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-Appellee.

RESPONDENT-APPELLEE'S BRIEF IN OPPOSITION TO ENFORCEMENT'S PETITION FOR REVIEW

MARANDA E. FRITZ PC

335 Madison Avenue,
New York, New York 10017
646 584-8231
maranda@fritzpc.com

Attorney for Digital Brand Media & Marketing

Table of Contents

Table of Authorities

Preliminary Statement

The Division of Enforcement ("DOE") is appealing from the decision of the Administrative Law Judge ("Decision") denying revocation of the registration of Digital Brand Media & Marketing Inc. ("DBMM" or the "Company"), issued in November 2019 after extensive briefing on all of the contentions of DOE. As detailed below, the Law Judge in that ruling properly took into account the particular facts relating to the delinquency, the Company's remedial efforts, and its demonstrated ability to remain current, and applied the *Gateway* factors to conclude that revocation of its registration was not necessary or appropriate for the protection of investors.

DOE, in an overwrought and misleading submission on this appeal, insists that the Law Judge's findings and reasoning should be rejected in favor of DOE's own skewed characterizations of the Company and its conduct. For example, it begins by referring to DBMM as a "chronically delinquent filer" when, in fact, the Company had timely filed for years prior to the circumstances that caused the delinquency, it became current in its filings in May 2018, and it has continued to timely file during the years since. Throughout its filing, DOE ignores the plain facts that were presented by the Company as to the events, substituting its own baseless claims that the Company's delays in filing were deliberate, resorting even to unseemly and unsupported pejorative language and injecting invectives, calling the Company "recalcitrant," "begrudging" and "dilatory." DOE Appellate Brief ("DOE Br.") at 23-26.

DOE also, in a misguided effort to draw parallels between this case and prior decisions of the Commission, injects in circular and remarkably repetitive fashion claimed deficiencies in the Company's disclosures relating to its internal controls, both of which have been remedied. Again, as discussed below, DOE rejects the explanations concerning those disclosures, and the fact that

they were amended by the Company, and instead constructs from nothing a nonsensical assertion that the Company's conduct was deliberate.

In the end, the salient aspects of this appeal are clear: while the Law Judge considered the actual evidence and rendered a decision that properly takes into account the unique circumstances of this case, DOE continues to insist that its version of events should have been accepted. Its strident tone and unsupported accusations reflect an unfitting antagonism toward the Company and suggest that DOE is determined to prevail in this action *not* because of, but in spite of, the reasons for the delinquency, the steps taken to remedy it, or the damage that would be done to shareholders through the revocation of the Company's registration. There is no proper purpose served by DOE's derisive and inaccurate assertions; in fact, this Company has consistently sought to comply with its reporting obligations and its failures stem, in large part, from the unusual circumstance of having to reaudit years of its filings.

More importantly, the Law Judge was correct: the law is not as harsh and inflexible as DOE is, and this particular case presented circumstances that more than supported the Decision to deny revocation. The result sought by DOE, on the other hand, does *not* serve to protect existing or prospective investors of the Company; in fact, DOE admits as much in its assertion that the Law Judge should have ordered revocation as a "deterrence," using DBMM as some kind of example and publicly penalizing it. DOE Br. at 32. But no aspect of DBMM's conduct justifies such a punitive result. To the contrary, DBMM has taken the steps that are appropriate, has succeeded in remedying its failures even as it also had to grapple with this proceeding, and no constructive message would be communicated to start-up and emerging companies and their investors from revocation of its registration.

BACKGROUND

A. The Company

DBMM is an active and operating management consultancy that provides for its clients an analysis and enhancement of its internet presence and social media activity to increase its clients' return on their investment in digital marketing. DOE Addendum ("DOE Add.") at 42: Transcript of August 9, 2017 Hearing ("Tr.") at 76, 144-46. It maintains a growing roster of corporate clients for which it provides services through its brand, Digital Clarity, and has posted revenues in excess of $400,000 in each of the years 2015 through 2017.[1] DOE Add. At 78: Consolidated 10-K for FYE August 31, 2015 through 2017, attached as Exhibit 1 to Affidavit of Linda Perry, dated June 1, 2018. Its Chief Executive Officer, Linda Perry, has spent decades serving as a Senior Executive in Fortune 500 organizations, first ExxonMobil and Credit Suisse and then as a consultant to Boards of Directors of global companies, and has continuously underscored, in those roles and in relation to DBMM, the critical importance of Corporate Governance and compliance. The Company's managing director, Reggie James, who oversees critical aspects of the acquired operating business, also has substantial credentials and he and his business have received numerous awards and recognition in the industry for their innovative and impactful services. *Id.* at 63 and 14-18.

