P OJ ALJ

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17990

In the Matter of

Digital Brand Media & Marketing Group, Inc., *et al.*,

Respondents.

DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF

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DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF

The Division of Enforcement ("Division"), by counsel, pursuant to the Post-Hearing Order and Rule of Practice 340, respectfully submits its Post-Hearing Brief.

INTRODUCTION

The present administrative proceeding was initiated pursuant to Section 12(j) of the Exchange Act. As a result of the hearing in this matter, there is no question that Respondent Digital Brand Media & Marketing Group, Inc. ("Digital Brand") knew of its reporting obligations under Section 13(a) of the Exchange Act and the rules promulgated thereunder, yet it failed to file two Forms 10-K and six Forms 10-Q, all of which remain delinquent to this day. As a result, investors have been deprived of current and accurate financial information about Digital Brand for two years.

The record evidence concerning the violations, together with the applicable Section 12(j) standards and precedents, establishes that the appropriate remedy is a revocation of Digital Brand's registration. The factors for determining whether revocation is appropriate are analyzed in detail below and strongly demonstrate the necessity of revocation in this case.[1] The recurrent and continuous nature of Digital Brand's failures are demonstrated by the timing of the failures (two Form 10-K's and six 10-Q's, all continuous), as well as by the company's cavalier attitude about the delinquencies. Moreover, Digital Brand has made no effort to cure its current

[1] *Gateway International Holdings, Inc.*, Securities Exchange Act Rel. No. 53907, 2006 SEC LEXIS 1288 at *19-*20 (May 31, 2006) (quoting *SEC v. Beisinger Indus. Corp.*, 552 F.2d 15, 18 (1st Cir. 1977)).

delinquencies, and has made no credible assurance of future compliance. All of the above firmly establish the need for an order of revocation of Digital Brand's registration.

Finally, Digital Brand's arguments against revocation are unavailing. Existing and prospective shareholders of Digital Brand continue to be harmed by the lack of current and reliable information about the company. Revocation will stop this ongoing harm. If Digital Brand wants its stock to trade on the public markets again, it may simply re-register its securities with two years of audited financials. Thus, the benefits of revocation to the investing public far outweigh any harm to Digital Brand while it prepares a new registration statement.

STATEMENT OF FACTS

Respondent Digital Brand Media & Marketing Group, Inc.

Digital Brand is a Florida corporation with no employees in the United States, a "virtual office" located in New York, New York, and a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). (Perry[2] Hearing Transcript ("Tr.") 72:18-73:9, 87:12-88:3; Division Exhibits ("Div. Exs.") 1, 6, 7, 20, and 21). All of Digital Brand's technology and operating business is in the United Kingdom (Perry Tr. 73:5-6), and all of its revenue comes from its wholly owned subsidiary, Stylar Limited, in London, England. (Boisseau Tr. 23:2-3, 28:8-13; Div. Ex. 20 at 4). As described by Linda Perry, its unpaid Executive Director and Chair of the Compensation Committee and of the Audit Committee, Digital Brand's business is to look at their clients' online activity and then use their technology-- Google, Microsoft, etc.-- in conjunction with

[2] The Division's transcript cites will include the names of the witnesses testifying.

about 38 social media sites, to develop their clients' algorithms in order to improve their clients' ROI (return on investment). (Perry Tr. 76:4-19, 144:22-146:3, 181:9-11). However, according to its annual reports filed with the Commission on EDGAR from 2003 to 2014, Digital Brand has never made a profit, and all of its audits have contained a "going concern" qualification.[3] As of May 11, 2017, the company's stock (symbol "DBMM") was quoted on OTC Link operated by OTC Markets Group, Inc., had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3). (OIP, ¶ II.A.1). As of July 28, 2017, Digital Brand's stock was still trading on the over-the-counter market, with 3,150 trades, a dollar volume of $19.3 million, and a share volume of 19.6 million shares. (Div. Ex. 10).

Although Neil Gray in the United Kingdom has been the Chairman and Executive Director of Digital Brand's U.S. company since April 1, 2010, according to Linda Perry, Gray has not been involved with the company really since 2014. (Perry Tr. 77:24-79:21). Reggie James received compensation in the UK as the Managing Director of Digital Clarity, which is their brand. Mr. James operates the technical side of the business in every aspect of the operations. In terms of his role as a director, his pay is accrued monthly and he has never been paid. (Perry Tr. 76:20-77:20).

Digital Brand's Annual and Quarterly Reports

As a publicly traded company, Digital Brand was required to file a Form 10-K annually and a Form 10-Q for three quarters. Digital Brand filed its last Form 10-K on

[3] The Division asks that pursuant to Rule of Practice 323, the Court take official notice of this and all other information and filings on EDGAR referred to in this brief.

February 17, 2015, and its last Form 10-Q on September 24, 2015. By the time of the hearing on August 9, 2017, there had been no timely filings for over two years.

Digital Brand's Form 10-K for the period ended August 31, 2017 is due by November 29, 2017. (Form 10-K, General Instruction A.(2)(c)). Digital Brand provided no credible evidence that this Form 10-K will be filed in a timely manner. It thus will be added to Digital Brand's long list of delinquent filings.

Preparation of Audit Packages

Historically, Digital Brand used Marc-Andre Boisseau and his firm Boisseau, Felicione & Associates, Inc. of Delray Beach, FL to prepare audit support packages, including financial statements, consolidated trial balances, roll-forward of accrued interest and derivative liabilities, bank reconciliations, supporting schedules tied to the balance sheet, confirmations for note holders, and usually a first draft of the Form 10-K. (Boisseau Tr. 19:25-20:10, 22:15-27:1). In addition, Boisseau's firm acted as a liaison between the company and the auditors. (Boisseau Tr. 22:23-25). Mr. Boisseau gathered material for his audit support from Linda Perry and Reggie James. (Boisseau Tr. 27:25-28:1-7).

Mr. Boisseau and his firm would account for the transactions of the parent company, Digital Brand, and consolidate those with the UK subsidiary, Stylar Limited. The material from the UK was in British pounds, so Mr. Boisseau's firm would convert that for consolidation with the U.S. accounting. (Boisseau Tr. 22:23-24:16).

Without the audit support work of the Boisseau firm, there would have been nothing for Digital Brand's auditor to audit. (Boisseau Tr. 25:20-24, 26:17-27:1, 27:20-

24). Sometimes the Boisseau firm's work was provided to the auditor by email, but for the most part it was uploaded into a drop box for the auditor, who would receive a notification of that. (Boisseau Tr. 27:6-12).

Mr. Boisseau's work on the audit support package for the Form 10-K for the period ended August 31, 2015 was completed in January or February 2016, but Digital Brand never had it audited. (Perry Tr. 98:11-24). The audit support package has remained unused because money was owed to the auditors. (Boisseau Tr. 46:16-47:1-7). The Boisseau firm has an outstanding balance of $7,000 to $8,000 due from Digital Brand on its services for the audit support package for the year ended August 31, 2015, and it has never been paid. Mr. Boisseau issued an internal order at his firm that they would discontinue providing any services to Digital Brand until they were paid. (Boisseau Tr. 31:23-32:18). The Boisseau firm was never instructed by Digital Brand to prepare the audit support for any of Digital Brand's periodic reports due after the Form 10-K for the period ended August 15, 2013. (Boisseau Tr. 34:1-35:3).

