UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20847

In the Matter of

Advanzeon Solutions, Inc.,

Respondent.

DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AGAINST ADVANZEON SOLUTIONS, INC.

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INTRODUCTION

The Division of Enforcement ("Division"), pursuant to Rules 154 and 250 of the Commission's Rules of Practice, respectfully moves for an order of summary disposition against respondent Advanzeon Solutions, Inc. (hereinafter "Advanzeon") on the grounds that there is no genuine issue with regard to any material fact and that pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), the Division is entitled to an order revoking each class of securities of Advanzeon registered pursuant to Exchange Act Section 12, as a matter of law.

BRIEF IN SUPPORT

The facts of Advanzeon's long-running delinquencies in its filing of periodic reports warrant revocation based on Commission precedent. *See Gateway Int'l Holdings*, Inc., Exchange Act Release No. 53907, 2006 WL 1506286 (May 31, 2006) (hereinafter "*Gateway*"); *Impax Lab'ys, Inc.*, Exchange Act Release No. 57864, 2008 WL 2167956 (May 23, 2008). Nothing in its record supports remedies more lenient than revocation in light of Advanzeon's disregard for the requirements for filing timely periodic reports.

Advanzeon admits it has not filed any required periodic reports since its Form 10-Q for the period ended September 30, 2020 (filed nearly a year after it was due). (Respondent's Answer and Defenses to Order Instituting Proceedings and Notice of Hearing ("Answer"), at 5). But the issuer offers only excuses for its delinquencies and repeated promises that it intends to become current "as soon as possible." (Answer, at 4). Advanzeon does not provide any timeframe for becoming compliant, or evidence that its dire financial problems have improved, or that its search for a "new accounting firm to prepare and finalize" its periodic reports has proved fruitful. Good intentions are simply

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not enough to prevent revocation.

I. Statement of Facts[1]

Advanzeon (CIK No. 0000022872) (stock symbol: "CHCR"), previously known as Comprehensive Care Corporation, is a Delaware corporation located in Tampa, Florida, with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). (Order Instituting Proceedings ("OIP"), ¶ II.A.1; Excerpted Form 10-K for the fiscal year ended May 31, 2001, filed with the Commission on August 24, 2001 by Advanzeon, attached as Exhibit 4 to the Declaration of Paul Hopker in Support of Division's Motion for Summary Disposition ("Hopker Decl."); Printout from Delaware Secretary of State website showing Advanzeon's corporate registration, Hopker Decl., Ex. 5.).[2]

On March 4, 2022, the Division of Corporation Finance ("Corporation Finance") sent a delinquency letter by certified mail to Advanzeon, addressed to Advanzeon's CEO, Clark Marcus. (Delinquency letter from Corporation Finance to Advanzeon dated March 4, 2022, Hopker Decl., Ex. 6.) The delinquency letter stated that the company appeared

[1] The Division asks that official notice be taken of all information and filings on EDGAR referred to in this brief and/or filed as exhibits with the accompanying Declaration of Paul Hopker. In order to reduce the volume of documents included in this submission, the Division has attached as exhibits excerpted copies of certain voluminous documents with just the cover page and relevant pages included. The Division will provide complete copies of any of these documents if requested by the Commission or by Respondent.

[2] Advanzeon common stock was registered pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange. (Excerpted Form 10-K filed for the fiscal year ended May 31, 1999, filed with the Commission on August 27, 1999 by Advanzeon, Hopker Decl. Ex. 3). On February 5, 1999, Advanzeon filed a Form 8-K stating that the the New York Stock Exchange had notified the issuer that the company's common stock would be delisted from the exchange and, shortly thereafter, CHCR ceased to be quoted or traded until June 1999, when it began being quoted on the Over the Counter Bulletin Board. (Form 8-K filed February 5, 1999, Hopker Decl. 1; printout from finance.yahoo.com showing trading in CHCR for the period February 1, 1999 through June 29, 1999, Hopker Decl. 2). Despite no longer being listed on a national exchange as required to be registered under Section 12(b) of the Exchange Act (*see* Exchange Act Rule 12d2-2) Advanzeon did not correctly reflect its shares were registered under 12(g) of the Exchange Act until its Form 10-K filing for fiscal year 2021. (Hopker Decl. ¶¶ 4, 5; Excerpted Form 10-K for the fiscal year ended May 31, 1999, filed with the Commission on August 27, 1999 by Advanzeon, Hopker Decl. Ex. 3; Hopker Decl. Ex. 4).

to be delinquent in its periodic filings and warned that it could be subject to revocation proceedings without further notice if it did not file its required reports within fifteen days of the date of the letter. *Id.*

Although Corporation Finance mailed the delinquency letter to Advanzeon's listed business address, the letter was returned twice. (Hopker Decl. ¶8). On April 12, 2022, the Division's Senior Counsel, Paul Hopker, emailed the delinquency letter to Advanzeon's counsel, Matt Mueller, who acknowledged receipt on behalf of Advanzeon. (*Id.*; April 14, 2022 Email from Matt Mueller to Corporation Finance, forwarding April 12, 2022 email from John Hopker to Matt Mueller, Hopker Decl., Ex. 7). Mr. Mueller stated that he did not know why the delinquency letter had been returned, and explained that Mr. Marcus was suffering from health issues and was recently hospitalized. *Id.* Mr. Mueller requested that the fifteen-day period provided in the letter – specifically, the period within which Advanzeon must file its outstanding required reports – be computed from April 12. (Hopker Decl., Ex. 7)

