

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 PETITION FOR REVIEW

The Division of Enforcement ("Division") respectfully submits this Petition for Review of an Initial Decision in a Section 12(j) proceeding concluding that Respondent should not receive any sanction whatsoever, despite the Law Judge's finding that Respondent violated Section 13(a) of the Exchange Act by failing to file three years' worth of required reports; despite Respondent's failure to attempt a curative filing until after the evidentiary hearing on the Commission's Order Instituting Proceedings ("OIP"); despite Respondent's express refusal to follow guidance of the Division of Corporation Finance ("CorpFin") in making its curative filing; and, despite CorpFin's uncontested opinion that Respondent's filings were materially deficient. *See* Exchange Act Rel. No. 1389 (Nov. 12, 2019).

ISSUES FOR REVIEW

Did the Law Judge err by failing to follow the standard for determining sanctions in a Section 12(j) proceeding as set forth in *Impax Laboratories, Inc.*, Rel. No. 34-57864 (May 23, 2008) and *Absolute Potential, Inc.*, Rel. No. 34-71866 (Apr. 4, 2014)?

Did the Law Judge err by concluding that Respondent had cured its initial filing failures and was current on its reporting obligations despite CorpFin's opinion to the contrary?

FACTS AND ARGUMENT

Respondent, Digital Brand Media & Marketing Company, Inc. ("DB"), decided neither to pay for preparation of, nor to file, any of its required reports for its 2015, 2016, and

2017 fiscal years. Linda Perry, the DB shareholder and officer responsible for DB's periodic filings, chose to spend all of DB's available funds on litigation with DB's lender, whose actions Ms. Perry believed were "crushing" DB's stock price. Ms. Perry viewed her decision to violate the reporting requirements as an "easy choice" because periodic reports "can be filed at a later date." Ms. Perry remains responsible for DB's periodic filings. DB did not attempt to cure its missing filings until years after the initial delinquency and only after the evidentiary hearing on the OIP. When CorpFin notified DB that its curative filing was materially deficient, DB rejected CorpFin's analysis and refused to correct the curative filing for another year.¹ Two months ago, DB partially corrected the curative filing, but CorpFin has opined that it is still materially deficient as are DB's subsequent filings.

In determining the appropriate sanction in a Section 12(j) proceeding, a Law Judge must reach a conclusion on the five *Gateway* factors: (1) the seriousness of the violations, (2) whether the violations were recurrent or isolated, (3) the degree of culpability, (4) the efforts to remedy past violations and ensure future compliance, and (5) the credibility of assurances against further violations. See *Gateway Intl Holdings, Inc.*, Rel. No. 34-53907, at 10 (May 31, 2006). Where the violations are serious and recurrent, only a "strongly compelling" showing on the remaining factors "would justify a lesser sanction than revocation." *Impax*, Rel. No. 34-57864 at 12.

The Law Judge correctly concluded that DB's violations were serious and recurrent. Op. at 6. Contrary to *Impax*, the Law Judge did not conclude that DB had made a strongly compelling showing on the remaining *Gateway* factors. Rather, the Law Judge simply stated that "revocation

¹ One of the deficiencies in both the curative filing and subsequent filings was DB's failure to comply with the requirements for reporting internal controls over financial reporting ("ICFR"), which the Commission has repeatedly held is material. See, e.g., *China-Biotics Inc.*, Exchange Act Release No. 67312, at 19-20 (Nov. 4, 2013). Just last week, DB made another filing repeating the same ICFR error that CorpFin has flagged for the past two years.

was not necessary or appropriate for the protection of investors.” Op. at 8. Had the Law Judge correctly applied the remaining *Gateway* factors, she would have been required to find that DB had a high degree of culpability because DB “knew of, yet repeatedly disregarded, its reporting obligations.” *Absolute Potential*, Rel. No. 34-71866 at 8. Once that finding was made, *Impax* required revocation.

In determining whether suspension was warranted, not only did the Law Judge fail to apply *Gateway* and *Impax* standards, she formulated her own standard – whether sanctions would deprive investors of current information – that is inconsistent with *Absolute Potential*. The Commission has previously pointed out the important role deterrence plays in investor protection:

We have held repeatedly, however, that “[t]he extent of any harm that may result to existing shareholders [from revocation] cannot be the determining factor in our analysis”; rather, “[i]n evaluating what is necessary or appropriate to protect investors, ‘regard must be had not only for existing stockholders of the issuer, but also for potential investors.’” ****Moreover, it is necessary to deter Absolute and other issuers from disregarding their obligations to present accurate and timely information to the investing public until spurred by the institution of proceedings.

Release No. 34-71866 at 10. The Law Judge’s focus on disclosure as the lodestar for assessing whether suspension would protect investors, to the exclusion of deterrence, was error. Here, the Law Judge even went so far as to hold that depriving investors of financial information – the inevitable result of suspension – is “antithetical” to the Exchange Act. Op. at 8. Suspension is specifically authorized by the Exchange Act, not antithetical to it.

Finally, the Law Judge’s finding that DB had remedied its past violations and had complied with its current reporting obligations was clearly erroneous in light of CorpFin’s uncontested opinion that DB’s amended curative and subsequent filings were materially deficient.

CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Commission grant the Petition for Review.

Dated: December 3, 2019

Respectfully Submitted,



Samantha M. Williams

David S. Frye

Securities and Exchange Commission

100 F Street, N.E.

Washington, DC 20549-5949

Tel: (202) 551-4061 (Williams)

Email: williamssam@sec.gov

Counsel for the Division of Enforcement

CERTIFICATE OF SERVICE

I certify that, on December 3, 2019, I caused the Division of Enforcement's Petition for Review to be e-mailed to the following:

Maranda E. Fritz

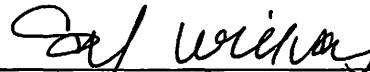
Thompson Hine LLP

335 Madison Avenue

New York, NY 10017

Counsel for Digital Brand Media & Marketing, Inc.

maranda.fritz@thompsonhine.com.



Samantha M. Williams