UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
100 F Street, N.E.
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DIVISION OF
ENFORCEMENT

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February 22, 2021

Via Email
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Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549

Re: *In re Digital Brand Media & Marketing Group, Inc., Administrative Proceeding File No. 3-17990*

Dear Secretary Countryman,

Enclosed for filing please find electronic versions of the appellate brief and addendum filed today on behalf of the Division of Enforcement. Copies have also been served electronically on counsel for Digital Brand Media & Marketing Group, Inc., who has agreed to accept service via email.

Respectfully submitted,

/s/ *Samantha M. Williams*
Samantha M. Williams

cc: Maranda E. Fritz, Esq. (via maranda@fritzpc.com)

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding File No. 3-17990

***In re* Digital Brand Media & Marketing Group, Inc., Respondent**

THE DIVISION OF ENFORCEMENT'S APPELLATE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORIEIS

Cases

Statutes, Regulations, and Rules

Other Authorities

This is an appeal from an Initial Decision in a proceeding to revoke or suspend the registration of a chronically delinquent filer under Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §78l(j)]. The Law Judge declined to revoke the registration of securities issued by Digital Brand Media & Marketing Group, Inc. ("Digital Brand") for serious and recurrent violations of Exchange Act Section 13(a) [15 U.S.C. §78m(a)]. In doing so, the Law Judge misapplied, and in some instances did not consider, the multi-factor framework for evaluating what sanctions are necessary for investor protection, as established through numerous decisions by the Commission. The Division of Enforcement ("Division") contends that the protection of investors—which includes deterring issuers from gaming the system by avoiding compliance until a sanction is imminent—mandates that the Initial Decision be reversed and that the registration of Digital Brand's securities be revoked.

INTRODUCTION

Beginning in December 2015, Digital Brand failed to file multiple quarterly and annual reports for over two years, claiming it had spent all available funds on litigation with its lender. After the Division of Corporation Finance ("Corporation Finance") issued a deficiency notice and the Division instituted these proceedings, Digital Brand filed papers minimizing the seriousness of the reporting requirements. In Digital Brand's view, required reports "can be filed at a later date," the seriousness of Digital Brand's delinquencies "pale[d]" in comparison to what would happen if Digital Brand lost the creditor litigation, and, in fact, Digital Brand should be "lauded" for its decision to spend its funds on litigation rather than reporting. Add. 35-36

Digital Brand did not make its first attempt to cure its violations or to resume current filing until after an evidentiary hearing. However, Digital Brand's curative filing was itself deficient, prompting Corporation Finance to issue a second deficiency notice. Digital Brand refused to

amend the curative filing, contending that Corporation Finance was wrong and that Digital Brand would only file an amendment if the Commission directed it to do so. Corporation Finance's second deficiency notice remained unaddressed for almost a year, at which point Digital Brand was still of the view that its violations were not "egregious" and "due to no fault of Digital Brand." Add. 136. When Digital Brand resumed filing, its reports contained deficiencies, one of which was the same deficiency noted in Corporation Finance's second deficiency notice. Corporation Finance issued a third deficiency notice which Digital Brand finally attempted to cure with materially misleading amendments. Only after Corporation Finance issued a fourth deficiency notice—three years after the first, one year after the second, three months after the third, and less than two months before the Initial Decision—did Digital Brand address most, but not all, of the noted deficiencies.[1]

The Law Judge correctly found that Digital Brand's reporting violations were serious and recurrent under the *Gateway* framework the Commission has established for determining the appropriate sanction under Section 12(j). *Gateway Int'l Holdings, Inc.*, Exchange Act Release No. 53907, 2006 WL 1506286, at *4 (May 31, 2006). This gave rise to the presumption that revocation was required. *Absolute Potential, Inc.*, Exchange Act Rel. No. 71866, 2014 WL 1338256, at *6 (Apr. 4, 2014). To justify not ordering revocation, the Law Judge was required under Commission precedent to find that Digital Brand had made a strongly compelling showing that revocation was not necessary, taking into account the remaining *Gateway* factors: the degree of Digital Brand's culpability, the extent of its efforts to remedy past violations, the extent of its efforts to ensure future compliance, and the extent it had made credible assurances against further violations. The

[1] For the Commission's convenience, following the signature page, the Division has included a chronology of all major reporting events along with charts tracking the history of each delinquent and deficient report at issue.

Law Judge discussed some of the remaining *Gateway* factors, but did not reach a clear conclusion on them or find that they made out the required strongly compelling showing. However, the Law Judge found that, because the available sanctions of suspension and revocation would deprive investors of current information, sanctions would be "antithetical" to the protection of investors. In doing so, the Law Judge failed to consider the role of deterrence in investor protection. The Commission should remedy the Law Judge's errors by vacating the Initial Decision and revoking the registration of Digital Brand's securities.

QUESTION PRESENTED

Did the serious and recurrent nature of Digital Brand's reporting violations warrant revocation where Digital Brand knowingly committed the violations, minimized the seriousness of the violations, did not attempt to address the violations until almost a year after the Commission issued its Order Instituting Proceedings, refused to follow Corporation Finance's guidance on correcting deficiencies in a curative filing for almost a year, addressed Corporation Finance's deficiency notices with amended reports that were misleading, failed to take responsibility for its violations, did not explain the cause of many of the violations, and did not identify any concrete measures adopted to ameliorate the causes of any of its violations?

STANDARD OF REVIEW

The Commission reviews a Law Judge's initial decision *de novo* and has "all powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). *See also Gross v. SEC*, 418 F.2d 103, 105, 107-08 (2d Cir. 1969) (Section 557(b) is a *de novo* standard of review). The Commission's Rules of Practice further provide that the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole

or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record. Rule 411. 17 C.F.R. §201.411

STATUTORY BACKGROUND

I. Sections 13(A) And 12(J) Of The Exchange Act.

Section 13(a) of the Exchange Act, which mandates public reporting, 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." *Impax Laboratories, Inc.*, Exchange Act Release No. 57864, 2008 WL 2167956, at *7 (May 23, 2008). Section 13(a), and the rules promulgated thereunder, require issuers of registered securities to file unaudited financial statements for the first three quarters of their fiscal year and to provide investors with a continuing view of the company's financial position during the year. Issuers must then file an annual report for the year, a Form 10-K, that provides a comprehensive overview of the company's business and financial condition over the past year and that includes audited financial statements.

Section 12(j) is one of the mechanisms Congress has provided for enforcement of the Exchange Act, including violations of Rule 13(a)'s reporting requirements. Section 12(j) authorizes the Commission "as it deems necessary or appropriate for the protection of investors[,] to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security," for any Exchange Act violations. 78 USC §78l(j).

When an issuer is unable to file a timely report, it is required to file a form pursuant to Rule 12b-25 disclosing, in reasonable detail, the reason the report could not be timely filed. 17 CFR §240.12b-25. The Rule 12b-25 form must be filed no later than one business day after the required report was due. *Id.*

II. Reporting Requirements Related To Internal Controls Over Financial Reporting And Disclosure Controls And Procedures.

In the wake of several accounting scandals that harmed public company investors, and pursuant to the Public Company Accounting Reform and Investor Protection Act of 2002, the Commission adopted rules requiring public company management to certify annually whether their internal controls over financial reporting ("ICFR") were effective and to certify quarterly whether their disclosure controls and procedures ("DCP") were effective. *See* Release No. 34-47986.

An ICFR report must include management's assessment as to the effectiveness of internal controls, the framework used to assess the effectiveness, whether the controls are effective, and any material weaknesses in the controls. Management is prohibited from stating that the controls are effective if there is a material weakness in them. 17 CFR § §229.308. An issuer's management is required to assess whether its DCPs are effective to ensure that information is: (1) recorded; (2) timely communicated to the issuer's management; (3) processed; (4) summarized; and (5) timely filed with the Commission. 17 CFR § §240.13a-15(e); 17 CFR § §229.308. Management's conclusion as to the effectiveness of its DCPs during the reporting period must be disclosed in each annual and quarterly report.