[1] As reflected in the Decision, the Company reported sales of $417,607 in 2014 and $536,501 in 2018. Dec. at 3. While entirely ignoring the fact that the Company has had substantial revenues in each year, DOE harps on the fact that, like so many developing firms, its filings contain a "going concern" provision. Petition at 7. That the Company still faces those challenges, after having been operating under the shadow of this proceeding for five years, is not surprising; that DOE would try to make use of it is surprising.

More importantly, and as reported by the Company in its Annual Report, the Company also has firm commitments for funding, but that funding becomes available only when this proceeding is finally resolved.

B. The Reason for the Delinquency: The SEC's Disqualification of the Company's Auditor

DBMM had filed its reports in a timely fashion until November 2013, just weeks prior to the submission of its Form 10-K. While DOE fails even to acknowledge the reason for the delinquency, it stemmed from action taken by the SEC in relation to the Company's auditor. For reasons having nothing to do with the company, and just weeks prior to the filing of the Company's 2013 Form 10-K, the SEC barred its auditor from appearing before the Commission and advised the Company that its financial statements for years 2011, 2012 and 2013 would have to be reaudited. Dec. at 4; DOE Add. at 1. Given the timing of that notification, DBMM sought relief from the Commission but that request was denied.

That development would wreak significant financial damage on any smaller reporting company, and could have devastated this Company. DBMM, however, proceeded diligently and recovered, completing the reaudit at substantial expense and filing its periodic reports on time or even early in the years since.

C. The ReAudit, its Ramifications and DOE's Mischaracterization of the Company's Response

In the wake of the disqualification of its auditor, DBMM retained a successor auditor and paid that firm, RBSM, more than $40,000, but did not receive the audit. Dec.at 4; DOE Add. At 42: Tr. 149-150, 165-66. DBMM then, in July 2014, engaged D'Arelli Pruzansky PA as its auditor, and that firm conducted the required re-audit, performing audit services for the 2012, 2013 and 2014 years. *Id*. at. 49, 150-51. It also reviewed the firm's quarterly report through the third

quarter of 2015. The total cost of those re-audit services, including the auditors, accountants and attorneys, exceeded $150,000.00. DOE Add. at 78, 92: Affidavit of Linda Perry.

The re-auditing issue resulted in even more damage for the Company, spawning a litigation that was filed against the company in 2014, specifically predicated on the Company's inability to submit its annual report in the wake of the notification from the SEC regarding its auditor. DOE Add. at 2, 13.[1] With respect to that litigation, DOE offers a strikingly biased recitation of the Company's response and its explanation of those actions, putting forth snippets of testimony out of context in its effort to portray management as lackadaisical regarding its reporting obligations. DOE Br. at 1, 8. The record actually reflects that management was working diligently on the reaudit but was also, at the same time, faced with the urgent threat to the Company from the aggressive actions of a toxic lender. It was because the threat from the lender *was immediate and would have destroyed the Company and all value to the shareholders, before the filings could even be completed*, that management used some of its funds to defend the litigation. DOE Br. at 8. While DOE claims that management thereby "downplayed the seriousness" of its failures to file, the opposite is clear from the record: the Company viewed the filing issues as critical but also understood that the threat posed by the lender was immediate and, if not addressed, would cause irreparable harm to shareholders. DOE Br. at 8.

DOE then claims, contrary to the record, that the Company did not "make its first attempt to cure its violations" until "after an evidentiary hearing." DOE Br. at 1. Here, again, DOE misstates the record. The testimony was clear that the Company worked continuously, in the period after the SEC notified it that it would be required to conduct the reaudit, to accomplish the reaudit and bring the Company current. By definition, it had to begin by obtaining additional

financing since the Company had used significant resources to pay the auditor who was later disqualified. Faced with this formidable task of having to pay ***again*** for audits of the same periods, management diligently sought and ultimately obtained financing to complete that process. In the end, an *additional* $192,000 was raised and spent, over and above that necessary for the re-audit, to cure the delinquency and continue the periodic filings. DOE Add. at 78, 98.

