LEXIS 1193 (Apr. 4, 2014) (shell company with total assets of \$27, accumulated deficit of \$1,972,404; filings made during administrative proceeding, but unpersuasive explanations for protracted delinquencies and absence of concrete changes to ensure compliance as of date of Commission opinion); *Nature's Sunshine Prods., Inc.*, Exchange Act Release No. 59268, 2009 SEC LEXIS 81 (Jan. 21, 2009) (filings just before oral argument on petition for review of Initial Decision; filings were materially deficient); *Am.'s Sports Voice, Inc.*, Exchange Act Release No. 55511, 2007 SEC LEXIS 1241 (Mar. 22, 2007) (no filings), *recon. denied*, Exchange Act Release No. 55867, 2007 SEC LEXIS 1239 (June 6, 2017).

As the Division points out, Digital Brand's Super 10-K and 2018 Form 10-K comprehensive filings do not contain the interim financial information that would have been covered by the missing quarterly reports, which brings the company outside of the reporting manual's (partial) safe harbor for a comprehensive annual report that includes "all material information that would have been included" in the delinquent filings. Nonetheless, filing non-audited interim financials for quarters up to three years old offers limited benefit to investors and

the public. Failure to include that information is not sufficient, on its own, to make revocation in the public interest.

The Division cites *American Steller Energy, Inc. (n/k/a Tara Gold Res. Corp.)*, Exchange Act Release No. 64897, 2011 SEC LEXIS 2455 (July 18, 2011) (*Tara Gold*), to support its argument that Digital Brand's comprehensive filings do not shield it from revocation. However, Digital Brand's reporting is distinguishable from Tara Gold's. Tara Gold had a nine-year period of delinquencies, promised to make various overdue filings by dates that it did not meet, and failed to include various material information in the filings it did make.

While revocation is not "necessary or appropriate for the protection of investors," neither is suspension. Digital Brand's reporting is now current, but suspension would relieve it of the requirement of filing periodic reports for the period of the suspension. Depriving investors of current financial information would be an undesirable consequence of a suspension and, contrary to the primary purpose of the reporting requirements of the Exchange Act, antithetical to "the protection of investors." Even so, Digital Brand should be aware that further violations of its periodic reporting timeliness and completeness obligations may mark it as a recidivist and invite further scrutiny from Commission staff.

In conclusion, the violations alleged in the OIP are proven, but no available sanction is appropriate. Thus, this proceeding will be dismissed.

V. ORDER

IT IS ORDERED that this administrative proceeding IS DISMISSED.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 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 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. 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. The Initial Decision will not become final until the Commission enters an order of finality. 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. If any of these events occur, the Initial Decision shall not become final as to that party.

Carol Fox Foelak
Administrative Law Judge