Digital Brand's Auditors

Sherb & Co., LLP was Digital Brand's original auditor for the year ended August 31, 2012, and RBSM, engaged on April 17, 2013 (Digital Brand Form 8-K dated July 3, 2014), was Digital Brand's original auditor for the the year ended August 31, 2013, but the Commission required Digital Brand to have re-audits done for 2012 and 2013.[4] On June 9, 2014, RBSM quit as Digital Brand's auditor. (Digital Brand Form 8-K dated July

[4] Digital Brand paid $40,590 to RBSM to do re-audits for 2012 and 2013, but never received the work, and never obtained its money back from RBSM. (Perry Tr. 148:24-151:5). Digital Brand had accepted Asher Enterprises' recommendation of RBSM, (Answer, ¶ 2), even though Digital Brand knew Asher Enterprises was a "toxic lender." (Perry Tr. 176:2-13).

3, 2014; Perry Tr. 165:16-166:3;180:3-5). On July 7, 2014, Digital Brand engaged D'Arelli, Pruzansky as its auditor, which performed audit services for Digital Brand for its fiscal years ended August 31, 2012, August 31, 2013, and August 31, 2014. (Pruzansky Tr. 49:4-10; Perry Tr. 150:22-151:1;180:6-7). D'Arelli, Pruzansky's audits relied upon the work of Mr. Boisseau. (Pruzansky Tr. 50:3-6). The last work that D'Arelli, Pruzansky did for Digital Brand was its review of Digital Brand's Form 10-Q for the period ended May 31, 2015. (Pruzansky Tr. 50:7-14). D'Arelli, Pruzansky did not receive full payment for its audit work for Digital Brand, and is still owed $53,500. (Pruzansky Tr. 50:15-20;52:5-8). In June 2016, D'Arelli, Pruzansky offered to settle its outstanding bill for one-half of the balance due, but Digital Brand refused the offer. (Pruzansky Tr. 50:21-51:7).

Re-Audits

Digital Brand had to have its 2012 financials re-audited because its auditor, Sherb & Co., was barred from practicing before the SEC. (Pruzansky Tr. 49:21-23;50:1-2; Perry Tr. 147:8-11;178:18-21; Div. Ex. 13; Resp. Ex. C). *See* additional discussion, *infra,* at 24-27. On November 29, 2013, Digital Brand asked the SEC for relief from the re-audit requirement, but the Division of Corporation Finance was unable to grant the company relief from the re-audit requirement. (Perry Tr. 147:8-18; Resp. Ex. D; Div. Ex. 19).

Asher Enterprises, Inc.

Linda Perry knew Asher Enterprises was a toxic lender charging high rates of interest, but "[i]t was the only act in town, and [she] could live with it and did for a couple of years." (Perry Tr. 135:5-136:15;176:2-16). She made the decision to borrow money from Asher Enterprises knowing the egregious terms. (Perry Tr. 125:23-126:2). In 2013, Digital Brand "entered into a series of ill-fated convertible instruments with Asher Enterprises, Inc.[:]" a February 2013 note borrowing $42,500, an April 2013 note borrowing $37,500, and a June 2013 note borrowing $32,500. (Answer, ¶ 2; Perry Tr. 113:25-115:17).

Digital Brand prioritized its conflict with Asher Enterprises above necessary audit work. On July 15, 2015, Digital Brand was sued by Asher Enterprises on the three 2013 notes, Digital Brand's counterclaim was dismissed, and summary judgment was granted in favor of Asher Enterprises and against Digital Brand for $122,801.87. (Div. Ex. 14). Digital Brand made one payment of $25,000 on the judgment, and did not make any more payments. The court then ordered Digital Brand to turnover all of its shares to Asher Enterprises. (Perry Tr. 117:19-121:15; Div. Ex. 14). *See* additional discussion, *infra*, at 28-33. While the Asher litigation was pending, Digital Brand made a deliberate choice not to make its SEC filings on a timely basis and failed to file required Forms 10-K or 10-Q for the annual year(s) ending August 31, 2015 and 2016, and the six quarters in 2016 and 2017. (Perry Tr. 123:22-125:22; Digital Brand's Answer to Motion for Ruling on the Pleadings, ¶ 14).

May 25, 2017 Letter from Boisseau to Digital Brand

In May 2017, Linda Perry of Digital Brand asked Marc Boisseau to provide a statement in writing as to where Digital Brand stood in terms of the filing of the Form 10-K for the period ended August 31, 2015. The letter concerned the same information that had been ready for auditing since early 2016. Nothing had changed since early 2016 in terms of the preparedness of the filing, (Boisseau Tr. 35:4-40:8; Div. Ex. 12), but that was not disclosed in the letter. A copy of the letter was attached to Digital Brand's Answer to the OIP.

Assurance Dimensions, Inc. Acquires Audit Clients of D'Arelli, Pruzansky

As of the end of September 2017, Digital Brand has not filed periodic reports for two years. Further, they do not have an audit firm. Indeed, the firm that had reviewed Digital Brand's Form10-Q for the period ended May 31, 2015 – D'Arelli, Pruzansky – is no longer registered with the PCAOB and had an outstanding receivable for the audit work it had performed in previous periods.

Earlier, in 2016, name partner Joseph D'Arelli resigned from D'Arelli, Pruzansky to pursue other opportunities. Mitchell Pruzansky stayed on to continue the practice, but after a year of running the firm, he decided to merge out the audit practice into a bigger firm. (Pruzansky Tr. 53:10-16). On May 3, 2017, the audit practice was acquired by Assurance Dimensions, Inc., which also took all of the employees of D'Arelli, Pruzansky, most of the clients that wanted to go to the merged firm, and the office space as well. (Pruzansky Tr. 48:23-49:3;53:17-54:9). As of May 3, 2017, Mr. Pruzansky became a partner in Assurance Dimensions, Inc. in Coconut Creek, FL, and also

remained a partner in D'Arelli, Pruzansky at the same location. (Pruzansky Tr. 48:19-49:3). On June 1, 2017, D'Arelli, Pruzansky filed a request to withdraw its registration with the Public Company Accounting Oversight Board ("PCAOB"), and the request was granted by PCAOB effective August 1, 2017. (Pruzansky Tr. 51:15-52:3; Div. Ex. 5).

Assurance Dimensions did not inherit Digital Brand as a client. Pursuant to the acquisition of D'Arelli, Pruzansky's audit practice, a list of D'Arelli, Pruzansky existing clients that were expected or believed to be moving over to Assurance Dimensions was given to Assurance Dimensions. Digital Brand was not on that list because it had not retained D'Arelli, Pruzansky to do any work on its behalf for well over a year. Mr. Pruzansky had no belief that Digital Brand was going to go forward with them, and believed that there were not finances available for Digital Brand's audit work. (Pruzansky Tr. 55:13-56:17).