As of April 27, 2022, Advanzeon's common stock CHCR was only eligible for unsolicited quotations on OTC Link operated by OTC Markets Group, Inc., had zero market makers, and was not eligible for the "piggyback exception" of the Exchange rule 15c2-11(f)(3) due to its delinquent SEC reporting status. (Hopker Decl. ¶9). A July 12, 2022 printout from otcmarkets.com reflects limited trading volume between December 30, 2021 and May 4, 2022, and drop in share price from 0.0002 per share to 0.0001 per share. (July 12, 2022 Printout from otcmarkets.com for CHCR, Hopker Decl., Ex. 8).

At the time the OIP was instituted on May 6, 2022, Advanzeon was delinquent in its periodic filings with the Commission, having not filed any periodic reports since filing

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a Form 10-Q for the period ended September 30, 2020, which reported a net loss of $3,157,577 for the prior nine months. (OIP, ¶ II.A.1; Printout from internal EDGAR database listing all filings for Advanzeon as of July 12, 2022, Hopker Decl., Ex. 9).

II. Argument

A. Standards Applicable to the Division's Summary Disposition Motion

Rule 250(b) of the Commission's Rules of Practice permits any party to move "for summary disposition on one or more claims or defenses" after the respondent's answer has been filed and documents made available by the Division. 17 C.F.R. §201.250(b). Summary disposition is appropriate if the "undisputed pleaded facts, declarations, affidavits, documentary evidence or facts officially noted . . . show that there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law." *Id. see Michael Puorro*, Initial Decision Release No. 253, 2004 WL 1462250, at *2 (June 28, 2004), citing 17 C.F.R. §201.250(b); *Garcis, U.S.A., Inc.*, Exchange Act Release No. 38495, 1997 WL 186887 (April 10, 1997) (granting motion for summary disposition). "'[N]ot every alleged factual dispute precludes summary disposition. To prevent summary disposition, the opposing party must present facts demonstrating a genuine issue of fact that is material to the charged violation."' *Absolute Potential, Inc.*, Exchange Act Release No. 71866, 2014 WL 1338256, at *5 (April 4. 2014) (quoting *Gately & Assoc., LLC*, Exchange Act Release No. 62656, 2010 WL 3071900, at *7 n.14 (Aug. 5, 2010)); *see also United Development Funding III, LP*, Exchange Act Release No. 89535, 2020 WL 4720528, at *2 (Aug. 12, 2020) (granting motion for summary disposition where respondent failed to "produce

documents, affidavits, or some other evidence to demonstrate that there [is] a genuine and material factual dispute").

The present administrative proceeding was instituted under Section 12(j) of the Exchange Act. Section 12(j) empowers the Commission to either suspend (for a period not exceeding twelve months) or permanently revoke the registration of a class of securities "if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder." Section 12(j), 15 U.S.C. §78*l*(j). It is appropriate to grant summary disposition and revoke a registrant's registration in a Section 12(j) proceeding where, as here, there is no dispute that the registrant has failed to comply with Section 13(a) of the Exchange Act. *See California Service Stations, Inc.,* Initial Decision Release No. 368, 2009 WL 113057 (Jan. 16, 2009); *Ocean Res., Inc*., Initial Decision Release No. 365, 2008 WL 5262370 (Dec. 18, 2008); *Medifirst Solutions, Inc.*, Exchange Act Release No. 94827, 2022 WL 1306540 (April 29, 2022); *AIC Int'l, Inc.,* Initial Decision Release No. 324, 2006 WL 3794352 (Dec. 27, 2006); *Bilogic, Inc.,* Initial Decision Release No. 322, 2006 WL 3253634 (Nov. 9, 2006); *Absolute Potential, Inc.*, 2014 WL 1338256.

B. The Division is Entitled to Summary Disposition Against Advanzeon for Violations of Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 Thereunder

Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act to file periodic and other reports with the Commission. Exchange Act Section 13(a) is a cornerstone of

the Exchange Act, establishing a system of periodically reporting invaluable information about issuers of securities. The Commission has stated:

> Failure to file periodic reports violates a central provision of the Exchange Act. The purpose of the periodic filing requirements is to supply investors with current and accurate financial information about an issuer so that they may make sound decisions. Those requirements are "the primary tool[s] which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities." Proceedings initiated under Exchange Act Section 12(j) are an important remedy to address the problem of publicly traded companies that are delinquent in the filing of their Exchange Act reports, and thereby deprive investors of accurate, complete, and timely information upon which to make informed investment decisions.

Gateway, 2006 WL 1506286, at *6 n.32 (quoting *SEC v. Beisinger Indus. Corp.*, 552 F.2d 15, 18 (1st Cir. 1977)).

"Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act to file periodic and other reports with the Commission. Exchange Act Rule 13a-1 requires issuers to submit annual reports, and Exchange Act Rule 13a-13 requires issuers to submit quarterly reports. No showing of scienter is necessary to establish a violation of Section 13(a) or the rules thereunder." *St. George Metals, Inc.*, Initial Decision Release No. 298, 2005 WL 2397240, at *3 (Sept. 29, 2005); *accord Gateway*, 2006 WL 1506286, at *4, *5 n.28; *Stansbury Holdings Corp.*, Initial Decision Release No. 232, 2003 WL 21640201, at *5 (July 14, 2003); *WSF Corp.*, Initial Decision Release No. 204, 2002 WL 917293, at *6 (May 8, 2002).

It is wholly appropriate to revoke Advanzeon's registration on a motion for summary disposition where, as here, the Section 12 issuer has failed to comply with Section 13(a). *See Chemfix Techs., Inc.*, Initial Decision Release No. 378, 2009 WL 1684741 (May 15, 2009); *AIC Int'l, Inc.*, Initial Decision Release No. 324, 2006 WL

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3794352 (Dec. 27, 2006) (summary disposition granted in Section 12(j) action); *Bilogic, Inc.*, 2006 WL 3253634 (same); *Investco, Inc.*, Initial Decision Release No. 240, 2003 WL 22767599 (Nov. 24, 2003) (same); *Nano World Projects Corp.*, Initial Decision Release No. 228, 2003 WL 26519856 (May 20, 2003) (Division's motion for summary disposition in Section 12(j) action granted where certifications on filings and respondent's admission established failure to file annual or quarterly reports); *Hamilton Bancorp, Inc.,* Initial Decision Release No. 223, 2003 WL 402821 (Feb. 24, 2003) (summary disposition granted in Section 12(j) action).

There is no dispute that Advanzeon has not filed its required periodic reports since its Form 10-Q for the period ended September 30, 2020. Indeed, Advanzeon agrees that this proceeding can be resolved by Motion for Summary Disposition.[3] Thus, there is no genuine issue with regard to any material fact as Advanzeon's violations of Exchange Act Section 13(a) and the rules thereunder, and the Division is entitled to summary disposition as a matter of law.

C. Revocation is the Appropriate Sanction for Advanzeon's Violations of Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 Thereunder

Exchange Act Section 12(j) provides that the Commission may revoke or suspend a registration of a class of an issuer's securities where it is "necessary or appropriate for the protection of investors." The Commission's determination of which sanction is appropriate "turns on the effect on the investing public, including both current and prospective investors, of the issuer's violations, on the one hand, and the Section 12(j)

[3] During its prehearing conference on this matter, counsel for the Division and Advanzeon agreed that this proceeding can be resolved by Motion for Summary Disposition, and set forth a briefing schedule. See Parties' Joint Statement Regarding Prehearing Conference dated June 17, 2022. On June 29, 2022, a Scheduling Order was issued adopting the proposed briefing schedule, and ordering Respondent to state in its with particularity the material factual issues in dispute. June 29, 2022 Scheduling Order.

sanctions on the other hand." *Gateway,* 2006 WL 1506286, at *4. In making this determination, the Commission has said it will consider, among other things: (1) the seriousness of the issuer's violations; (2) the isolated or recurrent nature of the violations; (3) the degree of culpability involved; (4) the extent of the issuer's efforts to remedy its past violations and ensure future compliance; and (5) the credibility of the issuer's assurances, if any, against future violations. *Id*.; *see also Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) (setting forth the public interest factors that informed the Commission's *Gateway* decision). Although no one factor is controlling, *see Stansbury*, 2003 WL 21640201, at *5; *WSF Corp.*, 2002 WL 917293, at *2, the Commission has stated that it views the "recurrent failure to file periodic reports as so serious that only a strongly compelling showing with respect to the other factors we consider would justify a lesser sanction than revocation." *Impax Lab'ys., Inc.*, 2008 WL 2167956, at *8; *see also Medifirst Solutions, Inc.*, 2022 WL 1306540, at *3 n.18.

The five *Gateway* factors and undisputed evidence in this case strongly supports revocation of Advanzeon's registration.

1. Advanzeon's continued Section 13(a) violations are serious.

As established by the record in this proceeding, Advanzeon is delinquent in two years of its yearly and quarterly periodic filings. Given the central importance of the reporting requirements imposed by Section 13(a) and the rules thereunder, violations of these provisions of similar and less duration have been found to be egregious. *See Bilogic, Inc.,* 2006 WL 3253634, at *3-4 (failure to file periodic reports for more than three years); *WSF Corp.*, 2002 WL 917293, at *6 (respondent failed to file periodic reports over two-year period); *Freedom Golf Corp.*, Initial Decision Release No. 227,

2003 WL 21106567, at *2 (May 15, 2003) (respondent's failure to file periodic reports for less than one year was egregious violation).