Exchange Act Section 18 imposes personal liability on those who make misleading statements in required periodic reports. 15 U.S.C. §78r(a).

PROCEDURAL POSTURE

On May 16, 2017, the Commission issued an order authorizing the Division to institute an adversary proceeding ("OIP") under Section 12(j) against Digital Brand for violations of Section 13(a) of the Exchange Act. Add. 26. On August 9, 2017, Law Judge Jason S. Patil held an evidentiary hearing ("Evidentiary Hearing") during which the Division presented uncontested

evidence that Digital Brand had failed to file required quarterly and annual reports since August 2015. Digital Brand presented one witness—Linda Perry, the Digital Brand executive responsible for Digital Brand's reporting obligations. Add. 42-54 (Evidentiary Hearing Transcript). On November 17, 2017, Law Judge Patil issued an Initial Decision revoking the registration of Digital Brand's securities. Add. at 55-69 (November 16, 2017 Initial Decision).

In connection with the proceedings that culminated in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Commission ratified Judge Patil's appointment and remanded the case for Judge Patil to take new evidence, reconsider the record, and decide whether to ratify the Initial Decision. *Bereday*, Release No. 4816 (Nov. 30, 2017). Both parties submitted additional evidence but, before Law Judge Patil could make a decision on ratification, the Commission stayed all proceedings pending the issuance of the Supreme Court's decision in *Lucia v. SEC. In Re: Pending Admin. Proceedings*, Release No. 4946 (June 21, 2018).

After the *Lucia* decision, the parties elected not to seek a second evidentiary hearing. Add. 70 (parties' stipulations regarding procedure on remand). Pursuant to the Commission's order, the Chief Administrative Law Judge reassigned this matter to Law Judge Carol Fox Foelak, who had not previously been assigned to the matter. *In Re: Pending Admin. Proceedings*, Release No. 4993 (Aug. 22, 2018). *See also* Add. 103 (Order Reassigning Matter to Law Judge Foelak). After an oral argument and additional written evidentiary submissions by both parties, on November 12, 2019, Law Judge Foelak issued her Initial Decision. Add. 329-336. This appeal followed.

FACTS

Digital Brand has a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Digital Brand is a marketing agency that assists clients with search engine marketing, web design, and social media marketing. Add. 220 (June 1, 2018 Affidavit of

Linda Perry enclosing Comprehensive Form 10-K). In the four annual reports filed before the Law Judge issued her Initial Decision, Digital Brand reported that there is "substantial doubt" about its ability to continue as a going concern. Add. 86,115 (2018 Annual Report). The most recent of those annual reports showed that Digital Brand had outstanding loans and convertible notes payable aggregating $1.4 million and insufficient cash to satisfy these obligations. Add. 120. Each of the four years showed a net operating loss, with yearly losses ranging from between $148,817 to $456,410. Add. 86, 117

I. The 2015- 2017 Reports.

In February 2014, Digital Brand's lender, Asher Enterprises, Inc. ("Asher"), sued Digital Brand for failing to pay loans claimed to be due and owing. Add. 2 (Asher Complaint) at ¶¶6-11; Add. 52(Evidentiary Hearing Tr.) at 113:8. Notwithstanding the ongoing Asher litigation, Digital Brand remained current on its required reports until late 2015. From December 2015 through December 2017, Digital Brand failed to file nine periodic reports (the "2015-2017 Reports"). Add. 143-4 (EDGAR Report).

A. Digital Brand Failed To File Any Of Its Quarterly Or Annual Reports For More Than A Year Before Corporation Finance Issued A Delinquency Notice.

From December 1, 2015 to February 27, 2017, Digital Brand failed to file six required reports (two annual reports and four quarterly reports). Add. 45, 47 at 15:13-15:18, 94:21-96:7; Add. 143-4. Digital Brand filed four of its six Rule 12b-25 forms late, by anywhere from three to sixteen days. Add. 143-4; Add. 340 (Chart of Rule 12b-25 form Delinquencies). On February 27, 2017, the Division of Corporation Finance ("Corporation Finance") issued a delinquency letter to Digital Brand (the "First Deficiency Notice"). Add. 24.

B. After The OIP Was Issued, Digital Brand Continued To Miss Deadlines But Claimed It Should Be "Lauded" For Its Decision To Forgo Funding Reports In Favor Of Funding Litigation.

On May 16, 2017, the Commission instituted revocation proceedings against Digital Brand under Exchange Act Section 12(j). Add. 26. In a response to the Division's Motion for Ruling on the Pleadings, Linda Perry, the Digital Brand executive responsible for Digital Brand's reporting obligations, stated that Digital Brand had failed to file its reports because it had chosen to expend its resources on the Asher litigation. According to Ms. Perry, Asher was a "toxic" lender that was only willing to lend Digital Brand funds under loan terms that allowed Asher to take Digital Brand shares at a "materially discounted below market price" in repayment of the loan. Add. 30 at ¶3. According to Ms. Perry, this loan term permitted Asher to "perpetually sell [the stock] at a profit, and ever decrease the share price because . . . . the share price can never go up with the selling pressure[.]" *Id.* For that reason, in the Asher litigation, Digital Brand filed a counterclaim seeking to avoid liability on the loans by claiming that they were "unfair." Add. 13-19 (Digital Brand's Verified Answer with Counterclaim),

Ms. Perry further stated that the decision to discontinue filing the required reports was deliberate, not inadvertent or accidental:

> There were enough resources to either stop Asher ... and stop the irreparable crushing of DBMM's stock price and prevent current and future holders of DBMM from irreparable harm, or file the periodic reports which can be filed at a later date. It is an easy choice; stop the irreparable harm.

Add. 35 (Answer to Motion for Ruling on the Pleadings). After noting that the required reports "can be filed at a later date," Ms. Perry downplayed the seriousness of Digital Brand's failure to file the required reports:

> Essentially the seriousness of the violation by not timely complying with Exchange Act §13 (a) pales in comparison to the alternative of the seriousness of letting a multiple time sanctioned Asher have their way. DBMM and made the responsible choice and stopped the more grave irreparable harm to current and future investors.

Id. Indeed, Ms. Perry's position was that Digital Brand should be praised for its decision to devote resources to voiding the Asher loans rather than meeting its compliance obligations:

> Digital Brand had no moral choice but to engage in a protracted litigation to protect its holders. There was no culpability on Digital Brand's part. If anything, Digital Brand should be lauded for its efforts to comply with the Commission's directive and zealously defend its holders.

Add. 36. Digital Brand never explained why it could not timely file its Rule 12b-25 forms, which contain no audited information and simply inform the Commission of an issuer's inability to timely file required reports. Nor did Digital Brand ever claim that the Asher litigation impacted its ability to timely file a Rule 12b-25 form.

In the three months between the issuance of the OIP and the August 9, 2017 Evidentiary Hearing, Digital Brand failed to file two more quarterly reports and filed both Rule 12b-25 forms late; the last form was not filed until after the hearing, 27 days late. Add. 144-5; Add. 340.

C. After The Evidentiary Hearing, Digital Brand Missed Another Annual Report.

At the Evidentiary Hearing, Ms. Perry testified that Digital Brand would have the funds needed to cure the then-delinquent filings the week after the hearing and could cure those violations within six months, that is, by February 2018 at the latest. Add. 50-52, 54 **at** 182:3-184:15; 108:17-109:13. Digital Brand did not receive any funding the week after the hearing and, when funding finally arrived, it was less than promised. Add. 254 (Comprehensive Form 10-K) ("Subsequent to August 31, 2017, the Company has raised $192,000 from the issuance of new loan agreements"). Digital Brand did not cure the then-delinquent filings in six months as Ms. Perry had predicted. Instead, Digital Brand closed out 2017 by missing another annual report deadline and filing the corresponding Rule 12b-25 form 15 days late. Add. 143; Add. 340.