Digital Brand's Form 8-K filed June 21, 2017 was Not Accurate

After not filing its Forms 10-K and 10-Q for 25 months, Digital Brand filed a Form 8-K on June 22, 2017. This Form 8-K was filed after Digital Brand was served with the OIP seeking revocation based on its delinquent filings. The Form 8-K that Digital Brand filed was not accurate in that it stated that Assurance Dimensions, Inc. was engaged as its auditor. Michael Naparstek of Assurance Dimensions was under the mistaken impression at that time that Digital Brand was one of the audit clients that D'Arelli, Pruzansky had sold to Assurance Dimensions, when in fact it was not. Assurance Dimensions' client acceptance procedures for continuing clients had not included Digital Brand. It was a mistake for the statement in the Form 8-K that

Assurance Dimensions was engaged as Digital Brand's auditor to have been made. (Naparstek Tr. 61:19-63:4). While Mr. Naparstek, discussed Assurance becoming Digital Brand's auditor, the relationship was never finalized. Assurance Dimensions has never been engaged or retained by Digital Brand for auditing purposes, and Assurance Dimensions has never performed any auditing work for Digital Brand. (Naparstek Tr. 58:23-25;63:2-4;65:3-8;66:1-68:6;69:8-12). An engagement letter would have had to be signed by both parties, and that was never done. (Pruzansky Tr. 52:16-24). Digital Brand never paid Assurance Dimensions any money to do new audit work. (Pruzansky Tr. 52:13-15). Thus, under the circumstances, it was not accurate to refer to Assurance Dimensions as Digital Brand's auditor in the Form 8-K and on the firm's website. (Naparstek Tr. 63:5-65:2; Div. Ex. 21). According to EDGAR, the Form 8-K has not been corrected by Digital Brand. The Digital Brand website also has not been corrected.

Digital Brand is Unable to Get Current in its Periodic Reports

Even though the SEC sent the delinquency letter to Digital Brand on February 27, 2017, and filed the OIP in this proceeding on May16, 2017, Digital Brand has failed to file the last two required Forms 10-K and six required Forms 10-Q, and neither the Boisseau firm nor any other firm is preparing pre-audit accounting packages for Digital Brand's missing periodic reports. Nothing has been started for any of those delinquent periods after the Form 10-K for the period ended August 31, 2015, which report was itself never filed. Moreover, without the pre-audit package that the Boisseau firm typically created, there is nothing for anyone to audit. (Perry Tr. 105:11-107:11). Ms. Perry explained that converting debentures is a lot of work, and that the "derivative

liability" is very tedious, labor intensive work, with all the confirms having to go out to third parties. While Ms. Perry agreed that Digital Brand is simply unable to catch up with its existing delinquent filings in the near to immediate future, she testified that she believes she can do it within three to six months. (Boisseau Tr. 24:4-7;26:3-5; Perry Tr. 108:9-12;182:19-184:6). Ms. Perry based her belief on the claim that she would have cash in hand-- $61,000 plus $250,000 from two private parties by the end of the week of the hearing (August 12, 2017), but her claim is not credible. (Perry Tr. 191:2-193:1). *See* additional discussion, *infra*, at 34-36.

Failure to File Forms 3, 4, and 5[5]

Linda Perry claimed at the hearing that she owned no common stock of Digital Brand, but the company's last Form 10-K for the period ended August 31, 2014 shows that she owned over 16.5 million shares of the common stock. (Tr. 82:4-10; Div. Ex. 20, at 37). Ms. Perry testified that she, Mr. James, and Mr. Gray currently own the same amount of Digital Brand preferred shares listed in Digital Brand's Form 10-K for the period ended August 31, 2014: 16,588,933 preferred shares for Perry, 26,326,599 for James, and 60,000 for Gray. (Perry Tr. 82:4-85:6; Div. Ex. 20.)

Ms. Perry testified that it was her intention to file Forms 3 and 4, "whatever is necessary." (Perry Tr. 184:16-18). But, neither she nor the other officers and directors of Digital Brand have filed any of their required insider trading forms, even after this proceeding brought the absence of these filings to their attention. (*See, e.g.*, Division's Motion for Ruling on the Pleadings, filed June 6, 2017, at 5-7).

[5] A required Form 3 or Form 4 must be filed within the time specified by those forms. "Form 3 holdings or Form 4 transactions reported on Form 5 represent delinquent Form 3 and Form 4 filings." SEC Form 5 General Instruction 4(a)(i)(C).

Digital Brand's Code of Ethics Required Timely Filings with SEC

Digital Brand's Code of Ethics provides that the principal officers of the company shall "provide full, fair, accurate, **timely**, and understandable disclosure in reports and documents that [the company] files with , or submits to, the Securities and Exchange Commission." (Perry Tr. 86:2-87:11; Digital Brand's Form 10-K for the period ended August 31, 2004, Ex. 14) (emphasis added).

Delinquency Letter Sent to Digital Brand

On February 27, 2017, the Commission's Division of Corporation Finance sent a delinquency letter by certified mail to Digital Brand that stated that Digital Brand appeared to be delinquent in its periodic filings and warned that it could be subject to revocation, and to a trading suspension pursuant to Exchange Act Section 12(k), without further notice if it did not file its required reports within fifteen days of the date of the letter. Digital Brand received the delinquency letter on March 1, 2017, but has failed to cure its delinquencies. (Simpson Tr. 13:14-16:9; Perry Tr. 95:14-25; Div. Exs. 2, 3, 7; Div. Demonstrative Ex. 1).

Commission Suspended Trading in Digital Brand's Stock

On May 16, 2017, the same day that this proceeding was instituted, the Commission issued a ten-day trading suspension for Digital Brand stock (symbol DBMM) pursuant to Exchange Act Section 12(k) because Digital Brand had not filed any

of its periodic reports since the period ended May 31, 2015. (Simpson Tr. 16:16-22; Div. Ex. 4).

Argument

I. Standards Applicable to the Decision in this Case.

This 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 title or the rules and regulations 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 the cornerstone of the Exchange Act, establishing a system of periodically reporting core 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 International Holdings, Inc., Securities Exchange Act Rel. No. 53907, 2006 SEC LEXIS 1288 at *26 (May 31, 2006) (quoting *SEC v. Beisinger Indus. Corp.*, 552 F.2d 15, 18 (1st Cir. 1977)).

As explained in the initial decision in the *St. George Metals, Inc.* administrative proceeding:

> 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 Rel. No. 298, 2005 SEC LEXIS 2465, at *26 (Sept. 29, 2005); *accord Gateway*, 2006 SEC LEXIS 1288 at *18, *22 n.28; *Stansbury Holdings Corp.*, Initial Decision Rel. No. 232, 2003 SEC LEXIS 1639, at *15 (July 14, 2003); and *WSF Corp.*, Initial Decision Rel. No. 204, 2002 SEC LEXIS 1242 at *14 (May 8, 2002).

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) sanctions on the other hand." *Gateway,* 2006 SEC LEXIS 1288, at *19-*20. 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 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, *Stansbury*, 2003 SEC LEXIS 1639, at *14-*15; and *WSF Corp.*, 2002 SEC LEXIS 1242 at *5, *18, 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 Laboratories, Inc.*, Exchange Act Rel. No. 57864, 2008 SEC LEXIS 1197 at *27 (May 23, 2008). An analysis of the factors above confirms that revocation of Digital Brand's securities is appropriate.

II. Revocation is the Appropriate Sanction for Digital Brand's Serial Violations of Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 Thereunder.