2. Advanzeon's violations of Section 13(a) are recurrent and continuous.

Advanzeon's violations are not unique and singular, but continuous. The issuer has failed to file any of its consecutive periodic reports, quarter after quarter, year after year, since its September 30, 2020 Form 10-Q, and *that* filing was a year delinquent. (OIP, ¶ II.A.1). Throughout this continuing period of delinquency, Advanzeon failed to file even one Form 12b-25 seeking an extension to make its periodic filings. (Hopker Decl. ¶11, Ex. 9). *See Investco, Inc.*, 2003 WL 22767599, at *3 (delinquent issuer's actions were found to be egregious and recurrent where there was no evidence that any extension to make the filings was sought). The continuous nature of Advanzeon's violations of Exchange Act Section 13 further support the sanction of revocation here.

3. Advanzeon's degree of culpability supports revocation.

In *Gateway*, the Commission stated that, in determining the appropriate sanction in connection with an Exchange Act Section 12(j) proceeding, one of the factors it will consider is "the degree of culpability involved." The Commission found that the delinquent issuer in *Gateway* "evidenced a high degree of culpability," because it "knew of its reporting obligations, yet failed to file" seven periodic reports and only filed two Forms 12b-25. *Gateway*, 2006 WL 1506286, at *5.

Advanzeon admits in its answer that it has not filed any required periodic filing since its Form 10-Q for the period ended September 30, 2020. (Answer, at 5). While Advanzeon denies that it "failed to heed a delinquency letter" (*Id.*), it is undisputed that the issuer did not become current, despite requesting additional time for the computation

of the 15-day period within which to become current. (Hopker Decl.¶ 8, Exs. 6, 7).

Instead, Advanzeon raises a litany of excuses in its Answer's "Introduction" as to why it has been unable to become current in its filings: (1) the COVID-19 pandemic negatively impacted a sleep apnea program developed through its wholly-owned subsidiary because it affected the Company's primary revenue stream – interstate truck drivers holding commercial driver's licenses; (2) the Department of Labor ("DOL") granted a moratorium on its requirement that truck drivers needed to appear for bi-annual medical exams (that presumably included the sleep apnea test); (3) many of the clinics Advanzeon contracted with closed; (4) Advanzeon was forced to file a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, and (5) the SEC and other creditors oppose the proposed reorganization plan; and (6) the SEC has filed a motion to appoint a Trustee and convert the case to a Chapter 7 bankruptcy. (Answer, 3-4). Pointing to these events, Advanzeon argues that it "never intended to avoid filing" but has been unable to do so, explaining that the company "needs to seek a new accounting firm to prepare and finalize" the delinquent periodic reports, that it has had "issues with prior accounting firms," and experienced a decrease in revenue and staff. (Answer, 4).

As an initial matter, Advanzeon's broad assertions of financial difficulties due to, among other things, the COVID-19 pandemic and a DOL moratorium on requiring medical exams for truck drivers is disingenuous. According to its Form 10-K/A for the year ended December 31, 2019, Advanzeon was not profitable even before the start of the pandemic, having generated only $300,000 in revenues and incurred a loss of about $3.2 million. (Hopker Decl. ¶ 12; Excerpted Form 10-K/ for the fiscal year ended December 31, 2019, filed with the Commission on July 29, 2020 by Advanzeon, Hopker Decl. 10).

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And contrary to its claim that a DOL moratorium affected the company's income stream by granting a medical exam moratorium on commercial license drivers (Answer, at 3), drivers have been required to obtain medical exams throughout the pandemic; the waiver simply provided for holders of *newly expired licenses* several additional months to fulfill requirements. (*See* True copy of February 16, 2021 Waiver in Response to the COVID-19 National Emergency – For States, CDL Holders, CLP Holders and Interstate Drivers Operating Commercial Motor Vehicles, Hopker Decl., Ex. 11).

But even accepting Advanzeon's unsupported claims as true, these financial difficulties and circumstances do not obviate Advanzeon's regulatory obligation to file its required periodic financial reports. The periodic filing requirement is a "central" provision of the Exchange Act and necessary to provide investors with financial and other information so that they may make sound investment decisions. *Gateway,* 2006 WL 1506286, at *6 n.32 (quoting *SEC v. Beisinger Indus. Corp.*, 552 F.2d 15, 18 (1st Cir. 1977)). It is clear that Advanzeon was aware of its delinquencies, and did not bother to file a single Form 12b-25.

4. Advanzeon has demonstrated no efforts to remedy its past violations and ensure future compliance.

Advanzeon claims in its Answer that it "continues to make substantial progress toward the goal of bringing Respondent's filings current" (Answer, at 4), yet over three months after it received the delinquency letter providing it with a 15-day period to become current, Advanzeon has not cured a single delinquency. Rather than demonstrating it has done anything to actually cure its delinquencies, Advanzeon instead offers excuses and promises it will file its Form 10-K "promptly" and other outstanding

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reports "as soon as possible." (Answer, at 4). Even if true, making efforts to bring delinquent filings current does not raise an issue of fact sufficient to preclude revocation.

In circumstances analogous to the instant case, the Division sought summary disposition in a Section 12(j) proceeding where there was no dispute that the respondent was delinquent in its periodic filings. See *Bilogic, Inc.*, 2006 WL 3253634, at *3. Like Advanzeon in the present case, the respondent in *Bilogic* argued that it was making efforts to bring its filings current and made assurances that it would comply in the future. In *Bilogic*, the Court found, however, that there was no genuine dispute of any fact material to the application of the Gateway factors and, accordingly, an order revoking the respondent's registrations was appropriate as a matter of law. *Id.* The same analysis applies here, and Advanzeon's registration should be revoked.