The repercussions of the lengthy and costly re-auditing process, combined with the Company's need to defend the litigation triggered by the re-auditing requirement, continued through the time of the initial hearing in 2017. At the hearing, DBMM's Executive Director, Linda Perry, confirmed the Company's efforts to identify the financing and proceed with the reaudit, and provided an estimate of the additional time it would take *to complete* those efforts. DOE Add. at 42: Tr. 108, 182-84. She confirmed for the Court that she had arranged for funds to pay accountants and auditors, and later advised that the company had engaged Liggett & Webb PA and that work was underway. DOE Add. at 78: Affidavit of Linda Perry dated June 1, 2018 at ¶¶ 6, 9-10. Ms. Perry also advised the Court of the company's intention to settle a pending litigation. *Id.* at 12.

D. DBMM Becomes Current and Has Timely Filed in the Almost Three Years Since

At the evidentiary hearing, Ms. Perry confirmed that financing had been arranged and testified that the Company could cure its delinquency within six months. DOE Add. at 50-54. The Company was then able to raise an additional $190,000.00, almost all of which was charged by auditors to cure the delinquency and continue with the subsequent filings. DOE Add. at 254. Also as represented by Ms. Perry at the hearing, she was able to negotiate a settlement of the pending litigation at an amount significantly lower than that sought by the plaintiff and resolve the litigation

that had contributed to the disruption of its activities. DOE Add. at 78: Affidavit of Linda Perry, dated June 20, 2018 at ¶ 6.

Indicative of the shrill tone of DOE's Petition, it actually claims that the delinquency was *not* cured within the estimated time frame and that this undermines management's credibility. But the discrepancy in timing was not significant enough to warrant that argument: the funding was obtained in October and the reaudit was then completed and reports filed within *seven months*.

In May 2018, Digital Brand filed its Consolidated 10-K for 2015, 2016 and 2017. DOE Add. at 78: Affidavit of Linda Perry, dated June 1, 2018 at ¶6 and Exhibit 1. Digital Brand continued with the filing of its Form 10-Qs for the first, second and third quarter of 2018, filed in June and July 2018. The Form 10-K for FYE August 31, 2018 was filed on December 14, 2018, followed by the Form 10-Q for the first quarter of the present fiscal year, filed on January 14, 2019. DOE Add. at 110.

Since then, the Company has filed its quarterly reports for the second and third quarters of 2019, its Form 10-K for 2019, its quarterly reports for 2020, its Form 10-K for 2020, and its first quarterly report for 2021. Its next filing, for the second quarter of 2021, is due on April 15, 2021 and will be filed early or on time.

E. The Claimed Deficiencies

Against this background, DOE spends much of its submission, in circular and repetitive fashion, arguing that three purported "deficiencies" still warrant revocation. First, it argues throughout that the lack of quarterly statements in the consolidated 10-K supports the argument that DBMM has a "high degree of culpability." DOE Br. at 2, 10, 22-23, 24-25. DOE claims also, contrary to the findings of the Law Judge, that the Company's violations continue because the

quarterly information was not included in the consolidated 10-K and certain language relating to internal controls and procedures has not been amended. DOE Br. at 20.

Second (and third), DOE rehashes, time and again in its submission, its complaints concerning language in the Company's disclosures regarding internal controls and the fact that they initially included qualifying language. DOE Br. at 11-14, 19-20, 22-24, 30. With respect to both the ICFR and DCP disclosures, DOE fails to acknowledge that the Company was responding to each of the identified issues *and* was dealing directly with specific individuals in the Division of Corporation Finance ("Corp Fin") in relation to its filings at the same time that, unbeknownst to the Company, DOE was having its "liaison" within Corp Fin identify deficiencies for use by DOE. DOE Add. at 205, 327.

That sequence of events began when the Company, on May 31, 2018, filed its comprehensive Form 10-K for years 2015 through 2017. DOE responded with a submission from Robert Shapiro, a Senior Staff Accountant, objecting to the failure to include quarterly report information and the ICFR disclosure.[2] DOE Add. at 89. Management responded by affidavit dated June 20, 2018, explaining the use of the language in the disclosure and confirming that it was prepared to amend that filing "on a priority basis" if advised that it needed to do so. DOE Add. at 92.