1. Digital Brand's violations are serious and egregious.

As established by the record in this proceeding, Digital Brand's conduct is serious and egregious. Digital Brand has not filed any periodic reports since it filed a Form 10-Q for the period ended May 31, 2015. Given the central importance of the reporting requirements imposed by Section 13(a) and the rules thereunder, Administrative Law Judges have found violations of these provisions of the same and of less duration to be egregious, and Digital Brand's violations support an order of revocation for each class of its securities. *See WSF Corp.*, 2002 SEC LEXIS 1242, at *14 (respondent failed to file periodic reports over two-year period); and *Freedom Golf Corp.*, Initial Decision Release

No. 227, 2003 SEC LEXIS 1178, at *5 (May 15, 2003) (respondent's failure to file periodic reports for less than one year was egregious violation).

Digital Brand does not dispute the serious and egregious nature of its filing failures. Digital Brand simply admits in a cavalier fashion that it was an "easy choice" for the company to make to not file its periodic reports because the company's reports could always be "filed at a later date," although Digital Brand has yet to make those filings. It was Digital Brand that made its own determination that it was more important to engage in its litigation efforts rather than comply with the regulatory filing requirements. (Perry Tr. 123:22-125:22; Digital Brand's Answer to Motion for Ruling on the Pleadings, ¶ 14). Rather than recognizing the seriousness of its violations and its responsibilities as a public company to file its periodic reports for its investors, Digital Brand has been obsessed and concerned with its litigation with Asher Enterprises, which it determined was more important than complying with the Exchange Act and the Commission's filing requirements. Far from excusing its conduct, Digital Brand's admission decisively establishes its culpability and the seriousness and egregious nature of its violations. *See* additional discussion, *infra*, at 30-33.

The Commission has made it clear that an issuer's attempt to "blame" others "and a variety of mishaps" for failure to file reports should result in a revocation of registration of securities. *See AIC Intl., Inc.*, Initial Dec. Rel. No. 324, 2006 SEC LEXIS 2996 at *18-*19 (Dec. 27, 2006).

2. Digital Brand's violations of Section 13(a) have been not just recurrent, but continuous.

Digital Brand's violations are not unique and singular, but continuous. Digital Brand has failed to file any of its periodic reports since the period ended May 31, 2015.

Thus, Digital Brand has failed to file two Forms 10-K and six Forms 10-Q. The serial and continuous nature of Digital Brand's violations of Exchange Act Section 13(a) further supports the sanction of revocation here.

In an attempt to refute the obvious recurrent nature of its violations, Digital Brand has attempted to recast its violations as "an isolated occurrence because being behind in the multiple filings stemmed from one directive of the Commission to refile its financial statements due to the disbarring of [its] prior auditor," and "are in accord one act." (Digital Brand's Answer to Motion for Ruling on the Pleadings, at 7-8). This same argument was made by Impax Laboratories, Inc., which also had missed eight periodic reports but argued that while "each failure to file a required report is technically a separate violation," "its violations are isolated to the extent that they resulted solely from 'the Company's inability to complete an unfortunately long and cumbersome process of developing a new accounting method for recognition of revenues.'" The Commission found Impax Laboratories' violations to be recurrent, not isolated in nature. *Impax Laboratories, Inc.*, Securities Exchange Act Rel. No. 57864, 2008 SEC LEXIS 1197 at *24-*26 (May 23, 2008). The same conclusion is appropriate here.

3. Digital Brand's degree of culpability, including its Officers' and Directors' Section 16 violations, supports revocation.

For many of the same reasons that Digital Brand's violations were long-standing and serious, they suggest a high degree of culpability. 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" its periodic reports. *Gateway*, at 10, 2006 SEC LEXIS 1288, at *21. Similar to the respondent in *Gateway*, according to EDGAR, Digital Brand has failed to file eight periodic reports. Because Digital Brand knew of its reporting obligations and nevertheless failed to file subsequent periodic reports, it has shown more than sufficient culpability to support revocation.

Digital Brand's Executive Director Linda Perry exhibited a high degree of culpability when she attempted to mislead the Court with the May 25, 2017 letter she procured from Mr. Boisseau (Div. Ex. 12), and had attached to Digital Brand's Answer filed June 13, 2017, to make it appear the company that was then currently making progress in getting its missing filings done. Whereas, in reality, Mr. Boisseau's work on the audit package for the year ended August 31, 2015 had been completed a year and a half before, in early 2016, and no audit work on the package had ever occurred. (Boisseau Tr. 38:10-39:5, 46:16-47:4; Perry Tr. 98:11-24). That deception of the Court was Digital Brand's intent is confirmed by its use of the letter in its subsequent submission to the Court referring to the "letter from DBMM's pre-audit accountant stating that efforts are **currently underway** to continue to comply." (Digital Brand's Answer to Motion for Ruling on the Pleadings, at 8) (emphasis added).

Ms. Perry exhibited a high degree of culpability when she had Digital Brand borrow money from Asher Enterprises on three different loans in 2013 when she knew that Asher Enterprises was a high risk toxic lender charging high rates of interest with egregious terms, thereby risking Digital Brand's ability to comply with its mandatory

periodic filing obligations. (Perry Tr. 113:25-115:17;125:23-126:2;135:5-136:15;176:2-16).

Ms. Perry and Digital Brand exhibited a high degree of culpability when they chose to fight Asher Enterprises instead of filing Digital Brand's periodic reports with the Commission. They made a deliberate choice not to make their SEC filings on a timely basis. (Perry Tr. 123:22-125:22;179:22-180:2; Digital Brand's Answer to Motion for Ruling on the Pleadings, ¶ 14). *See Cirtran Corp.*, Rel. No. 1134, 2017 WL 1953457 at *1,*6 (May 11, 2017) (CEO highly culpable when he knew issuer should have filed periodic reports yet made a conscious decision to use available funds to instead focus on product development).

Ms. Perry exhibited a high degree of culpability when she had Digital Brand accept Asher Enterprises' recommendation of RBSM to do re-audits for fiscal years 2012 and 2013 knowing that Asher Enterprises was "toxic," paid RBSM over $40,000 for the re-audits, never received the work from RBSM, and never sought the money back from RBSM (Perry Tr. 136:8-15;148:22-151:1;Div. Ex. 13; Resp. Ex. C), which money could have been used to pay another auditor and/or the Boisseau firm to get the company's periodic reports completed.

Exchange Act Section 16(a) requires that an individual file a Form 3 within ten days of becoming an officer, director, or ten percent beneficial owner of a company. According to EDGAR, Digital Brand filed a Form 10-K for the fiscal year ended August 31, 2014 stating that Neil Gray has served as Chairman and Executive Director since April 1, 2010, Reggie James has served as Senior Vice President of Marketing and Communications and Executive Director as of April 1, 2011, and Linda Perry served as

President, Chief Executive Officer, and Director until March 31, 2010, and as Executive Director and Chair Nominations/Compensation and Audit Committees since April 1, 2010. (Digital Brand Form 10-K for the fiscal year ended August 31, 2014, at 34-35). However, EDGAR shows that none of these three officers/directors has ever filed a Form 3 disclosing that they were an officer or director of Digital Brand. (Div. Ex. 7). Further, no steps had been taken to date to file Forms 3, nor had any steps been taken to inform Messrs. Gray or James about the Form 3 requirement. (Perry Tr. 88:13-90:5;91:9-15).