D. Digital Brand Attempted To Cure The Delinquent 2015-2017 Reports With A Deficient Comprehensive Form 10-K.

On May 31, 2018, nine months after the Evidentiary Hearing and three months after Digital Brand's own outside deadline to become current, Digital Brand filed its delinquent annual reports for 2015, 2016, and 2017 in one, consolidated filing or "Comprehensive Form 10-K." Add. 78-88. Digital Brand did not file the delinquent quarterly reports for those years. Add. 89-91 (Declaration of Robert Shapiro). Corporation Finance will generally not issue comments asking delinquent reports to be filed separately as long as a comprehensive form 10-K includes all material information that would have been included in the quarterly filings. *SEC Division of Corporation Finance Financial Reporting Manual* at § 1320.4. The Comprehensive Form 10-K did not include any quarterly financial information or a comparison of quarterly financial statements from prior years, all information that would have been included in the delinquent quarterly reports. Add. 90 at ¶4. The Comprehensive Form 10-K was also deficient because it did not include the required disclosures on Digital Brand's ICFR. Add. 91 at ¶4.

On June 15, 2018, in response to Digital Brand's representation to the Law Judge that it had cured its delinquencies, Robert Shapiro, a Senior Staff Accountant with Corporation Finance, submitted his Declaration to the Law Judge and to Digital Brand. In his Declaration, Mr. Shapiro informed Digital Brand that the Comprehensive Form 10-K was deficient for failing to include the quarterly report information or the ICFR disclosure (the "Second Deficiency Notice"). Add. 89-91. In response, Digital Brand took the position that it had intended to state in the Comprehensive Form 10-K that its ICFRs "were effective (notwithstanding the mitigating factors outside the Company's control)," that it "d[id] not agree that any of the aforementioned citations [in the deficiency notice] are 'material deficiencies,'" but that, if "the Commission directs DBMM to amend the Comprehensive Form 10-K despite our explanation, we will comply on a priority basis."

Add. 78-80 (June 20, 2018 Affidavit of Linda Perry).

II. The 2018-2019 Reports.

Digital Brand began 2018 by missing two more quarterly report deadlines and filing each of the correspondent Rule 12b-25 forms late, with the latest filed 93 days after the due date. Add. 143; Add. 10. In June 2018, Digital Brand paid off the judgment that had been issued against it in the Asher Litigation, filed the two quarterly reports it had missed at the beginning of 2018, and, thereafter, filed the third quarterly report for 2018, the 2018 annual report, and the first quarterly report for 2019 (the "2018-19 Reports"). Add. 143; Add. 95. Digital Brand filed papers with the Law Judge notifying her of the filings. Add. 129.

The 2018 annual report had the same ICFR disclosure deficiency as the Comprehensive Form 10-K, which had been the subject of the Second Deficiency Notice issued six months before. Add. 141 (Declaration of Hilda Garret) at ¶4. Even so, Digital Brand continued to take the position in its legal filings that its violations were not "egregious" and "due to no fault of Digital Brand." Add. 136. On March 29, 2019, Assistant Chief Accountant Hilda Garrett of Corporation Finance submitted her Declaration to the Law Judge and Digital Brand explaining that the ICFR disclosure was missing from the 2018 annual report (the "Third Deficiency Notice"). Add. 140-42.

Because Digital Brand failed to timely file the first two quarterly reports for 2018, it reasonably would have been expected to disclose that its DCP had been ineffective during the reporting periods covered by the quarterly reports and the 2018 annual report. Instead, Digital Brand concluded in all of the 2018-2019 Reports that its DCPs were effective. Add. 141 at ¶5. Perhaps because management is personally liable for false or misleading reports, Digital Brand qualified these conclusions with the phrase, "notwithstanding mitigating factors outside the

Company's control." *Id.*[2] Whatever this vague phrase was intended to mean, Ms. Garrett was clear that this qualifier is not permitted; that Digital Brand was required to state whether its DCPs "were effective or not, without any qualifying language;" and that if Digital Brand concluded that its DCPs were unqualifiedly effective, it "should explain in more detail how the company came to that conclusion[.]" Add. 141.

III. The First Amendments To The Comprehensive Form 10-K And One Of The 2018-2019 Reports.

After taking the position for over a year that Corporation Finance was wrong in finding material deficiencies in its Comprehensive Form 10-K, or that it would only amend the Comprehensive Form 10-K if the Commission directed it to do so, Digital Brand filed an amendment to the Comprehensive Form 10-K in April 2019. Add. 143. Digital Brand also filed an amendment to one of the four 2018-2019 Reports, the 2018 annual report. *Id.* In its papers notifying the Law Judge of the amendments (the "First Amendments"), Digital Brand did not explain what had caused the violations prompting the First Amendments; nor did it describe any measures it had implemented to ameliorate the cause. Add. 205.

Both amendments contained disclosures in which Digital Brand concluded that its ICFRs were effective, but also included a disclaimer: "This management report on internal control over financial reporting shall not be deemed to be filed for purposes of Section 18 of the Exchange Act or otherwise subject to the liabilities of that Section." Add. 204 at Item 9A (First Amendment to Comprehensive Form 10-K); Add. at 202 at Item 9A (First Amendment to 2018 Annual Report). When the ICFR reporting requirement was first implemented, a temporary rule permitted issuers who filed reports for fiscal years ending before December 15, 2009 to include the disclaimer

[2] The Comprehensive Form 10-K also included the same DCP disclosure deficiency, but Corporation Finance did not specifically refer to this in the second deficiency notice. Add 132 at Item 9A.

language that Digital Brand used in 2019. The temporary rule has long since expired. Add. 207-208 (Second Declaration of Hilda Garrett) at ¶6. Because all ICFR disclosures are, in fact, filed for purposes of Section 18, the disclaimer was incorrect and materially misleading. *Id.*

In both amendments, Digital Brand removed the language qualifying its conclusion on the effectiveness of its DCP, but made a change that was even more misleading. In its amendments, Digital Brand stated that its controls were effective, and then recited only the second DCP assessment topic. Add. 202 and 204 at Item 9A ("our disclosure controls and procedures were adequate and effective to ensure that material information relating to us and our consolidated subsidiaries would be made known to them by others within those entities."). As a result, Digital Brand failed to include an assessment of whether its DCPs were effective at ensuring that information was recorded, processed, summarized, and timely filed with the Commission. Add. 208-09 at ¶¶7-8. An investor would need to be highly familiar with the DCP rules and regulations to understand the import of this text—that Digital Brand was describing the effectiveness of its DCPs in one area only.

The First Amendment to the Comprehensive Form 10-K did not include the delinquent quarterly information and no amendments were made to four of the 2018-2019 Reports. Add. 210-11 at ¶¶11-12. On June 21, 2019, Ms. Garrett submitted another declaration to the Law Judge and to Digital Brand explaining that the First Amendments were materially misleading, did not cure the ICFR or DCP disclosure deficiencies, did not provide the quarterly information omitted from the Comprehensive Form 10-K, and did not cover four of the 2018-2019 Reports (the "Fourth Deficiency Notice"). Add.206-11

IV. The Second Amendments To The Comprehensive Form 10-K And One Of The 2018-2019 Reports.

More than three months after the Fourth Deficiency Notice, on October 1, 2019, Digital

Brand filed a second amendment to the Comprehensive Form 10-K and the 2018 annual report (the "Second Amendments"). In its papers notifying the Law Judge that the Second Amendments had been filed, Digital Brand did not explain what had caused the deficiencies in the First Amendments; nor did it describe any measures it had implemented to ameliorate the cause. Add. 327-8.

The Second Amendments included the required assessments of Digital Brand's ICFR and DCP. After undertaking the required assessment, Digital Brand's management disclosed that, contrary to its prior statements, neither its ICFR nor its DCP had been effective during the reporting period. Add. 274 (Second Amendment to Comprehensive Form 10-K) at Item 9A; Add. 319 (Second Amendment to 2018 Annual Report) at Item 9A. The Second Amendments did not cure all of the noted deficiencies. The quarterly information was still missing from the Comprehensive Form 10-K and the DCP disclosures in four of the 2018-2019 Reports remained uncorrected. Add. 210 at ¶12.