Eight months later, in March 2019, DOE provided a similar declaration from Hilda Garrett, Assistant Chief Accountant, who had never communicated any concerns or identified any "deficiencies" to the Company. DOE Add. at 140. That declaration asserted that the Company's

[2] DOE's labeling of this and other declarations that it submitted as the "Second" through "Fourth" Deficiency Notices is misleading. DOE Br. at 10-13. Those were submissions obtained by DOE to use in the litigation, included assertions regarding the lack of quarterly filings that were not consistent with other guidance and decisions, and were not consistent with the communications that were simultaneously being received from Corp Fin.

filing "fail[ed] to include" the ICFR disclosure. Petition at 10. Ms. Garrett's statement was based on her assertion that explanatory language – the Company's reference to events "outside the Company's control" -- was "not permitted." DOE Br. at 10, 12.

Digital Brand then prepared and filed an amendment to the comprehensive Form 10-K and the 2018 Annual Report. Petition at 12. And, as of April 2019, DBMM received a communication from Lisa Sellars at Corp Fin with respect to its review of the amendment to Form 10-K, filed April 23, 2109 which letter raised a question pertaining to Item 9A and sought amendment of that disclosure. The Company responded, by letter to Ms. Sellars dated May 8, 2019, explaining its review of the effectiveness of controls and procedures and, on May 16, 2019, advised the Law Judge that the Company, on April 23, 2019 and April 24, 2019, filed amended Form 10-Ks to address the SEC's questions and comments. DOE Add. at 205.

Ignoring those cooperative and normal communications that occurred with Corp Fin, DOE once again sought and obtained a different statement from a different Corp Fin representative for use against the Company in this proceeding. In June 2019, DOE submitted a further affidavit from Hilda Garrett, still objecting to the disclosures concerning internal controls and the absence of quarterly information in the comprehensive 10-K. DOE Br. at 13; DOE Add. at 206. Ms. Garrett at that point criticized the disclosure for its failure to reference *all* of five required components. DOE Br. at 13-14.. By letter dated June 28, 2019, the Company advised the Law Judge that its language had not previously been identified as deficient and that the filings would be revised.

DOE also pointed out the Company's reference to a temporary rule, devising a baseless and strained argument regarding the error supposedly being intentional. DOE Br. at 13. That is nonsense, of course. Management was not deliberately referencing an outdated rule and, as the

Company advised the Law Judge, the timing of the lapse of the rule appeared unclear and that language was still contained in many company's filings. Letter to Honorable Carol Fox Foelak, dated June 28, 2019. The Company promptly confirmed that the language would not be included in further filings.

The more productive direct communication between the Company and Corp Fin continued: on August 13, 2019, Ms. Sellars responded to the Company's May 2019 letter, providing further guidance to the Company. Letter from Sellars dated August 13, 2019. At that point, the Company promptly responded, through newly retained counsel, attaching proposed language relating to Item 9A. Counsel continued the discussion with Corp Fin and then, on October 2, 2019, amended those filings. By letter to Judge Foelak dated October 3, 2019, confirmed that the Company had finally received confirmation from Corp Fin that the proposed language was acceptable and so had submitted the amended filings. DOE Add. at 327: Letter to Judge Foelak dated October 3, 2019. Notably, a few days later, the Company received a further communication from Corp Fin that it had completed its review of the Form 10-K for the fiscal year ended August 31, 2018; no deficiencies were identified.

It was after receipt and consideration of all of those various submissions, both DOE's arguments as well as the information concerning DOE's failure to acknowledge the Company's responses and its ongoing interactions with Corp Fin, that the Law Judge issued the Decision confirming that deficiencies had been addressed and the issues did not warrant revocation.

F. The Initial Decision

Based on a review of the evidence and the sequence of events following the disqualification of its auditor, the Law Judge held that "the reason for the delay in filings was a lack of funds."

Dec. at 4. In concluding that revocation was not warranted, the Law Judge began with the fundamental proposition that the appropriate sanction "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. Dec. at 6 (*citing Gateway Intl Holdings Inc.,* Exchange Act Release No. 53907, 2006 SEC LEXIS 1288 at *19-20 (May 31, 2006)).