Linda Perry testified that she was aware that Forms 4 must be filed by officers and directors before the end of the second business day following the day in which a transaction resulting in a change in beneficial ownership has been executed for the company stock. She claimed that Form 4 might not apply because the officers and directors of Digital Brand never sold shares of the company stock, and that they only obtained preferred shares. (Perry Tr. 92:24-94:18). However, the instructions to Form 4 clearly state, "This Form must be filed before the end of the second business day following the day on which a transaction resulting in a change of beneficial ownership has been executed . . ." (Form 4, General Instruction, 1(a)). The instructions also state that persons "must report each transaction resulting in a change in beneficial ownership of any class of equity securities of the issuer... even though one or more of such classes may not be registered pursuant to Section 12 of the Exchange Act." (Form 4, General Instruction 3 (a)(i)). The instructions also clearly contemplate that preferred stock is covered by the reporting requirement: "The title of the security should clearly identify the class, even if the issuer has only one class of securities outstanding; for example, "Common Stock," "Class A Common Stock," "Class B Convertible **Preferred Stock**,"

etc." (Form 4, General Instruction (3)(b) (emphasis added).

This conduct of Digital Brand and its officers/directors, although not alleged in the OIP, provides further evidence of Digital Brand's culpability that the Court can and should consider when assessing the appropriate sanction for its admitted violations. *See Gateway* at 5, n.30 (Commission may consider other violations "and other matters that fall outside of the OIP in assessing appropriate sanctions"); *Citizens Capital Corp.*, Exchange Act Rel. No. 67313, 2012 SEC LEXIS 2024 at *32 (June 29, 2012) (management's failure to comply with Exchange Act Sections 13(d) and 16(a) "further brings into question the likelihood of the Company's future compliance with Section 13(a)"); *Ocean Resources, Inc.*, 2008 SEC LEXIS 81 at *15, Securities Act Rel. No. 59268 (Jan. 21, 2009) (ALJ found on summary disposition that respondent's assurances of future compliance achieved little credibility where its sole officer had ongoing violations of Exchange Act Section 16(a)).[6]

4. Digital Brand has made no efforts to cure its delinquencies, and can make no credible assurance of future compliance.

Digital Brand has made no efforts to remedy its past violations by, for example, filing any of its delinquent periodic reports, nor has it made a credible assurance of future

[6] The Commission has applied the same principle in other contexts. *Robert Bruce Lohman,* Exchange Act Rel. No. 48092, 2003 SEC LEXIS 1521 at *17 n.20 (June 26, 2003) (ALJ may properly consider lies told to staff during investigation in assessing sanctions, though they were not charged in the OIP); *Stephen Stout,* Exchange Act Rel. No. 43410, 2000 SEC LEXIS 2119 at *57 & n.64. (Oct. 4, 2000) (respondent's subsequent conduct in creation of arbitration scheme, which was not charged in OIP, found to be relevant in determining whether bar was appropriate); and *Joseph P. Barbato,* Exchange Act Rel. No. 41034, 1999 SEC LEXIS 276 at *49-*50 (Feb. 10, 1999) (respondent's conduct in contacting former customers identified as Division witnesses found to be indicative of respondent's potential for committing future violations). *See also SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 78 (D.C. Cir. 1980) (district court's injunction against future securities violations upheld; court found noncompliance with Exchange Act Section 16(a) "does evince a disregard of the securities laws that may manifest itself in noncompliance elsewhere.").

compliance. Nor could it because Digital Brand is not in a position to retain any of the professional services it would need to file audited financials.

Digital Brand has No Money to Pay Boisseau or an Audit Firm

According to its annual reports filed with the Commission on EDGAR from 2003 to 2014, Digital Brand has never made a profit, which does not bode well as far as its immediate ability to hire and pay for the bookkeeping services provided by Mr. Boisseau and the retention and payment of an auditor. Without the audit support work of the Boisseau firm, there is nothing for an auditor to audit. (Boisseau Tr. 25:20-27:5-24). The Boisseau firm has an outstanding balance of $7,000 to $8,000 due from Digital Brand on its services for the audit support package for the year ended August 31, 2015, and it has never been paid. Mr. Boisseau issued an internal order at his firm that they would discontinue providing any services to Digital Brand until they were paid. (Boisseau Tr. 31:23-32:8).

Digital Brand Does Not have an Auditor

Digital Brand cannot make any realistic efforts to remedy its delinquent filings violations nor make any assurances against future violations when it still has no auditor. Although Michael Naparstek of Assurance Dimensions mistakenly agreed to the Form 8-K filed on June 21, 2017 stating that Assurance Dimensions was engaged as Digital Brand's auditor, no engagement letter was signed by the parties, no retainer was paid to Assurance Dimensions, and no audit work has been done. (Naparstek Tr. 52:13-24, 58:23-25, 61:12-14;63:2-4;66:1-68:2-9;70:2-13). Moreover, even if a new auditor was

hired by Digital Brand, it would have nothing to audit because the evidence is that Digital Brand's bookkeeper, Mr. Boisseau, has not prepared the books for Digital Brand past the period of the Form 10-K for the period ended August 31, 2015. (Boisseau Tr. 34:11-35:3). And, Digital Brand has not hired any other firm to prepare pre-audit accounting packages for the delinquent reports. (Perry Tr. 105:10-14). At this juncture, Digital Brand cannot remedy its violations until it obtains the resources to pay for Mr. Boisseau or some other bookkeeper's services, and to hire and pay an auditor to audit the bookkeeper's financial statements for the company. And, Digital Brand offered no credible evidence of financial resources to accomplish these tasks at the hearing. Further, it is too late for Digital Brand to catch up on its multiple delinquent periodic reports, even if it could, and avoid revocation. In *Absolute Potential, Inc.*, 2014 SEC LEXIS 1193 at *16-*32 (April 4, 2014), the Commission found, *inter alia*, that even where the delinquent issuer became current in its periodic reports during summary disposition briefing, the public interest still required revocation of its securities registration as a deterrent to other issuers that might become delinquent. *See Law Enforcement Associates Corp.*, 2013 SEC LEXIS 1436 (May 15, 2013) (issuer revoked even though it filed all delinquent reports after Section 12(j) proceeding was instituted); *Citizens Capital Corp.*, 2011 SEC LEXIS 3307 at *14-*15 (Sept. 23, 2011) (in Section 12(j) proceeding, "even bringing all of its overdue periodic reports current would not extinguish Respondent's violations"); *Bio-Life Labs, Inc.*, 2011 SEC LEXIS 2546 at *9-*10 (July 25, 2011) (Section 12(j) proceeding "is not an extension of time to file delinquent reports or correct filing deficiencies as sometimes occurs during the normal filing process").

III. There are No Viable Excuses for Digital's Current Delinquencies.

Digital Brand has attempted to raise various excuses for its delinquent filings. None of the excuses are viable.

1. The Required Re-Audit of Digital Brand's 2012 Financials Provides No Excuse for its Current Delinquencies.

Rather than accepting responsibility for its delinquent filings, Digital Brand attempts to place the blame on others. Digital Brand attempts to attribute much of its current delinquency woes on the re-audit that was required when its then auditor, Sherb & Co., LLP, was barred in 2013 from practicing before the Commission because it had engaged in improper professional conduct. (Div. Exs. 13, 19; Resp. Exs. B, C, D). The necessity of the re-audit, however, provides Digital Brand with no excuse for its current filing delinquencies.