5. Advanzeon's assurances against future violations are not credible and do not ensure future compliance.

Advanzeon has a poor record of compliance, refuses to accept responsibility for its delinquency and, importantly, does not provide any comfort that it will comply in the future.

The undisputed facts show that Advanzeon is not likely to become current. In its Form 10-Q for the period ending September 30, 2020, Advanzeon reported a loss of $3,157,577. (OIP II.A.1). Advanzeon's stock has no market makers and is eligible only for unsolicited quotations on OTC Link operated by OTC Markets Group, Inc. (Hopker Decl. ¶ 9). Advanzeon is not eligible for the "piggyback exception" of the Exchange rule 15c2-11(f)(3) due to its delinquent SEC reporting status. (*Id*., and Ex. 8). Between December 30, 2021 and May 4, 2022, there was limited trading of its shares, and a drop in share price from 0.0002 per share to 0.0001 per share. (Hopker Decl., Ex. 8).

Advanzeon has also filed for relief under Chapter 11 of the Bankruptcy Code on September 7 2020. *In re Advanzeon Solutions, Inc.*, Case No. 8-20-bk-06764-MGW (M.D. Fla.).[4] Based on this record, any assurance that Advanzeon will become current soon are simply not credible and should be disregarded.

* * *

Advanzeon's continued and multiplying violations of Section 13(a) and the rules thereunder raise an inference it will engage in future violations. Indeed, the likelihood of future violations can be inferred from a single past violation, including the very violation that led to the enforcement action. *See KPMG Peat Marwick LLP*, Exchange Act Release No. 44050, Accounting and Auditing Enforcement Act Release No. 1374, 2001 WL 223378, at *6 (Mar. 8, 2001) (some risk of future violation "need not be very great to warrant issuing a cease-and-desist order and that in the ordinary case and absent evidence to the contrary, a finding of past violation raises a sufficient risk of future violation.").

Moreover, the undisputed facts in this case more than satisfy the *Gateway* factors and establishes that revocation is the correct remedy. The remedy of revocation will not be overly harmful to Advanzeon's business operations, finances, or shareholders. Such a remedy will not cause Advanzeon to cease being whatever it was before the sanction, but will instead ensure that until the company becomes current on past filings, their shares cannot trade publicly on the open market (but may be traded privately). *See Eagletech Commc'ns., Inc.*, Exchange Act Release No. 54095, 2006 WL 1835958, at *3 (July 5, 2006) (revocation would lessen, but not eliminate, shareholders' ability to transfer their securities).

[4] As further discussed in Section II.D.1 below, the SEC has filed objections to Advanzeon's disclosure statement to its Plan of Reorganization and moved to appoint a Chapter 11 Trustee or convert to a case under Chapter 7, raising concerns about the integrity of management and misuse of funds.

D. Advanzeon's Affirmative Defenses Are without Merit and Should Not Prevent Summary Disposition and Revocation of Registration

Since it cannot deny that it is delinquent in its reporting obligations, Advanzeon instead raises four defenses to revocation, the specific relief sought in this proceeding, specifically, that: (1) the Division's claims are barred under the doctrine of estoppel based upon the Commission's participation in Advanzeon's bankruptcy proceeding; (2) the claims for relief are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law"; (3) the claims are barred because of an unconstitutional delegation of legislative power by Congress to the Commission; and (4) the statute of limitations and/or the doctrine of laches. These defenses are without merit, and they do not raise a genuine issue of material fact to prevent summary disposition and revocation.

1. The Commission's Section 12(j) action is not barred by the equitable estoppel defense.

Advanzeon argues that the Division's claims are barred "in whole or in part by the doctrine of estoppel because Respondent's ability to file timely reports has been hindered in part by the Commission's role as an adversary in the bankruptcy litigation" discussed in Advanzeon's Introduction to its Answer. Answer, at 6-7. Advanzeon's argument is specious and unsupported by either the facts or law governing the estoppel doctrine.

Courts have long held that the federal government is cannot be estopped on the same grounds as private litigants, and some courts have rejected the equitable estoppel defense in SEC enforcement actions. *See, e.g., SEC v. Keating*, No. CV 91–6785 (SVW), 1992 WL 207918, at *3 (C.D. Cal. July 23, 1992) ("In the context of a civil enforcement action by the SEC, courts have flatly rejected the estoppel defense for the reason that the Commission may not waive the requirements of an act of Congress nor may the doctrine

of estoppel be invoked against the Commission."). If the estoppel defense has any viability to claims brought by the federal government, it is "only in the most extreme circumstances." *Dantran, Inc. v. U.S. Dept. of Labor*, 171 F.3d 58, 66 (1st Cir. 1999). At the very least, "the defendant must prove that the government's conduct was egregious and that the resulting prejudice to the defendant was of a constitutional magnitude." *SEC v. McCaskey*, 56 F. Supp. 2d 323, 326 (S.D.N.Y. 1999); see also *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422 (1990) (noting that the Courts of Appeal have searched for "an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed").