The Law Judge then identified and considered each of the factors discussed in *Gateway*. Dec. at 6-8. The Law Judge first confirmed that the violations were serious and recurrent. Dec. at 6. It then turned to the issue of culpability, and properly weighed the Company's circumstances and decisions, finding that the Company did not fail to file reports in order to conceal its financial condition. Rather, it "devoted its limited resources to what it regarded as more pressing obligations" relating to the pending litigation while also moving forward to remedy the filing violations. As confirmed by the Law Judge, the Company had obtained financing in the past from a lender, Asher Enterprises, and "successfully repaid [its] borrowings" (Dec. at 4) until it was sued by the lender based on the failure to timely file a 10K that resulted from the SEC's actions against the firm's auditor. As confirmed by the Law Judge, because of the immediate threat posed by the Asher litigation, management used funds to deal with that situation because she "believed that to be in the best interests of Digital Brand's shareholders." Dec. at 5.

The Law Judge then considered the third *Gateway* factor: the extent of the issuer's efforts to remedy its past violations and ensure future compliance." The Law Judge found that the Company 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 reporting obligations." Dec. at 7. The Law Judge also confirmed that the Company expended

more than $100,000 in relation to the re-audits, and filed its Comprehensive 10K in May 2018. Further, "since filing the overdue reports from the period of delinquency, Digital Brands has filed periodic reports timely." Dec. at 5. Those circumstances, the Law Judge found, distinguished the case from ones in which "the Commission has determined that revocation was necessary or appropriate." Dec. at 7.

The Law Judge also fully considered all of DOE's arguments concerning deficiencies in the Company's filings. Dec. at 2 (DOE relied on "the period of delinquency," asserted deficiencies in the filed reports, and the Company's prioritization of "other matters over timely filings in using its limited resources"). With respect to DOE's continuing assertion that the consolidated 10-K was deficient because it did not include quarterly reports, the Law Judge concluded that such information, relating to quarters years earlier, would provide "limited benefit to investors and the public" and did not "make revocation in the public interest." Dec.at 7-8. Having received and reviewed all of DOE's assertions pertaining to other asserted deficiencies, the Law Judge properly concluded that the deficiencies were "cured with the filing of amended Forms 10-K of the Super 10-K and the 2018 Form 10-K on October 1, 2019." Dec. at 5. Under all of the specific circumstances of this particular case, the Law Judge therefore concluded that neither revocation nor suspension are "necessary or appropriate for the protection of investors." Dec. at 8.

THE PURPORTED QUESTION PRESENTED

Because DOE injects into its question presented so many statements that are contrary to the record, the Commission should disregard that iteration of the issue. By way of example. DOE falsely states that the Company did not attempt to address its delinquency "until almost a year after" proceedings were instituted; "refused to follow" Corporation Finance's guidance; filed amended reports that were "misleading;" and "did not explain" the violations. DOE Br. at 3.

The question is more properly articulated as follows: whether revocation is the appropriate sanction where the Company's delinquency resulted from the unique circumstance of unrelated SEC action against the auditor; where the Company then took diligent and successful steps to bring itself current; where the Company is not a shell but is instead an operating firm with revenues, supportive shareholders and funding commitments; and where the Company has timely filed its periodic and annual reports for approximately three years.

ARGUMENT

THE DECISION OF THE LAW JUDGE DENYING REVOCATION IS CONSISTENT WITH DECISIONAL AUTHORITY, SUPPORTED BY THE RECORD, AND SHOULD BE AFFIRMED

The factors pertaining to the issue of revocation are well known to the Commission and were properly identified and considered by the Law Judge. Consideration of those factors supports the Law Judge's conclusion that revocation is not "necessary and appropriate" for the protection of investors.

A. The Reason for the Delinquency

Here, the delinquencies stemmed from a specific and unusual circumstance: the disqualification of its auditor on the eve of the Company's filing of its 2013 Form 10-K. For years, the company had submitted its filings in a timely fashion, until November 2013. It was advised at that point that its auditor had been barred from appearing before the SEC and so its Form 10-K, which was only weeks away from being filed, had to be redone as did its filings for 2011 and 2012. As the Law Judge found, the Company explained the reasons for the delinquency, including "the need to devote resources to re-audit due to the disqualification of its original auditor" as well as "litigation with its creditor" which *also* stemmed from the SEC's disqualification of the auditor. Dec. at 7.