V. The Initial Decision.

The Law Judge issued her Initial Decision shortly after Digital Brand filed the Second Amendments. Add. 329-336. The Law Judge made findings of fact, including that Digital Brand "did not timely file periodic reports for more than two years" and that its last audited financial statement showed an accumulated deficient of $11.6 million for 2014 and contained a "'going concern' statement, indicating substantial doubt about the company's ability to continue as a going concern." Add. 331. The Law Judge found that the "reason for the delay in filings was a lack of funds" due to the Asher litigation. Add. at 332. Notably, based on Digital Brand's representation, the Law Judge found that "all deficiencies identified by the Division of Corporation Finance (CorpFin) have been cured with the filing of amended Forms 10-K of the Comprehensive Form

10-K and the 2018 Form 10-K on October 1, 2019." Add. at 333. Elsewhere, though, the Law Judge acknowledged that Digital Brand had never provided the interim financial information related to its delinquent quarterly filings. Add. 335.

The Law Judge then made one conclusion of law, finding that Digital Brand had violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 "[b]y failing to timely file required annual and quarterly reports." Add. 333. The Law Judge then turned to consideration of whether revocation was an appropriate sanction, holding that "[w]hile 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 . . ..'" Add. 334. After reciting the *Gateway* factors, the Law Judge found that Digital Brand's "violations were serious," went to "a crucial provision of the Exchange Act," and "were recurrent." *Id*.

The Law Judge then addressed some of the remaining *Gateway* factors in a discussion that included inconsistent factual findings and factual findings at odds with the record. For example, the Law Judge did not state what degree of culpability she found Digital Brand to have evinced, noting only that "there is no evidence that it forwent periodic reports to conceal its parlous financial condition." Add. 334-35. The Law Judge concluded that Digital Brand had remedied its past delinquencies "to the extent possible after the fact," while acknowledging that the Comprehensive Form 10-K did "not contain the interim financial information that would have been covered by the missing quarterly reports." Add. 61. Nonetheless, the Law Judge concluded that this information "offers limited benefit to investors and the public," and "[f]ailure to include that information is not sufficient, on its own, to make revocation in the public interest." *Id*. at 352.

Despite substantial record evidence establishing the contrary, the Law Judge also found that Digital Brand was unlike issuers that had ignored staff directives, failed to explain the cause

of its violations, and failed to provide evidence of concrete changes ameliorating the causes. Add. 336. To the extent the Law Judge addressed the credibility of Digital Brand's assurances of future compliance at all, she noted that "despite the best intentions, future compliance is affected by the company's financial status and need to rely on obtaining outside financing." *Id*. at 333.

Ultimately, however, the Law Judge did not address the *Gateway* factors taken together, and did not reach a conclusion on whether Digital Brand had made a strongly compelling showing on the remaining *Gateway* factors sufficient to avoid revocation. Rather, the Law Judge found that the available sanctions of suspension or revocation would result in "[d]epriving investors of current financial information" and thus "would be an undesirable consequence" and "antithetical to 'the protection of investors.'" *Id*. at 334.

ARGUMENT

I. The Legal Framework For Determining Whether A Sanction Is Necessary Or Appropriate For The Protection Of Investors.

Exchange Act Section 12(j) states that when a registrant violates the provisions of the Act, the Commission is authorized, "as it deems necessary or appropriate for the protection of investors[,] to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security[.]" 78 USC §78l(j). To determine whether suspension or revocation is warranted, the Commission assesses the violation pursuant to the five "public interest factors" set forth in *Gateway Int'l Holdings, Inc*. The *Gateway* factors are:

(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 its assurances, if any, against further violations.

2006 WL 1506286, at *4. *See also Absolute Potential, Inc.*, 2014 WL 1338256, at *4 (referring to the *Gateway* factors as the "public interest" factors).

Although the *Gateway* factors are nonexclusive, and no single factor is dispositive, if consideration of the first two *Gateway* factors establishes that the violations were serious and recurrent, a presumption arises that revocation is required to protect investors. The Commission applies "a strong presumption in favor of revocation whereby a recurrent failure to file periodic reports is so serious that only a strongly compelling showing with respect to the other factors we consider would justify a lesser sanction than revocation." *Absolute Potential, Inc.*, 2014 WL 1338256, at *6 (citation and internal punctuation omitted). *See also Advanced Life Sciences Holdings, Inc.*, Exchange Act Release No. 81253, 2017 WL 3214455 at *4 (July 28, 2017) (when an issuer's violations are serious, "we apply a strong presumption in favor of revocation") (internal punctuation and citations omitted); *Equilar Capital Corp. & Neurobiotech Corp.*, Exchange Act Release No. 85510, 2019 WL 1505174, at *2 (Apr. 4, 2019) (same and citing numerous authorities).

Where the presumption arises, "only a strongly compelling showing regarding the other *Gateway* factors would justify a sanction less than revocation." *Calais Res., Inc.*, Exchange Act Release No. 67312, 2012 WL 2499349, at *4 (June 29, 2012) (internal punctuation and citation omitted). The Commission has rarely found the standard satisfied. Issuers that have met the standard have done so by curing all outstanding deficiencies, identifying the specific causes that led to the violations, and demonstrating concrete and effective corrective measures addressing the causes. *Phlo Corp.*, Exchange Act Release No. 55562, 2007 WL 966943, at *16 (Mar. 30, 2007) (issuer became current, identified ICFR failures that led to violations, and identified concrete measures addressing the ICFR failures). *See also e-Smart Techs., Inc.*, Exchange Act Release No. 50514, 2004 WL 2309336, at *2 n.14 (Oct. 12, 2004) (issuer identified the cause of its delinquencies and concrete remedial measures to ensure future compliance including retaining new

securities counsel and auditors and implementing new internal accounting controls.)

II. Proper Application Of *Gateway* Mandates Vacating The Initial Decision And Revoking Digital Brand's Registration.

Digital Brand's violations were recurring and serious giving, rise to the presumption that revocation is necessary and appropriate to protect investors. Digital Brand did not make a strongly compelling showing that it had no culpability for its violations, or that its efforts to remedy past violations, concrete measures to prevent future violations, and credible assurances of future compliance were so substantial that the presumption was rebutted. In fact, consideration of these factors demonstrates that Digital Brand committed its violations with a high degree of culpability, was dilatory, recalcitrant, and misleading in its efforts to remedy its violations, and did not provide credible assurances of future compliance.

A. Digital Brand's Violations Were Serious And Recurrent.

The Commission views reporting violations as serious because "they violate a central provision of the Exchange Act [and] deprive both existing and prospective holders of [a company's] registered stock of the ability to make informed investment decisions based on current and reliable information." *Equilar Capital Corp.*, 2019 WL 1505174, at *2 (internal punctuation omitted).

The seriousness of Digital Brand's violations is aggravated by the reason for them: Digital Brand's inability to pay its auditor. The Commission has singled out an issuer's inability to pay an auditor as information that is particularly significant to investors, yet Digital Brand's violations deprived investors of this critical information. *Advanced Life Sciences Holdings, Inc.*, 2017 WL 3214455at *7, n.19 (an issuer's "inability to pay an auditor to certify financial statements is something investors surely would want to know") (citations and internal punctuation omitted). *Am. Stellar Energy, Inc. (n/k/a Tara Gold),* Exchange Act Release No. 64897, 2011 WL 2783483,

at *5 (July 18, 2011), *aff'd* at *Tara Gold Res. Corp. v. SEC*, 678 F.3d 557, 558 (7th Cir. 2012) (fact that issuer did not have the ability to pay an auditor to certify more recent financial statements was "something investors surely would want to know").