At a minimum, traditional equitable estoppel elements must be met: "(1) words, acts, conduct or acquiescence causing another to believe in the existence of a certain state of things; (2) willfulness or negligence with regard to the acts, conduct or acquiescence; and (3) detrimental reliance by the other party upon the state of things so indicated." *Bokum v. C.I.R.*, 992 F.2d 1136, 1141 (11th Cir. 1993) (quotations omitted). Generally, this means that "if estoppel is available against the Government, it is warranted only if affirmative and egregious misconduct by government agents exists." 328 Fed. Appx. 601, 2009 WL 1376248, at *4 (11th Cir. 2009).

Advanzeon has not identified *any* egregious misconduct, or any other conduct that could possibly establish estoppel; it cannot identify any statement, conduct, filing, or other action by Commission staff in its bankruptcy action (or anywhere else) that Advanzeon can plausibly claim caused it to rely to its detriment.

The Commission filed an appearance and general unsecured claim in Advanzeon's bankruptcy because the agency is formally investigating whether

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Advanzeon violated – or is violating – the federal securities laws. (*See* Securities and Exchange Commission's Objection to Approval of Debtor's Disclosure Statement for Plan of Reorganization ("Objection to Plan of Reorganization"), Hopker Decl., Ex. 12). The Commission filed the its Objection to Plan of Reorganization, and also a Motion to Appoint a Chapter Trustee or Convert a Case Under Chapter 7 ("Motion to Appoint Trustee") (Hopker Decl., Ex. 13), on May 3, 2022. Thus, the two actions that Advanzeon claims the Commission has taken that has "hindered" Advanzeon's ability to become current occurred nearly *two years* into Advanzeon's delinquencies.

The Commission has the right to participate where, as here, there is an ongoing investigation into whether a public company has committed securities violations. (*See* Objection to Plan of Reorganization, Hopker Ex. 12, at 1). The Commission has raised concerns about the integrity of Advanzeon's management and significant sums of money paid to the CEO in the form of unsubstantiated loans and credit card reimbursements. (Motion to Appoint Trustee, Hopker Ex. 13, 1-2). While these filings may be an annoyance or hindrance to Advanzeon, the Commission's participation is entirely appropriate and cannot provide grounds for equitable estoppel or any other defense.

2. The Section 12(j) proceeding is not arbitrary, capricious or an abuse of discretion.

Advanzeon's defense based on vague and unsupported allegation that the "claims for relief are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law," fail as a matter of law. An "affirmative defense must be stricken when the defense is comprised of no more than 'bare-bones, conclusory allegations' or is 'insufficient as a matter of law.'" *Northrop & Johnson Holding Co., Inc. v. Leahy*, No. 16-cv-63008, 2017 WL 5632041, at *3 (S.D. Fla. Nov. 22, 2017) (*quoting Adams v.*

Jumpstart Wireless Corp., 294 F.R.D. 668, 671 (S.D. Fla. 2013); *see also Longhini v. Kendall Lakes Office Park Condo. Assoc.,* 2020 WL 7074641, *4 (S.D. Fla. Dec. 3, 2020) (striking defenses that merely state bare-bones conclusions of law without factual support); *Microsoft Corp. v. Jesse's Computers & Repairs, Inc.*, 211 F.R.D. 681, 683-84 (M.D. Fla. 2002) ("[A] court must not tolerate shotgun pleading of affirmative defenses, and should strike vague and ambiguous defenses which do not respond to any particular count, allegation or legal basis of a complaint.").

Advanzeon provides no specifics, no facts, or other information that fairly provides notice to the Division as to why or how this Section 12(j) proceeding – filed after nearly two years of Advanzeon's serial delinquencies in filing its required periodic reports – is "arbitrary," "capricious" or "an abuse of discretion." The proceeding is appropriate under Section 12(j) and revocation is warranted in this case.

3. Advanzeon's nondelegation affirmative defense fails as a matter of law.

Contrary to Advanzeon's asserted defense, the Commission is not barred from seeking relief under Section 12(j) on the ground that "Congress unconstitutionally delegated legislative power to the SEC by failing to provide an intelligible principle by which the SEC would exercise the delegated power, in violation of Article I's vesting of 'all' legislative power in Congress." Answer at 7. Advanzeon's affirmative defense is a word-for-word invocation of the decision in *Jarkesy v. SEC*, in which the majority concluded, in the alternative and over a dissent, that the Commission's choice to institute an administrative proceeding to adjudicate fraud claims rather than filing those claims in a district court enforcement action violated the nondelegation doctrine because Congress "fail[ed] to provide an intelligible principle by which the SEC would exercise the

delegated power, in violation of Article I's vesting of 'all' legislative power in Congress." 34 F.4th 446, 449 (5th Cir. 2022). But *Jarkesy's* nondelegation holding is inapposite to this case in a number of independent respects and, in any event, is incorrect.

(a) *Jarkesy's* nondelegation holding is inapposite.