Thus, unlike other instances in which companies simply failed to file or "ignored" filing requirements, Digital Brand's failure to file involves no misconduct, culpability, deliberate indifference to filing requirements, or even negligence. In *Absolute Potential*, Exchange Act Release No. 71866, 2014 WL 1338256 (Apr. 4, 2014), for example, revocation was predicated not just on a failure to file but on a confluence of additional factors, *e.g.,* the company had failed to

file reports for five years, it was a shell with *no revenue* with which to accomplish future compliance, it provided only an "unilluminating" and "unpersuasive" explanation for its failure to satisfy its filing obligations. The Commission, in reaching its decision regarding revocation, specifically cited Absolute's "protracted delinquencies, unpersuasive explanations for those delinquencies and the absence of concrete remedial changes to ensure compliance," pointing out that revocation may be warranted in relation to those registrants who ignore their filing obligations and try to "game the system." *Id*. at * 26 ("we recently stated that 'even if an issuer has filed all delinquent periodic reports, revocation can be appropriate, particularly when … the delinquencies continued for an extended period *without adequate explanation*.") (emphasis added).

The Commission in *Absolute Potential* also distinguished the results in *Phlo Corp.,* Exchange Act Release No. 55562, 2007 WL 137145 (Jan. 21 2009), and in *e-Smart Technologies*, Release No. 50514 2004 WL 2309336 (Oct. 12, 2004), in which the Commission declined to revoke the company's securities. In *Phlo*, "the issuer – unlike Absolute – pointed to specific internal accounting failures that led to its violations." Further, "the Company made extensive and successful efforts to remedy the internal accounting failures that led to its violations, became current in its reporting obligations while the disciplinary proceeding was pending, and expended significant resources in so doing." *Id*. The circumstances of *e-Smart*, the Commission in *Absolute Potential* continued, were also distinguishable: there, management had retained new counsel, explained the filing delinquencies and was able to bring and keep the Company current.

Notwithstanding those clear distinctions, DOE has insisted that Digital Brand cannot "overcome" the decision in *Absolute Potential* that revocation is still required "as a deterrent to others." DOE Br. at 32 and DOE Brief in Response to Digital Brand's Submission at 3. In fact,

according to DOE, the Law Judge erred in failing to impose revocation as a "deterrent," even where it was not otherwise warranted and would harm investors. DOE Br. at 32. That assertion, that a Company under these circumstances should be sanctioned so harshly in order to send a message to others, is wrong; the revocation of this Company's registration would not send a productive message to issues that have experienced challenges but seek to comply with regulatory requirements.

The DOE also, remarkably, fails even to acknowledge that the re-audit requirement, which cost the Company more than $150,000.00, was a factor in the delinquency. Instead, DOE tries to turn that circumstance on its head, declaring that the reason for the delinquency was the Company's "inability to pay its auditor" and asserting that it constitutes an "aggravating" factor. DOE Br. at 18. DOE then seeks to portray the litigation issue faced by the Company as another "aggravating" circumstance, still refusing to acknowledge that the lawsuit was based on the Companys inability to file *resulting from* the auditor disqualification. Dec. at 18-19. The reality, acknowledged by the Law Judge, is clear: but for the SEC's disqualification of the Company's auditor, the Company would have remained – as it was before – compliant with all of its reporting obligations.

B. The Degree of Culpability

While claiming that the Law Judge "misapplied" the standard for culpability, DOE's Petition makes clear that it simply disagrees with the Law Judge's analysis and conclusions concerning the Company's actions. The Law Judge found that the Company explained the reasons for its failures, and then took into account all of those events. The Law Judge considered the Company's circumstances, in the wake of the SEC's disqualification of its auditor, and the fact that management took steps that it understood were critical for the shareholders.