The fact that the filing failures occurred during the Asher litigation, which Digital Brand has portrayed as a life-and-death struggle, is also aggravating. The investing public was deprived of highly relevant information arguably when it was most needed. *China-Biotics, Inc.*, Exchange Act Release 70800, 2013 WL 11270156, Add. 371 (Nov. 4, 2013) (delinquencies were "especially serious" because they occurred when the company was undergoing significant changes which were "precisely the kind of material information that must be disclosed on a timely basis under Exchange Act Section 13 to ensure fair dealing in a company's securities").

The length of the violations related to the 2015-2017 Reports, two years at a minimum, is more than sufficient to establish that they were recurrent. But Digital Brand's filing failures continued for an additional year with the 2018-2019 Reports. All told, the period during which Digital Brand ***committed*** violations lasted three years. The Commission has found violations to be recurrent for far shorter reporting delinquencies. *See, e.g., Accredited Bus. Consolidators Corp.*, Exchange Act Release No. 712, 2014 WL 6737052, at *2 (Dec 1, 2014) (two year delinquency); *China-Biotics, Inc.*, 2013 WL 11270156, Add. 375 (one-and-a-half year delinquency); *Nature's Sunshine Prods., Inc.*, Exchange Act Release No. 59268, 2009 WL 137145, at *5 (Jan. 21, 2009) (two year delinquency); *Impax Labs., Inc.*, 2008 WL 2167956, at *7 (two year delinquency); *Gateway Int'l Holdings, Inc.*, 2006 WL 82562929 at *l (two year delinquency).

The amount of time the violations stood uncorrected is even longer and, indeed, lasts through this day. The deficient ICFR and DCP disclosures in the Comprehensive Form 10-K

remained uncorrected until the filing of the Second Amendment, a year-and-a half later (May 31, 2018 – October 1, 2019). The identical deficiencies remained uncorrected in the 2018 annual report for over ten months (December 14, 2018 – October 1, 2018). Investors would certainly have wanted to know that Digital Brand's ICFRs and DCPs continued to be ineffective even after the Asher Litigation was settled. The quarterly information omitted from the 2015-2016 Reports has never been supplied and the qualified DCP disclosure in four of the 2018-2019 Reports has never been corrected.

Whatever period of time is used to measure the length of Digital Brand's violations—the two years of violations related to the 2015-2017 Reports, the total three years of violations, which includes the 2018-2019 Reports, the almost four years during which most of the violations remained uncorrected, or the more than five years and counting that the quarterly financial information and the DCP disclosures in four of the five 2018-2019 Reports remains missing – Digital Brand's violations spanned a significant period.

Digital Brand's protracted delinquencies, followed by reports containing material deficiencies—all coming at a time when this information would have been of greatest import to investors—were serious and recurrent. Indeed, while Digital Brand initially argued that its violations were not egregious, it ultimately conceded that they were both serious and recurrent. Add. 390 (Digital Brand's Reply in Support of Motion for Summary Disposition).

Because Digital Brand's violations were serious and recurrent, there is "a strong presumption in favor of revocation," *Absolute Potential, Inc.*, 2014 WL 1338256, at *6, that can only be rebutted by "a strongly compelling showing regarding the other *Gateway* factors [that] would justify a sanction less than revocation." *Calais Res., Inc.*, 2012 WL 2499349, at *4.

B. Digital Brand's Violations Demonstrated A High Degree Of Culpability.

Digital Brand did not make a strongly compelling showing that its culpability warranted a sanction less than revocation. The record shows that Digital Brand knew of its reporting obligations but failed to comply with them, over and over again. This reinforces that revocation is necessary.

In determining whether an issuer is culpable for reporting violations, the question is not whether the issuer committed the violation with nefarious intent, but whether the failure was deliberate as opposed to "inadvertent or accidental." *China-Biotics, Inc.*, 2013 WL 11270156, at Add. 371. Evidence that an issuer knew of its reporting obligations but failed to comply with them, or persisted in noncompliance after receiving a deficiency notice, establishes that the issuer has a high degree of culpability. *Id.*

The Law Judge appears to have misapplied the standard for culpability; her only observations related to culpability were that "there is no evidence that [Digital Brand] forwent periodic reports to conceal its parlous financial condition," and "[r]ather, Digital Brand devoted its limited resources to what it regarded as more pressing obligations, such as paying a court-ordered judgment to a lender." Add. 335. If the Law Judge was holding that evidence of an intent to conceal is required to establish a high degree of culpability, this was error, because a violation of the reporting provisions "does not require scienter," and instead "a long history of ignoring … reporting obligations under the Exchange Act evidences a high degree of culpability." *Advanced Life Sciences Holdings, Inc.*, 2017 WL 3214455 at *2, *3.

Likewise, the Law Judge appeared to conclude that Digital Brand's decision to apply its funds to uses other than filing its reports was evidence that tended to *mitigate* its culpability. This was error. The Commission has found that a registrant's decision to violate its reporting

obligations in favor of spending its money elsewhere tends to *aggravate* its degree of culpability. *Citizens Capital Corp.,* Exchange Act Release No. 67313, 2012 WL 2499350, at *4 and n.7 (June 29, 2012) (issuer had a high degree of culpability where it decided "to temporarily suspend its periodic financial reporting requirements, and the related expenses thereof, in favor of reallocating its time and financial resources towards insuring [sic] the continuance and ongoing progress of the Company and its subsidiaries in meeting its various goals and objectives").

1. Digital Brand Knew That It Was Required To File The 2015-2017 Reports And Chose Not To.

As for the 2015-2017 Reports, Ms. Perry conceded at the Evidentiary Hearing that she was aware of Digital Brand's filing obligations and that she was aware the required filings were not being made. Add. 46 at 86:2-5, 87:1-11 (Perry knew that Company's ethics policies required timely filing); Add. 47 at 94:24-95:2 (Perry knew that Digital Brand's Form 10-K was due 90 days after the end of Digital Brand's fiscal year); Add. 48 at 98:15-17 (Perry knew that information had not been sent to auditors for preparation of the 2015 annual report); Add. 49 at 103:13-15 (Perry believed it would be inappropriate to "cure" the delinquencies without "money in hand"). Indeed, Ms. Perry herself described the decision to forgo filing reports as a deliberate, and even "easy choice." Add. 33-4 (Digital Brand's Answer to Motion for Ruling on the Pleadings).

2. Digital Brand Knew The Comprehensive Form 10-K Was Deficient, But Filed It Anyway And Then Refused To Correct It For More Than A Year.

Digital Brand also has a high degree of culpability for its deficient Comprehensive Form 10-K. First, the Comprehensive Form 10-K did not include interim financial information covering the quarters for which Digital Brand had failed to make filings. Ms. Perry submitted an affidavit conceding that Digital Brand knew that Corporation Finance's Manual required the Comprehensive Form 10-K to include all of the quarterly information that would have been included in separately filed quarterly reports and knew that such information was missing from the

Comprehensive Form 10-K. Add. 92-93 at ¶3. Second, Digital Brand included a qualified statement that Digital Brand's DCPs were effective "notwithstanding mitigating factors outside the Company's control." The careful wording of this disclosure indicates that Digital Brand was aware that it was required to disclose whether its DCPs were effective, and suggests that it was seeking to skirt that obligation by including a qualifier. Third, Digital Brand also knew it was required to include an ICFR disclosure and failed to do so. In her affidavit, Ms. Perry asserted that Digital Brand had intended to include a disclosure in the Comprehensive Form 10-K stating that its ICFRs "were effective (notwithstanding the mitigating factors outside the Company's control," but had, for reasons not explained in the Affidavit, omitted the disclosure completely.

Certainly, Digital Brand has a high degree of culpability for failing to address the ICFR disclosure deficiency until almost a year after Corporation Finance issued the second deficiency notice. Digital Brand's offer to make the corrections to the Comprehensive Form 10-K if the Commission directed it to does not lessen Digital Brand's culpability; it "reflects a highly troubling attitude towards Commission reporting requirements." *America's Sports Voice, Inc.*, Exchange Act Rel. No. 55511, 2007 WL 9421706, *4 (March 22, 2007). Compliance with reporting requirements "is mandatory and may not be subject to conditions from the registrant." *Id.* (issuer had a high degree of culpability where it had decided not to expend funds on curing its delinquencies unless the Commission granted its request for an additional 90 days to become compliant).