At the outset, *Jarkesy's* nondelegation holding is irrelevant to this Section 12(j) proceeding because such a proceeding can only be brought before the Commission. *Jarkesy* arose from a securities fraud enforcement matter that the Commission decided, consistent with statute, to institute as an administrative proceeding rather than filing it as a federal district court action. Id. at 450, 455, 462. While the Fifth Circuit concluded that Congress violated the nondelegation doctrine by giving the Commission "unfettered authority to choose" to institute administrative enforcement proceedings rather than file enforcement actions in Article III courts, the panel majority rested on the critical fact that Congress delegated to the Commission an actual "decision—to assign certain actions to agency adjudication." *Id.* at 462; see also id. (Congress "effectively gave the SEC the power to decide which defendants should receive certain legal processes (those accompanying Article III proceedings) and which should not.") (first emphasis added, second emphasis in original).

Here, however, there is no district court option. Congress did not grant—and, consequently, the Commission did not exercise—"the power to decide which defendants should receive certain legal processes (those accompanying Article III proceedings) and which should not" in Section 12(j)-related matters. *Id.* Section 12(j) expressly provides that only the Commission may suspend and revoke the registration of a security; accordingly, such matters must be determined in administrative proceedings before the

Commission. See 15 U.S.C. § 78l(j) ("The Commission is authorized, by order, 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, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer, of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder.") (emphasis added). The predicate for the Fifth Circuit's nondelegation ruling in *Jarkesy* is thus not present here because all Section 12(j) proceedings are brought in the same venue: before the Commission. *See, e.g., Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 764 (2d Cir. 1998) (concluding that "there was no delegation at all" when "[t]he decision [at issue] was manifestly made by Congress itself rather than by the [Executive Branch]").

For the same reasons, the Fifth Circuit's determination that Congress did not provide the Commission with an intelligible principle for deciding between adjudicatory venues has no application in this matter. "[A] statutory delegation is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Gundy v. U.S.*, 139 S. Ct. 2116, 2123 (plurality op.) (brackets and internal quotation marks omitted). By mandating that all Section 12(j) proceedings be brought before the Commission, 15 U.S.C. § 78l(j), Congress itself directed the adjudicatory venue for such proceedings; because there is no delegation on that question, there is no need to identify an "intelligible principle" to guide its exercise. *See Rein*, 162 F.3d at 764.

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To the extent Advanzeon is arguing that Congress failed to provide an intelligible principle for the Commission to exercise its authority under Section 12(j), that argument is likewise meritless. Section 12(j) provides that when an issuer fails to comply with requirements under the Exchange Act, the Commission may suspend or revoke the registration of the issuer's security "as it deems necessary or appropriate for the protection of investors." 15 U.S.C. § 78l(j). The Supreme Court has found that similar language is sufficiently intelligible to satisfy constitutional scrutiny. *See, e.g., NBC v. United States*, 319 U.S. 190, 216 (1943) (Congressional directive for agency to regulate as "public interest, convenience, or necessity" requires is sufficiently intelligible); *see also, e.g., Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001) (Congressional directive for agency to issue air quality standards "requisite to protect the public health" is sufficiently intelligible); *Yakus v. United States*, 321 U.S. 414, 422 (1944) (Congressional directive for agency to set "fair and equitable" prices is sufficiently intelligible). Section 12(j)'s "necessary or appropriate for the protection of investors" directive thus falls "well within the outer limits of [the Supreme Court's] nondelegation precedents," *Whitman*, 531 U.S. at 474, and stands in stark contrast to what the *Jarkesy* majority (incorrectly) characterized as a "total absence of guidance" from Congress regarding the Commission's choice "to bring enforcement actions in Article III courts or within the agency," *Jarkesy*, 34 F.4th at 462.

(b) *Jarkesy* is wrongly decided and contradicts Supreme Court precedent.

In any event, *Jarkesy's* nondelegation holding would still not provide a viable affirmative defense for Advanzeon in this proceeding because *Jarkesy's* application of the nondelegation doctrine to the Commission's actions contradicts Supreme Court

precedent. Under the nondelegation doctrine, Congress may not delegate "powers which are strictly and exclusively legislative." *Gundy*, 139 S. Ct. at 2123 (plurality op.). By contrast, the federal government's decision to enforce the laws is a matter over which "Executive Branch has exclusive authority and absolute discretion." *United States v. Nixon*, 418 U.S. 683, 693 (1974); *accord Heckler v. Chaney*, 470 U.S. 821, 835 (1985).

Jarkesy held that the Commission's decision to enforce the laws through an administrative proceeding was legislative action in violation of the nondelegation doctrine. The majority relied on one sentence in *INS v. Chadha*, 462 U.S. 919 (1983), which held that the House of Representative's veto of the Attorney General's decision in an immigration matter violated the Constitution's bicameralism and presentment requirements. *Chadha* held that the House's veto was a legislative act because it "alter[ed] the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." Id. at 952. Based on that sentence, the *Jarkesy* majority concluded that the Commission exercised legislative authority because its decision to bring an administrative (rather than Article III) proceeding altered the rights Jarkesy would have had if sued in district court. 34 F.4th at 461–63.