As confirmed by the Law Judge, that circumstance distinguishes this case from those relied upon by DOE in which issuers failed to explain the failure to file or were otherwise indifferent to their obligations. The decision in *Calais Res. Inc.,* Exchange Act Release No. 67312, 2012 WL 2499349 (June 29, 2012), also illustrates that the Commission looks carefully at the specific circumstances of each case in deciding whether revocation is warranted. There, the Company failed to file reports for six years and provided "no excuses for its failures to timely file periodic reports." *Id.* at 14. Based on that protracted and unexplained failure to file, the Commission concluded that the issuer acted with a "high degree of culpability." The Commission also found that the issuer had not, and apparently could not, file audited reports for certain periods of its operation and was continuing to fail to timely file its quarterly reports, "further undermining the credibility of its assurances against future violations." *Id.* at 29.[3]

[3] *See also Advanced Life Sciences Holdings Inc.,* Exchange Act Release No. 81253, 2017 WL 3214455 (July 28, 2017) (revocation order affirmed where company failed to file for six years, never filed reports for delinquent periods, was "indifferent" to its obligations, was not providing current and accurate information to shareholders as of the time of the Commission's consideration, and its assurances of future compliance were not consistent with its conduct and were not credible); *America's Sports Voice Inc.,* Exchange Act Release No. 55511, 2007 WL 3214455 (March 22, 2017) (revocation order affirmed where company failed to file for more than six years, company had no business operations, no revenue and no evidence of resources or wherewithal to file, and it was not providing accurate and current information to shareholders as of the time of the Commission's consideration); *China-Biotics Inc.,* Exchange Act Release No. 70800, 2013 WL 11270156 (Nov. 4, 2013) (revocation order affirmed where company failed to file in the midst of auditor identifying matters of "grave concern" and resigning, company was under investigation and delisted, board members resigned, company did not make needed amendments, and provided no adequate explanation for delinquencies); *American Stellar Energy*, Exchange Act Release No. 64897 (July 18, 2011) (revocation order affirmed where company failed to file between 2002 and 2011, company made assurances that it would become current but failed to do so, and investors were still deprived of current and accurate information as of the time of the Commission's consideration); *Nature's Sunshine Products*, Exchange Act Release No.59268 (Jan. 21, 2009) (revocation ordered where company failed to file from 2004 through the proceeding in 2007 and had advised that reports from 2002 could not be relied on, where it was engaged in an internal investigation that reported "internal control weaknesses" and "potential violations of law," its auditor resigned because of "likely illegal acts" which appeared to have a material impact on the Company's financial statements, and had not become current and in compliance as of the time of the Commission's consideration, leaving existing and potential shareholders without complete and accurate information).

DOE'S strident insistence that the Company's failure to file was deliberate or willful is yet another example of its failure to acknowledge the impact of the auditor disqualification and the need to act in the best interest of the shareholders. That management was able to address the issues facing the Company, dealing with the litigation while also raising the funds necessary to accomplish the reaudit and keep the Company current, all while having to deal with this proceeding and its impact on the Company's ability to grow its business, speaks well of the Company's resilience and determination to become and remain compliant, under even adverse conditions.

C. The Company's Successful Remedial Efforts

Critical here is the Company's determined and successful efforts to return to compliance. This factor, along with the reason in this case for the delinquency, render this case markedly different from any decision in which revocation has been ordered. Consideration of the circumstances that underlie these other Commission decisions confirms that unexplained failures to file, an indifference to reporting obligations, and a company's failure to and apparent inability to remedy its reporting violations have all been critical factors in the Commission's decision to revoke an issuer's registration. Here, none of those circumstances exist: this Company complied with its reporting obligations for years, until it was confronted with the disqualification of its auditor and that, even then, it worked continuously and diligently to resolve those issues and return to compliance.

The decision in *Phlo* illustrates the Commission's consideration of the critical issue of whether the Company has brought itself into compliance such that existing and prospective investors have access to current information. In that proceeding, the Commission declined to revoke the issuer's registration because the Company "continues to function as an issuer" and "has

now devoted considerable resources to satisfying its reporting obligations and has become current with respect to its periodic filing obligations." *Id.* at 23, 27-28. *See also e-Smart Technologies,* Release No. 50514 (Oct. 12, 2004) & 2005 WL 274086 (Feb. 2, 2005) (Commission remanded matter for reconsideration of sanction because company had become current and "the investing public now has access to current, audited financial information," and its filing of its annual and quarterly reports "is an important factor to be considered in determining whether revocation is 'necessary and appropriate for the protection of investors"); *In the Matter of Cal Can,* Release No, 6393 (Dec.10.2018) & Release No. 6486 (March 6, 2019) (where a registrant is current in its filings, revocation may not constitute an appropriate result).

D. DBMM Assured the Court that It Would Remediate its Delinquency, it Did So, and it Has Demonstrated the Credibility of its Assurances.