Linda Perry picked Sherb & Co. as Digital Brand's auditor. Ms. Perry was unhappy when her chosen auditor was barred for improper conduct and that as a result, Digital Brand was required to have a re-audit. (Perry Tr. 146:13-25; Tr.147:1-7).[7] Since Sherb & Co. had been barred from practicing before the SEC, Digital Brand was required to have a firm registered with PCAOB re-audit its 2012 financial statements. (Div. Ex. 13; Resp. Ex. C).[8]

[7] Although it complains about the expenses that resulted from having to have a re-audit, Digital Brand provides no explanation why it did not seek reimbursement from Sherb & Co., the cause of the need to re-audit.

[8] Ms. Perry claims that the timing of the need to re-audit 2012 as a result of the misconduct by Sherb & Co., and its resulting impact on the 2013 Form 10-K filing, was another cause of woe because financing then fell apart that would have allowed her to get "over the hump to never use toxic people again". (Perry Tr. 153:24-25; Tr.154:1-9). Respondent, however, presented no corroborating documentary evidence to support this claim of dashed financing or the hope of same.

The audit firm of RBSM took on Sherb & Co.'s clients, but Digital Brand was not required to use RBSM. The use of RBSM was not preordained by the need to re-audit. It was not "precipitated" by the Commission ordering Digital Brand to do the re-auditing, as claimed by Digital Brand. (Perry Tr. 151:11-13). Asher Enterprises, the "toxic lender" that Ms. Perry often had to borrow money from, "recommended" RBSM as the new auditor, and the "recommendation" was, not surprisingly, accepted by Digital Brand. (Digital Brand's Answer, at ¶3; Perry Tr. 136:10-15). It was Ms. Perry who chose to go forward with RBSM for the re-audit, (Perry Tr. 154:13), just as she chose to agree to the terms of Asher's toxic financing. *See* discussion, *infra*, at 28-29.

Digital Brand paid $40,509 for the re-audit work to be performed by RBSM. (Perry Tr. 149:11-12, 21-23). RBSM then failed to perform the work. According to Ms. Perry, RBSM "back-burnered" the re-audit work because she was not a priority client. (Tr. 149:11-13). "Long story short, I paid $40,509 and never got the final." (Perry Tr. 149:11-12). As Ms. Perry further described it, she "messed with RBSM, and they were not delivering." (Perry Tr. 154:12-13). RBSM then resigned without completing the re-audit. Ms. Perry did not like RBSM's work ethic and the firm never completed and filed "one bloody thing for me." (Perry Tr. 150:6-7). RBSM "finally resigned because [Ms. Perry] was giving the service partner such a hard time in June of 2014." (Perry Tr. 150:22-23). As explained by Ms. Perry, one thing about the microcap market is that "you do have to change professional advisors frequently." (Perry Tr. 92:3-4).

The $40,509 was never returned to Digital Brand (Perry Tr. 150:10; 151:5), but it was not because Sherb & Co. had been barred for professional misconduct and a re-audit was thereby required. Ms. Perry knew that RBSM was failing to perform the re-audit.

The $40,509 was lost because RBSM did not perform the work that was required and Digital Brand was afraid to "make a fuss" about the money or report RBSM to the PCAOB. (Perry Tr. 150:8-16). Digital Brand did not demand that the $40,509 be returned. Thus, the $40,509 hardly provides an excuse for Digital Brand's subsequent multiple filing delinquencies.

Linda Perry testified that the cost of the re-audit work was $100,000. (Perry Tr. 154:20-22; 159:12). The RBSM payment constitutes $40,590 of the claimed $100,000 total expense. (Perry Tr. 158:14-15). However, that lost payment was not a re-audit expense but, instead, was the result of Digital Brand's failure to demand the repayment of the money from RBSM or Sherb & Co. It reasonably should not be included as a re-audit expense.

Ms. Perry's recently created notes reflect payments to D'Arelli Pruzansky through December 10, 2014 of $40,000, which Perry includes in her $100,000 calculation. Yet, Ms. Perry admits that she "didn't pay all of that, because I still owe." (Perry Tr. 154:21-22). In fact, Digital Brand still owes $53,500 to D'Arelli, Pruzansky. (Pruzansky Tr. 50:18-20; 52:5-8). Accordingly, the $40,000 reasonably should not be included as a re-audit expense.

With respect to the Boisseau & Felicione firm, Linda Perry points to three entries for April, June, and August 2014 in her notes adding up to only $19,310. (Perry Tr. 159:3-4). However, other than the cryptic notes, there is no support provided concerning the work that was provided and whether it was duplicative of work previously performed by a predecessor. Marc Boisseau testified that his firm's work consisted of supplementing, not duplicating, some transactions. (Boisseau Tr. 25:5-9). Of course, it

cannot be that professional fees of $19,310 for three months of work in 2014 are somehow responsible for Digital Brand's subsequent multiple filing delinquencies in 2016-17.

If the Respondent wished to establish the claimed cost of the re-audit, it should have attempted to meet its burden with business records with a proper foundation, which were identified and exchanged by the established pre-trial exchange date for exhibits, not by last minute cryptic handwritten notes, which include no detail of work performed.

According to Ms. Perry, Digital Brand filed all of the then outstanding periodic reports in July 2014, and it then became fully compliant in mid-September 2014. (Perry Tr. 154:14-17). Thus, the re-audit work provides Digital Brand with no excuse for its subsequent multiple filing delinquencies in 2016-17, as to which the issuer continues to be seriously delinquent to this date. (Div. Demonstrative Ex. No. 1).

2. The Deposit Chill Provides No Excuse for Digital Brand's Current Delinquencies.

Digital Brand continues its parade of woes by pointing to a deposit transaction restriction on its stock, known as a "Deposit Chill," imposed by the Depository Trust Company ("DTC") in 2012. The reason for the Deposit Chill was unknown to Digital Brand. Linda Perry saw the chill problem as a reflection of the microcap world that she was a part of ("this microcap world is something else"). (Perry Tr.160:19-20). Digital Brand was able to demonstrate to the DTC that it had not issued shares to the company that was the cause of concern. (Perry Tr. 160:4-8; 18-25). Digital Brand thus established that "we were cool and we got our chill withdrawn." (Perry Tr. 161:9-10).

To Digital Brand, the upshot of the chill episode is not that it occurred and had to be dealt with, as with any business problem. Instead, as posited by Digital Brand, the relevant take-away from the chill episode is that Digital Brand had to go through three attorneys to have the chill removed. (Perry Tr. 161:12-15). The trial examination of Ms. Perry by Digital Brand's counsel is illuminating:

> Q: Did the company make a great expenditure and spending resources in getting that chill removed?
>
> A: **We spent about $25,000 on attorneys at that point, yes, because they just, honestly, did not know what they were doing.**

(Perry Tr. 161:16-19) (emphasis added).

The Deposit Chill was lifted on November 8, 2013. The money wasted by Digital on claimed-to-be incompetent attorneys in 2012-13 was a matter for a complaint to the relevant bar association. It provides no excuse for Digital's filing deficiencies in 2016-17.

3. The Consequences of Digital's Chosen Relationship with Asher Enterprise Does Not Provide an Excuse for the Current Filing Delinquencies.