The crucial point in *Chadha* was that action by Congress was "legislative." The Court did not suggest that enforcement of the laws by the Executive Branch raises similar concerns. And it has always been understood that in enforcing the laws, Executive Branch officials not only decide whether to institute proceedings, but also what violations to assert, what penalties to seek, and in what forum to proceed. *Cf. United States v. Batchelder*, 442 U.S. 114, 125–26 (1979) (prosecutor's choice to charge one criminal

violation but not another does not "impermissibly delegate to the Executive Branch the Legislature's responsibility to fix criminal penalties"). While those charging decisions may affect whether a party "receive[s] certain legal processes," *Jarkesy*, 34 F.4th at 462, they are executive, not legislative, actions—and "[t]he Supreme Court has long allowed discretionary decisions by police, prosecutors, and regulators as part and parcel of the exercise of executive power," *Kincaid v. Gov't of D.C.*, 854 F.3d 721, 730 (D.C. Cir. 2017) (collecting cases).

For instance, the United States may choose to charge a defendant with a petty misdemeanor rather than a felony. That decision would deprive the defendant of a right to a jury trial, *Baldwin v. New York*, 399 U.S. 66, 69–70 (1970), and the requirement for a grand jury, *United States v. Linares*, 921 F.2d 841, 844 (9th Cir. 1990). The United States may also choose to pursue certain claims in district court or in "any administrative proceeding to determine a civil money penalty." 31 U.S.C. § 3730(c)(5). Such enforcement decisions are quintessentially executive actions—not "delegations of legislative power." *Big Time Vapes, Inc. v. FDA,* 963 F.3d 436, 443 (5th Cir. 2020). *Cf. United States v. Bruce*, 950 F.3d 173, 176 (3d Cir. 2020) ("[T]he decision of what, if any, charges to bring against a criminal suspect . . . is firmly committed to the discretion of the Executive Branch.") (citation and internal quotation marks omitted); *Kincaid*, 854 F.3d at 729 ("Supreme Court precedent teaches that the presence of enforcement discretion alone does not render a statutory scheme unconstitutionally vague."); *U.S. ex rel. Miller v. Bill Harbert Int'l Const., Inc.*, 608 F.3d 871, 886 (D.C. Cir. 2010) (where two overlapping statutes provide alternative regimes under which the government can sue, that "choice does not create a conflict, let alone an 'irreconcilable conflict'"); *United States v.*

Cespedes, 151 F.3d 1329, 1333 (11th Cir. 1998) (noting that "the charging decision" is "a power . . . traditionally exercised by the executive branch); *United States v. Dockery*, 965 F.2d 1112, 1117 (D.C. Cir. 1992) (noting executive-branch discretion to select an appropriate forum for a criminal case).

Because *Jarkesy's* nondelegation holding clearly contradicts Supreme Court precedent, it does not provide a viable affirmative defense for Advanzeon in this proceeding.

4. This Section 12(j) proceeding is not barred by the statute of limitations or the under the doctrine of laches.

There is no merit to Advanzeon's affirmative defense that this Section 12(j) administrative proceeding is barred by a statute of limitations. Congress has not specifically prescribed any limitations period within which Section 12(j) proceedings must be commenced before the Commission. Even assuming, arguendo, that either the five-year limitations period under 28 U.S.C. 2462 or the ten-year limitations period under Exchange Act Section 21(d)(8) applied to such proceedings, the conduct at issue occurred well within either timeframe. This administrative proceeding is timely.

Advanzeon's defense of laches is insufficient as a matter of law because the Commission is not subject to a laches when, as here, it is enforcing its rights and protecting the public's interest. *See Silverman*, 2009 WL 1376248, at *4 ("laches is not available as a defense to this SEC civil law enforcement action" because the United States is not subject to the defense of laches in enforcing its rights); *United States v, Delgado*, 321 F.3d 1338, 1349 (11th Cir. 2003) ("the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights"); *FTC v. On Point Glob, LLC*, No. 19-25046-CIV, 2020 WL 4505811 at *2 (S.D. Fla. Aug. 04,

2020) (striking affirmative defense of laches on basis that the defense cannot be used against a government agency in a civil suit brought to enforce a public right or interest); *FTC v. U.S. Fin. LLC,* 2009 WL 10671254 at *2 (M.D. Fla. Feb. 18, 2009) (affirmative defense of laches is not available against the federal government when it undertakes to enforce a public right or to protect the public interest).

Here, the SEC, a federal government agency, has brought an administrative proceeding under Section 12(j) to determine whether it is in the public interest to revoke the registration of Advanzeon, which has failed to comply with its regulatory obligation as a public company to file required periodic reports. As such this proceeding is not barred by the doctrine of laches.

III. Conclusion

For the reasons set forth above, the Division asks that the Commission grant the Division's Motion for Summary Disposition and revoke the registration of each class of Advanzeon's securities registered under Exchange Act Section 12.

Dated: July 15, 2022

Respectfully submitted,

TERESA VERGES

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CERTIFICATE OF SERVICE

Pursuant to Rule 150 of the Commission's Rules of Practice, I hereby certify that on July 15, 2022, the foregoing Division's Motion for Summary Disposition was filed using the eFAP system and that a true and correct copy of the document has been served via email on the following person entitled to notice:

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