The company's remediation efforts, and the availability of updated audited financial information, are principal among the factors that the court should consider. *Gateway Int'l Holdings*, Exchange Act Release No. 53907, 2006 WL 15066286 at *26 (May 31, 2006) (Commission should consider "the issuer's effort to remedy its past violations and ensure future compliance and the credibility of its assurances, if any, against future violations"). In fact, DOE can point to no instance in which an operating entity was required by the SEC to re-audit years of its filings, and still managed to ensure that its filings were current as of the date when the issue of revocation was presented to the Commission.

Although the Company has now been able to identify and obtain resources necessary to complete the re-audit, bring the Company current, and continue its timely filings, DOE resorts to groundless and *ad hominem* attacks on the Company and its management. DOE Br. at 25-28. It *once again* rejects the Law Judge's analysis and conclusion that the Company explained the

reasons for the reporting violations and demonstrated that it had taken effective measures to ensure timely filing. The Company undertook and successfully completed the re-audit, while also addressing and resolving the litigation. Having resolved those issues, the Company then ensured, for three years, the timely filing of its periodic reports. Its assurances are more than credible; they have been borne out by years of filings.

E. The Law Judge Properly Held that Alleged Deficiencies, Each of Which was Addressed by the Company, Did Not Justify Revocation

DOE communicated its complaints concerning the consolidated 10-K at high volume to the Law Judge in this case. The Law Judge specifically addressed that argument, finding that the lack of quarterly information did not support revocation. Dec. at 5, 7. The Law Judge certainly considered DOE's position; DOE simply refuses to accept the Law Judge's assessment of DOE's claims. The Law Judge's conclusion is also consistent with other decisions in which DOE has made the same argument. As reflected in those decisions, the Division of Corporate Finance, in August 2015, revised its provision relating to the filing of comprehensive annual reports by a delinquent issuer. Division of Corporate Finance *Financial Reporting Manual* at §1320.4. *See Can-Cal*, Release No. 6525 at 9 and n. 48 (where DOE argued that issuer was still delinquent, after filing of comprehensive Form 10-k, in relation to its quarterly filings, held that "the filing of a 10-K containing the material information that would have been in the 10-Qs does not absolve the registrant of liability but is sufficient for the purposes of becoming current").

The other claimed deficiencies were, again, not the result of any indifference or failure to seek to comply with reporting obligations. Those issues, when raised by DOE in this proceeding, were explained and addressed by the Company, and remedied through amended filings.

F. The Decision of the Law Judge that Revocation is Not Necessary and Appropriate Under the Circumstances of This Case Should be Affirmed

Here, the registrant has successfully weathered and overcome the substantial hurdles presented by the unexpected and unusual requirement that it re-audit its filings. It has ensured that it has fulfilled the critical purposes of Section 13: *its investors are in receipt of accurate and timely information*. It has provided an explanation for its prior failures to file and has honored its commitment to bring the Company into compliance. It has funding commitments, reflected in its audited filings, but those funders have waited to ensure that the Company does not have its registration revoked by the Commission. The Company has the present ability to move forward to continue to grow its business for the benefit of its shareholders and asks that the Commission affirm the decision of the Law Judge denying revocation of its registration.

CONCLUSION

For the foregoing reasons, the Company submits that revocation of its registration is not necessary and appropriate for the protection of investors, and that the denial of revocation should be affirmed.

Dated: March 26, 2021

Respectfully Submitted,

*/s/Maranda Fritz*_____

Maranda E. Fritz
Maranda E. Fritz PC
335 Madison Avenue
New York, New York 10017
(646) 584-8231

Certificate of Compliance with Rule of Practice 450

The undersigned certifies that, according to Microsoft Word, this Memorandum contains 6736 words.

/s/Maranda Fritz
Maranda E. Fritz
Maranda E. Fritz PC
335 Madison Avenue
New York, New York 10017
(646) 584-8231

Certificate of Service

I certify that, on March 26, 2021, I emailed this Memorandum and Addendum to the email addresses provided by the Division for purpose of receiving service in this matter, i.e., bednart@sec.gov and williamssam@sec.gov.

*/s/Maranda Fritz*_____
Maranda E. Fritz
Maranda E. Fritz PC
335 Madison Avenue
New York, New York 10017
(646) 584-8231