Digital Brand borrowed "over a half a million dollars from Asher starting in 2010." (Perry Tr. 114:7-8). From the beginning, Linda Perry knew that Asher was a "toxic lender" -- "I sure did know that." (Perry Tr. 136:10-11). Digital Brand's borrowing from Asher was always based on "egregious terms," including conversion rights, which Asher always was "relentless" in exercising. (Perry Tr. 114:6-9; 122:6-7). Digital Brand was well aware of, was "fine" and in "good stead" with, and accepted the known requirements for it to obtain financing from Asher, even as egregious and potentially deleterious as the requirements were. (*Id.*) Ms. Perry knew that other

financing was unavailable in the microcap world, and she willingly accepted the Asher financing even though the cost and risk were high. As she testified:

- "I made a decision to borrow money from Asher knowing the egregious terms". (Perry Tr. 125:25; 126:1).
- "I knew the terms. I knew what they were, and I felt that because it was so difficult to get financing, I would live with it...so that we could reach that crossover point where we would never need anybody like Asher again." (Perry Tr. 136:11-15).
- "I was willing to accept Asher's terms. It's not that I didn't realize. I knew they were a toxic lender charging high rates of interest. It was the only act in town, and I could live with it and did for a couple of years...." (Perry Tr. 176:11-14).
- "...as bad as Asher was, I just felt at least that was a direct loan for which it was convertible debenture, egregious but I could live with it for the period of time that I needed it and then I never wanted to see them again." (Perry Tr. 179:18-21).

Digital Brand was able to live "quite rightly" (Perry Tr. 126:1-2) with the egregious terms that it agreed to with Asher until the negative consequences of its high risk strategy emerged.

Ms. Perry argues that she had no control over Asher being unable to convert its shares and deciding that "they were going to sue me and relentlessly chase me". (Perry Tr. 176:20-21). However, Ms. Perry chose to enter into the convertible instruments and agreed to the egregious terms, and she did so over an extended period of time. It was the terms of three of those very high risk instruments that she entered into and then violated that provided the basis for the litigation, monetary judgment and turnover orders that followed.

4. Digital Brand's Active and Continuing Litigation with Asher Enterprises Provides No Excuse for the Current Delinquencies.

Consistent with its pattern of obtaining high risk financing from Asher Enterprises, in 2013 Digital Brand entered into convertible promissory notes in February, April, and June. (Resp. Ex. F, ¶¶ 6-11; Perry Tr. 115:3-12). The notes entered into with Asher explicitly provided that Digital Brand would be in default of the notes upon "failing to comply with the reporting requirements of the Securities Exchange Act of 1934, as amended (the "Exchange Act")." (Resp. Ex. F, ¶ 13). On February 7, 2014, as a result of Asher not being able to convert the shares it received pursuant to the promissory notes because of Digital Brand not filing its 2013 10-K, Asher served Digital Brand with a written notice of default under the notes. (Resp. Ex. F, ¶ 15). Asher informed Ms. Perry that because Digital Brand was not compliant and Asher could not convert, it was going to sue Digital Brand. (Perry Tr.122:9-12).

The default was not cured and Digital Brand was sued by Asher on February 12, 2014 for, *inter alia*, the amounts owed on the convertible promissory notes. (Resp. Ex. F; Perry Tr. 117:19-21). On June 30, 2015, summary judgment was granted in favor of Asher on the on the unpaid balance of the promissory notes. (Resp. Ex. H; Perry Tr. 118:7-10). On July 20, 2015, a monetary judgment, including pre-judgment interest, in favor of Asher Enterprises was entered for $122,801.87. (Div. Ex. 14).

The judgment entered against Digital Brand was the result of Digital Brand's default on convertible promissory notes voluntarily entered into by Linda Perry on behalf of Digital Brand. As indicated, *supra*, and without question, Ms. Perry was fully informed of the high risk terms of the notes, including the conversion rights, when she chose to enter into the contractual agreements. According to Ms. Perry, Asher is "just a

bad guy" because it did not allow for the "extenuating circumstances" that Digital Brand was in. (Perry Tr. 178:13-15.) However, she knew all along that Asher was "toxic" and the promissory notes that she willingly signed nowhere provided for an "extenuating circumstances" exception.

After the entry of the monetary judgment, Digital Brand has engaged in extensive post-judgment motion practice "to the present day in push back against Asher Enterprises, Inc." (Answer, ¶ 7; Digital Brand's Answer to Motion for Ruling on the Pleadings, at ¶ 10; Digital Brand "has and still is aggressively fighting Asher Enterprises, Inc."). This has included fighting an order requiring that Digital Brand turnover certain of its own securities to Asher Enterprises. (Answer, ¶ 7).

Digital Brand has sought to defend this Enforcement action by arguing that it could not afford to have its 2015 Form 10-K and the required filings thereafter audited because of its active and ongoing litigation with Asher. (Digital Brand's Answer to Motion on the Pleadings, at ¶ 12). Yet, incredibly, Digital Brand attempts to venerate its delinquencies by claiming that it **chose** to engage in costly litigation with Asher rather than pay to prepare and file it mandatory periodic reports, "**which can be filed at a later date**," and that it "**should be lauded for its efforts.**" (*Id.*, at ¶¶ 14, 16) (emphasis added). Digital Brand boasts that it fought Asher:

> for the very protection of its shareholders and the protection of the marketplace." *** [to] protect the current and future shareholders, DBMM **entered into a protracted litigation with Asher Enterprises, Inc.** to fight off an entity that FINRA has deemed a "bad actor" **as an exemplification of its efforts to be a responsible issuer.*** Unfortunately, these efforts have come at **the cost of leaving DBMM with diminished resources to pay for an audit.** If DBMM was not acting as a responsible issuer, DBMM would have simply handed over the securities requested by Asher Enterprises, Inc. **Such costly efforts by DBMM should not be held against DBMM,** especially where

> restraining of Asher Enterprises, Inc. from converting securities en masse protects the current and future shareholders. **Regrettably, the conscious choice to be a responsible issuer came at a Sophie's choice: pay for the audits and satisfy the letter of the regulations and let the share price be crushed by Asher's conversions, or pick up the sword where the Commission left off and protect the investors from immediate harm.**

(*Id.*, at ¶ 12) (emphasis added).

This statement provides no assurance against future delinquencies. Digital Brand should not decide when and **if** it will comply with applicable regulations based on unrelated business disputes with third parties. It cannot simply ignore regulations designed to protect investors by providing them with financial information through the required periodic filings.

Ms. Perry attempts to avoid her own responsibility for Digital Brand's high risk taking and the consequences therefrom by pointing to negative publicity about Curt Kramer. (Resp. Ex. I). That information, however, changes nothing about what Ms. Perry's fully informed state of mind was at the time that she willingly embraced the Asher financing. Ms. Perry knew who and what she was dealing with when she made the high risk decision to do business with Asher.

Digital Brand has been unable to obtain financing for a substantial period of time. This is not surprising since it remains engaged in contentious ongoing litigation with Asher. (Perry Tr. 125:16-22; 126:7-24; 176:22-25; 177:1-8; 180:17-21; 183:8-9). Nothing has changed. The continuing litigation means continuing litigation costs, a continuing lack of financing, and continuing delinquent filings. This does not excuse the delinquencies but, instead, demonstrates the necessity of revocation.