3. Digital Brand Knew The 2018-2019 Reports Were Deficient, But Filed Them Anyway.

Digital Brand has a high degree of culpability for the five 2018-2019 Reports. With full knowledge that Corporation Finance had found the omission of an ICFR disclosure from the Comprehensive Form 10-K to be a material deficiency, Digital Brand filed the 2018 annual report

with the same omission. All five of the 2018-2019 Reports qualify Digital Brand's assessment as to the effectiveness of its DCPs.

4. The First Amendments Were More Than Knowingly Deficient, They Were Intentionally Misleading.

Digital Brand is highly culpable for the deficiencies in the First Amendments, which were filed after Corporation Finance told Digital Brand that it could not omit or qualify the conclusion that its ICFRs and DCPs were effective. Rather than disclose that its controls were ineffective, Digital Brand used different qualifiers and limitations that were materially misleading.

The First Amendment claimed that Digital Brand's ICFRs were effective but attempted to limit the personal liability of its officers should that statement be deemed false or misleading. That Digital Brand had to reach all the way back to a temporary rule last effective for 2009 annual reports demonstrates that Digital Brand went to great effort in crafting its ICFR disclosure. That Digital Brand was only willing to say that its ICFRs were effective if its officers were shielded from liability for making the statement strongly suggests that even Digital Brand did not believe it. The First Amendment stated that Digital Brand's DCPs were effective, but mentioned only one of the five categories Digital Brand was required to assess. This carefully parsed language created the misleading impression that Digital Brand had assessed its DCPs to be effective across all areas it was required to assess. The wording of these disclosures supports the inference that Digital Brand did not simply know that the First Amendment was deficient; Digital Brand intentionally intended the First Amendment to mislead.

5. Digital Brand Has Knowingly Failed To Cure Some Deficiencies.

Digital Brand also has a high degree of culpability for the quarterly report information missing from the Comprehensive Form 10-K which it has never corrected, now over two years after Corporation Finance noted the deficiency. The four uncured 2018-2019 Reports still state

that Digital Brand's DCPs are effective "notwithstanding mitigating factors outside the Company's control," two years after Corporation Finance notified Digital Brand that the qualifier was unacceptable and more than a year after Corporation Finance reminded Digital Brand that the reports were still not corrected.

C. Digital Brand Was Begrudging And Dilatory In Its Efforts To Remedy Its Violations And Presented No Evidence That It Adopted Concrete Measures To Ensure Future Compliance.

Digital Brand did not make a strongly compelling showing on the fourth *Gateway* factor—efforts to remedy past violations and ensure future compliance. Indeed, consideration of this factor provides more confirmation that revocation is required.

1. Digital Brand's Recalcitrant, Dilatory, And Misleading Remedial Efforts Can Only Be Deterred Through Revocation.

To make a compelling showing, it is not enough for the issuer to show that it "has returned to reporting compliance and begun to submit long overdue filings; other considerations may justify" revocation. *e-Smart Techs., Inc.*, 2004 WL 2309336, at *4, n.18 (Oct. 12, 2004) (internal punctuation and citation omitted). Evidence that an issuer became compliant only shortly before a revocation decision does not satisfy the "strongly compelling" showing necessary to overcome the presumption of revocation:

> As we have recognized, revocation may be warranted [where an issuer has regained compliance before a law judge issues an initial decision] to address not only the harm to current and prospective investors in the non-compliant issuer but also to address the broader systemic harm that follows from registrants who "game the system" by complying with their unambiguous reporting obligations only when they are confronted by imminent revocation. A sanction other than revocation would reward those issuers who fail to file required periodic reports when due over an extended period of time and make last-minute filings only after becoming the subject of Exchange Act Section 12(j) proceedings in an effort to bring themselves current with their reporting obligations. Such conduct prolongs indefinitely the period during which public investors would be without accurate, complete, and timely reports and significantly detracts from the Exchange Act's reporting requirements.

Absolute Potential, Inc., 2014 WL 1338256, at *7. *See also China-Biotics*, 2013 WL 11270156, Add. 377 (even where issuer has become current, revocation may be required where issuer's "filing history may ultimately suggest a troubling pattern of complying with regulatory requirements only when the issuer has concluded that its continued failure to do so will result in significant adverse consequences.") (internal punctuation and citation omitted); *Nature's Sunshine Prods.*, 2009 WL 137145, at *8 (revocation warranted to deter issuers who, "on the eve of hearings before the law judge or, in this case, oral argument on appeal, make last-minute filings in an effort to bring themselves current with their reporting obligations"); *Calais Res., Inc.*, 2012 WL 2499349, at *7 (same).

Here, Digital Brand was dilatory in all of its remedial efforts. Digital Brand did not make its first attempt to cure the 2015-2017 Reports until it filed the Comprehensive Form 10-K on May 31, 2018, more than a year after Corporation Finance issued its first deficiency notice, after the Commission issued its OIP, and nine months after the Evidentiary Hearing. Digital Brand did not attempt to address the Comprehensive Form 10-K deficiencies until a year after Corporation Finance notified Digital Brand it was deficient. While Digital Brand did address Corporation Finance's deficiency notice regarding the 2018-2019 Reports within a month, the First Amendments only addressed the deficiency in one of the five reports covered by the deficiency notice and were misleading. When Corporation Finance notified Digital Brand that the First Amendments were deficient and materially misleading, Digital Brand waited another three months before filing the Second Amendments. Digital Brand has never supplied the quarterly information missing from the Comprehensive Form 10-K or corrected the deficiencies in the remaining four 2018-2019 Reports.

Giving Digital Brand credit for curing most of its reporting deficiencies would improperly

reward it for "the opportunistic practice of complying with regulatory requirements only when the issuer has concluded that its continued failure to do so will result in significant adverse consequences." *Advanced Life Sciences Holdings, Inc.*, 2017 WL 3214455 at *5 (ordering revocation).

Similarly, the Commission does not credit efforts that do not comply with Corporation Finance guidance. In *China-Biotics*, the issuer stated in its 2010 Form 10-K that its ICFRs were effective, but admitted in later annual reports that they were not. SEC staff directed the issuer to amend the 2010 Form 10-K, but, without explanation, the issuer refused to do so. The Commission held that the refusal to follow staff directives "discredited" the issuer's compliance efforts:

> China-Biotics' purported compliance efforts are further discredited by its troubling willingness to ignore clear staff directives regarding its reporting obligations under the Exchange Act. The company's prolonged and continuing failure, for more than a year and a half, to follow Corporation Finance staff's direction to amend its 2010 Form 10-K or to explain its longstanding failure to do so offers little assurance of the company's commitment to Exchange Act reporting.

2013 WL 11270156, Add. 375 (revoking issuer's registration) (internal punctuation and citation omitted). *See also Calais Res., Inc.*, 2012 WL 2499349, at *6 (issuer's "decision to file its annual reports in a form that the Company knew Corporation Finance had twice rejected as improper indicates a troubling willingness of the Company to ignore clear staff directives regarding reporting obligations under the Exchange Act.").

Here, when Corporation Finance issued its deficiency notice regarding the Comprehensive Form 10-K, Digital Brand refused to address the deficiencies unless the Commission ordered it to do so and subsequently filed the 2018 annual report with the same deficiency. A year later, Digital Brand filed misleading First Amendments to "cure" both the ICFR and the subsequently noted DCP disclosure deficiencies. Not until three months later—just a month before the Initial Decision was issued—did Digital Brand correct the misleading amendments, and only then as to some

reports. Digital Brand is entitled to no credit for the fact that it finally followed some (but not all) of Corporation Finance's guidance years after it was given. This record of deficiency contradicts the Law Judge's finding that "all deficiencies identified by the Division of Corporation Finance . . . have been cured." [Initial Decision at 5].

2. Digital Brand Put Forth No Evidence That It Adopted Concrete Measures To Ensure Future Compliance.

To make a compelling showing on future compliance, Digital Brand had to identify the specific causes of its reporting violations and demonstrate that it implemented concrete and effective measures to ameliorate those causes. *Compare Phlo Corp.*, 2007 WL 966943, at *16 (issuer pointed to specific internal accounting failures that led to its reporting violations and demonstrated it had retained a consultant to improve internal accounting functions); *with Absolute Potential*, 2014 WL 1338256, at *3 & n.19 (issuer failed to offer a meaningful explanation for its reporting violations or demonstrate that it has taken concrete, effective measures to remedy their cause).

Far from making a compelling showing, Digital Brand only explained the cause of some of its violations and put forth no evidence whatsoever that it had adopted concrete measures to ameliorate that cause. Digital Brand identified its relationship with Asher, which Digital Brand described as a "toxic" lender, and a lack of resources, as the cause of the 2015-2017 failures to file periodic reports. But, Digital Brand has never explained why it repeatedly filed its Rule 12b-25 forms late, why it filed deficient and misleading ICFR and DCP disclosures in the Comprehensive Form 10-K and 2018-2019 Reports, why it failed to comply with Corporation Finance's Comprehensive Form 10-K deficiency notice for over a year, why it filed the misleading First Amendment, why it took three months to correct the misleading First Amendment, why it has not supplied the missing quarterly information, and why it has not corrected four of the 2017-2019

Reports.

As for concrete and effective measures to prevent the causes of its violations, Digital Brand has not shown that its self-described "toxic" relationship with Asher has terminated or that Digital Brand was relieved of the terms of the Asher financing that was so detrimental Digital Brand sought to have its loan contract set aside in the Asher litigation. Nor has Digital Brand provided any evidence that its financial circumstances have improved. Indeed, Digital Brand's financial condition calls into question whether it can make and sustain concrete changes necessary to ensure compliance in the future. As the Law Judge noted, "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." Add. at 335. As for the other violations, the cause of which was never explained, the only information in the record on remedial measures is that Ms. Perry—the Digital Brand officer responsible for Digital Brand's reporting obligations when these unexplained violations occurred—is still the person responsible for Digital Brand's reporting obligations.

D. Digital Brand's Assurances Against Further Violations Were Not Credible.

Digital Brand did not make a compelling showing on the fifth *Gateway* factor the — credibility of its assurances against future violations. As with the other *Gateway* factors, consideration of Digital Brand's credibility weighs in favor of revocation.

An issuer's failure "to recognize the importance of providing [required] information to its investors undermines the credibility of its assurances of future compliance with its reporting obligations," *Tara Gold*, 2011 WL 2783483, at *5, as does an issuer's failure to "accept[] responsibility for its failure to meet its reporting obligations" and efforts to blame others for them.

Gateway Int'l Holdings, Inc., 2006 WL 1506286, at *5 (issuer claimed its newly-acquired subsidiaries' failure to provide financial information was the cause of its violations even though issuer had agreed in contract by which it acquired subsidiaries that they would only be required to provide issuer with financial information if ordered to do so by the Commission). *See also Tara Gold,* 2011 WL 2783483, at *5 (issuer's assurances were not credible where it claimed investors were not harmed by delinquent annual reports in 2008 and 2009 because there was no reliable information on the company's condition for those years and the issuer's last annual report contained the most current information available); *China-Biotics,* 2013 WL 11270156, Add. 375(issuer's assurances were not credible where it attempted to cure delinquent reports with deficient reports).

The record is replete with evidence that Digital Brand fails to recognize the importance of its reporting obligations. In papers filed below, Digital Brand took the position that the seriousness of its failure to file the 2015-2017 Reports "pales" in comparison to allowing Asher to prevail in the litigation; down-played the seriousness of the reporting requirements by stating that the reports "can be filed at a later date;" and contended that it should be "lauded" for the decision to fund the Asher litigation rather than compliance.

When Corporation Finance pointed out the material deficiencies in the Comprehensive Form 10-K, Digital Brand's response was that it did not agree with Corporation Finance's assessment and would amend the Comprehensive Form 10-K, but only if the Commission directed it to. A month before Digital Brand filed the First Amendments, it continued to contend that its reporting violations were not "egregious" and "due to no fault of Digital Brand." When Digital Brand finally addressed Corporation Finance's concerns about the ICFR and DCP disclosures, it did so by way of the misleading First Amendments and then waited another three months, and

after a fourth deficiency notice, to finally cure them.

Although Digital Brand should have been on its best behavior during this proceeding, its actions and statements significantly undermine the credibility of its assertions of future compliance.

III. Revocation Is Appropriate And Necessary To Protect Investors.

The Law Judge held that neither revocation nor suspension was warranted because "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." Add. 336 (internal punctuation omitted).

The Law Judge's finding that the passage of time relieved Digital Brand from any adverse consequences flowing from uncured deficiencies is contrary to Commission precedent. In *China-Biotics*, the Commission found that the issuer's failure to cure an ICFR disclosure violation for a time period that had ended over three years before negatively impacted the evaluation of the issuer's compliance efforts. 2013 WL 11270156, Add. 375-6. *See also Gateway Int'l Holdings, Inc.*, 2006 WL 1506286 at *7 (rejecting issuer's contention that its failure to file seven reports did not warrant revocation because current reports were "more than sufficient to enable them to make informed decisions;" Section 13(a) "is intended to provide investors with not merely 'sufficient' information, but information that is complete, timely, and accurate."). Under the Law Judge's reasoning, sanctions would be imposed, not based on the issuer's conduct, but on how quickly or slowly the revocation proceeding progressed. The Law Judge's finding would also lead to the absurd result of treating an issuer favorably based on the issuer's own delay in curing its violations.

Finally, the Law Judge limited her assessment of investor protection to the current and prospective investors of Digital Brand. Section 13(a) and its enforcement mechanism, Section 12(j), are broader than that. Investor protection takes into account "not only the harm to current and prospective investors in the non-compliant issuer but also . . . the broader systemic harm that follows from registrants who 'game the system' by complying with their unambiguous reporting obligations only when they are confronted by imminent revocation." *Absolute Potential*, 2014 WL 1338256, at *7. *See also Nature's Sunshine Prods.*, 2009 WL 137145, at *8 (revocation "further[s] the public interest by reinforcing the importance of full and timely compliance with the Exchange Act's reporting requirements."). The Law Judge's narrow view of investor protection would, ironically, deprive more investors of current, required reports because, absent Section 12(j) sanctions, nothing would prevent other issuers from "prolonging indefinitely the period during which public investors would be without accurate, complete, and timely reports (that comply with the requirements of the Exchange Act and its rules and regulations) to make informed investment decisions." *Nature's Sunshine Prods.*, 2009 WL 137145, at *9. "Deterrence is effective only if a lengthy delinquency, in the absence of strongly compelling circumstances regarding the other *Gateway* factors, results in revocation." *Advanced Life Sciences Holdings, Inc.*, 2017 WL 3214455 at *6.

In addition to being contrary to Commission precedent, the Law Judge's rationale was contrary to the rules of statutory interpretation. It is impermissible to interpret Section 12(j), the mechanism for enforcing Section 13(a) violations, as "antithetical" to Section 13(a). Similarly, it is impermissible to interpret the sanctions authorized by Section 12(j) as antithetical to the standard for granting Section 12(j) sanctions. *See Saad v. Sec. & Exch. Comm'n*, 980 F.3d 103, 108 (D.C. Cir. 2020) ("A court must ... interpret [a] statute as a symmetrical and coherent regulatory scheme

and fit, if possible, all parts into a[ ] harmonious whole.") (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

In this case, Digital Brand was delinquent in its filings for two years, violations that were serious, recurrent, and then filed deficient reports for another year and one month. Digital Brand never cured some deficiencies, and its attempts at curing others were marked by delays, recalcitrance in the face of repeated notices of deficiency, and a troubling tendency to elide the reporting requirements through the use of improper qualifiers that blunted the utility of critical disclosures about controls. Digital Brand's violations were serious, recurrent, and committed with a high degree of culpability. A sanction other than revocation would reward Digital Brand for gaming the system, incentivize other registrants to do the same, and undermine the Exchange Act's reporting requirements.

CONCLUSION

For the foregoing reasons, the Commission should vacate the Initial Decision and enter an order revoking the registration of Digital Brand's securities.

Respectfully submitted,

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2015-2017 Reports
Deficiencies Timeline

		1 Year, 2 Months, 25 Days			10 Months, 10 Days		3 Months, 11 Days	
		2 Years, 7 Months, 25 Days						
Report (Fiscal Year End 8/31)	**Deficiency**	**Def. Notice**	**OIP Issued**	**Comprehensive Form 10-K**	**Def. Notice**	**1st Amd. of Comprehensive Form 10-K**	**Def. Notice**	**2nd Amd of Comprehensive Form 10-K**
		2/27/17	**5/16/17**	**5/21/18**	**6/15/18**	**4/24/19**	**6/21/19**	**10/1/2019**
2015 10-K	Not filed			•No ICFR Disclosure •Qualified DCP Disclosure •Missing Quarterly Information		•Misleading ICFR Disclosure (Liability Limitation) •Misleading DCP Disclosure (Only one of 5 Topics) •Missing Quarterly Information		•Missing Quarterly Information
2016 10-Q1	Not filed							
2016 10-Q2	Not filed							
2016 10-Q3	Not filed							
2016 10-K	Not filed							
2017 10-Q1	Not filed							
2017 10-Q2	Not filed							
2017 10-Q3	Not filed							
2017 10-K	Not filed							

2018-2019 Reports
Deficiencies Timeline

		28 Days		3 Months, 10 Days	
		Six Months, 4 Days			
Report (Fiscal Year End 8/31)	**Deficiency**	**Def. Notice**	**Curative Filing**	**Def. Notice**	**Curative Filing**
		3/27/19	**4/23/19**	**6/21/19**	**10/1/2019**
2018 10-Q1	•Delinquent •Qualified DCP Disclosure		None		None
2018 10-Q2	•Delinquent •Qualified DCP Disclosure		None		None
2018 10-Q3	•Delinquent •Qualified DCP Disclosure		None		None
2019 10-K	•No ICFR Disclosure •Qualified DCP Disclosure		**1st Amd. of 2018 Form 10-K** •Misleading ICFR Disclosure (Liability Limitation) •Misleading DCP Disclosure (Only one of 5 Topics)		**2nd Amd. of 2018 Form 10-K**
2016 10-Q1	•Qualified DCP Disclosure		None		None

Comprehensive Deficiencies Timeline

2015-2017 Report Deficiencies
2018-2019 Report Deficiencies
Rule 12b-25 Form Deficiencies

DATE	EVENT
12/1/2015	DB Fails to File Form 10-K for 2015
1/25/2016	DB Fails to File Form 10-Q1 for 2016
4/14/2016	DB Fails to File Form 10-Q2 for 2016
4/18/2016	DB Files 12b-25 Form 3 Days Late
7/15/2016	DB Fails to File Form 10-Q3 for 2016
7/19/2016	DB Files 12b-25 Form 3 Days Late
11/29/2016	DB Fails to File Form 10-K for 2016
12/16/2016	DB Files 12b-25 Form 16 Days Late
1/14/2017	DB Fails to File Form 10-Q1 for 2017
1/19/2017	DB Files 12b-25 Form 4 Days Late and Form References a Different Time Period
2/27/2017	Corporation Finance Issues a Delinquency Notice
4/14/2017	DB Fails to File Form 10-Q2 for 2017
4/19/2017	DB Files 12b-25 Form 4 Days Late
5/16/2017	The Commission Issues its Order Instituting Proceedings
6/13/2017	DB Files an Answer to the Division's Motion for Ruling on the Pleadings • DB states that required reports "can be filed at a later date;" DB's failure to file reports "pales in comparison" to the harm that would occur if Asher won the litigation; and DB should be "lauded" for its decision to forgo funding reports in favor of funding litigation
7/17/2017	DB Fails to File Form 10-Q3 for 2017
8/09/2017	Evidentiary Hearing
8/14/2017	DB Files 12b-25 Form 27 Days Late

10/16/2017	DB Hires Auditor to Prepare Missing Reports
11/29/2017	DB Fails to File Form 10-K for 2017
12/15/2017	DB Files 12b-25 Form 15 Days Late
1/14/2018	DB Fails to File Form 10-Q1 for 2018
4/16/2018	DB Fails to File Form 10-Q2 for 2018
4/18/2018	DB Files 12b-25 Form (for Form 10-Q1 for 2018) 93 Days Late
4/18/2018	DB Files 12b-25 Form (for Form 10-Q2 for 2018) 1 Day Late
5/31/2018	DB Files Deficient Comprehensive Form 10-K for 2015, 2016, and 2017 • Form omits the ICFR Disclosure, includes a qualified DCP Disclosure, and omits quarterly information
6/15/2018	Corporation Finance Notifies DB of Comprehensive Form10-K Deficiencies
6/20/2018	DB Files Affidavit of Linda Perry • DB states that it "does not agree that any of the aforementioned citations are 'material deficiencies'" • DB states that it will correct the deficient comprehensive Form 10-K if "the commission directs DBMM to amend"
6/22/2018	DB Files Delinquent and Deficient Form 10-Q1 for 2018 • Qualified DCP Disclosure
6/25/2018	DB Files Delinquent and Deficient Form 10-Q2 for 2018 • Qualified DCP Disclosure
7/16/2018	DB Fails to File Form 10-Q3 for 2018
7/17/2018	DB Files 12b-25 Form on Time, but Form References a Different Time Period
7/18/2018	DB Files Delinquent and Deficient Form 10-Q3 for 2018 • Qualified DCP Disclosure
11/29/2018	Digital Brand Fails to File Form 10-K for 2018
12/14/2018	DB Files Delinquent and Deficient Form 10-K for 2018 • Omitted ICFR Disclosure, the same deficiency noted by Corporation Finance on 6/15/2018, and qualified DCP Disclosure
1/14/2019	DB Files Deficient Form 10-Q1 for 2019 • Qualified DCP Disclosure
3/19/2019	DB Files Motion for Summary Disposition • DB claims that its violations were not "egregious" and "due to no fault of Digital Brand"

3/29/2019	Corporation Finance Notifies DB that the 2018-2019 Reports are Deficient
4/23/2019	DB Files a Deficient First Amendment to the Form 10-K for 2018 • Form disclaims liability for ICFR Disclosure and limits the DCP Disclosure to one of five topics
4/24/2019	DB Files a Deficient First Amendment to the Comprehensive Form 10-K • Form disclaims liability for ICFR Disclosure, limits the DCP Disclosure to one of five topics, and omits quarterly information
6/21/2019	Corporation Finance Notifies DB that the First Amendments are Deficient
10/01/2019	DB Files a Second Amendment to the Form 10-K for 2018
10/01/2019	DB Files a Deficient Second Amendment to the Comprehensive Form 10-K • Form omits quarterly information
11/12/2019	Initial Decision

Certificate of Compliance with Rule of Practice 450

The undersigned certifies that, according to the word-counting feature in Microsoft Word software, with which this Memorandum was created, this Memorandum contains 10,704 words, exclusive of pages containing the table of contents, table of authorities, and the addendum. The undersigned further certifies that the addendum consists solely of exhibits submitted to the Law Judge and cited portions of Orders and papers filed in this proceeding.

/s/ Samantha M. Williams
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Certificate of Service

I certify that on February 24, 2021, I emailed this Memorandum, along with the Division's Addendum, to the email address provided by Respondent for purposes of receiving service in this matter as shown below:

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