A substantial monetary judgment already has been entered against Digital Brand. In addition, the same court has issued an order requiring that Digital Brand turnover shares to Asher. (Perry Tr. 121:11-14). The monetary judgment and the turnover order are still in effect. (Perry Tr. 127: 9-15; 128: 6-10). According to Ms. Perry, "there's recourse that we can take [in Federal Court] and we intend to do that." (Perry Tr. 121:1-14). The litigation has no end in sight. (Digital Brand's Answer to Motion on the Pleadings, at ¶ 10: Digital Brand "has and still is aggressively fighting Asher Enterprises, Inc.") Digital Brand's impecunious state will thus continue into the future with no realistic hope that the filing delinquencies will be cured in the foreseeable future.[9]

5. A Lack of Financial Resources is No Excuse for Digital Brand's Filing Delinquencies; Digital Brand Still Lacks the Necessary Resources to Bring its Filings Up to Date; Even if Digital Brand had Funding, it is Too Late to Avoid Revocation.

Digital Brand attempts to excuse its delinquent filings by arguing that it has lacked the funds to avoid or cure the delinquencies. However, existing case law demonstrates that a lack of funding is an insufficient excuse. *See*, *Cirtran Corp*, Rel. No. 1134, 2017 WL 1953457 at *1,*6 (May 11, 2017) (granting revocation of registration where the company failed to file required reports due to insufficient funds; CEO highly culpable when he knew issuer should have filed periodic reports yet made a conscious decision to use available funds to instead focus on product development); *Magnum D'Or*

[9] Knowing that the ongoing litigation with Asher Enterprises does not bode well for any financing, Ms. Perry conveniently pivots and speculates that the Asher Enterprises litigation will settle, not because Digital Brand has money to pay in settlement but because she has "worn them down." (Perry Tr. 188:20-22; 189:7). Both parties, however, are preparing for the next round of motions for the court to decide, including a motion by Asher Enterprises to hold Digital Brand in contempt for its refusal to comply with the turnover order. (Answer, at ¶ 6.) Accordingly, the validity of Digital Brand's defense to the turnover order will be taken up in the New York state court case or in a new Federal Circuit case. But, even if successful, Digital Brand will still owe on the monetary judgment, and the supplementary post-judgment charges that are applicable.

Resources, Inc., 101 SEC Docket 2333, 2011 WL 2662106 at *1, *3 (July 8, 2011) (finding violations of Exchange Act Section 13(a) and Rules 13a-1 and 13a-3 where the company failed to file periodic reports "because it lacked the funds to retain accountants and legal counsel"; "Magnum's lack of resources does not mitigate its violations"); *Freedom Golf Corp.*, 80 SEC Docket 619, 2003 WL 21106567 (May 15, 2003) (revoking a company's stock for violations of Section 13(a) and Rules 13a-1 and 13a-13 where the company failed to file required reports because of a lack of funds).

The case law is consistent with Digital Brand's Code of Ethics, which requires "timely" filing of all SEC reports. The Code of Ethics does not allow for a decision to deviate from the timely filing requirement to use available funds to pay for something different than the required filing. (Perry Tr. 86:2-25; 87:1-11).

Further, the claimed lack of funding, the alleged causes of the deficiency, Digital Brand's admitted voluntary choice to spend its funds other than on the delinquent filings, and its financial inability to cure its delinquencies all demonstrate that revocation is appropriate.

Digital Brand claims that it has obtained funding that will allow for the completion of all its delinquent filings. Even if it were true, it simply is too late to avoid revocation. Further, the unsubstantiated claim by Digital Brand of new funding totally lacks credibility. The claim should be rejected as fictitious. As such, it completely undermines and creates more than a preponderance of doubt concerning any purported assurance of future compliance.[10]

[10]Even if the claimed new funding did materialize, it would be quickly burned through to cover the current outstanding debts and the substantial fees for the accounting and auditing services for the many delinquent filings. Thus, Digital Brand still cannot ensure future compliance. It should be concluded that even with the claimed new funding Digital Brand will return to delinquencies as usual.

Digital Brand Chief Executive Linda Perry claimed for the first time while on the stand that she has arranged for funding that would allow Digital Brand to bring its delinquent filings up to date. There previously had not been even a whisper of any sort about such new found funding from Digital Brand or its counsel. Ms. Perry first testified that she had the funds "as of yesterday." (Perry Tr. 108:19-20.) Ms. Perry then said that she had the funds as of "last week". (*Id.*). Ms. Perry testified that she had to sign for the money "by the end of the week, this week" and that "$61,800 plus $250,000" would be provided from two private parties in the next week. (Perry Tr. 108:24-25; 109: 1-16). Perry then admitted that the paperwork for the claimed funding had not been drawn up. (Perry Tr. 109:17-24). Later in her testimony, confirming that the essential element of a dollar amount had not been agreed to and thus that her story was, at most, only a hope, Perry changed her previous claim of $250,000 in agreed funding to "it's going to be between 200 and 250." (Perry Tr. 182:18).

Although insisting based on her self-proclaimed credibility that the Court should believe that she somehow had obtained significant funding for the delinquent filings on the eve of the hearing, Ms. Perry refused to identify the supposed sources of the funding. (Perry Tr. 110:8-25; 111:1-14). Perry also would not identify or produce a single piece of paper, whether a note of discussions, a draft or an email, that would substantiate the claimed new funding. (Perry Tr. 191:13-22; 192:24-25; 193:1). To emphasize that she was playing games with the facts and the Court, and that she had the ability to immediately retrieve evidence of her claimed new funding *if it was true,* in response to her counsel, Perry announced: "I've gotten two texts which I'd be happy to share. No, I wouldn't but you know what I'm saying." (Perry Tr. 182:10-11). If Ms. Perry's counsel

had thought that such documents actually existed, he could have then and there requested confidentiality or *in camera* protection for them. Notably, he made no such request.

Linda Perry's insistence that she would not say something that she could not "prove" (Tr. 109:20-21) ignores the fact that the hearing was precisely the time and place for the presentation of such "proof" as to a party's claim. Yet, Ms. Perry provided no substantiation of her late claim of funding. Further, there was no such proof provided by Digital Brand's counsel as a Supplemental Exhibit before the record closed. Funding for Digital Brand had been totally unavailable for an extended period of time and the causes of that have gotten worse, not better. Accordingly, it should be concluded that Ms. Perry's claim of funding is not only too late but simply not credible.

IV. Digital Brand Does Not Qualify for the Hardship Exemption.

While Digital Brand claimed in its Answer that the Commission should grant it an unauthorized and unprecedented hardship exemption, it failed to pursue that claim at the August 9, 2017 hearing in this case. It had asserted that it "qualifies for a Continuing Hardship Exemption as specified in 17 CFR §232.202" based on certain hard-luck events. (Answer, ¶ 10; Digital Brand's Answer to Motion for Ruling on the Pleadings, at ¶ 11). Digital Brand's Answer then "requests that the Hardship exemption be granted and the Commission withdraw proceedings to enforce Section 12(j) of the Exchange Act pursuant to the authority granted in 17 CFR §232.202." (Answer, ¶ 10 and Prayer for Relief). Fundamentally, however, even assuming that the claimed events did occur, Digital Brand is not entitled to a hardship exemption. Respondent's assertion is entirely

unfounded as is evident by the very language of the regulation upon which it bases its hardship defense.

The asserted regulation provides that an electronic filer may apply in writing for a continuing hardship exemption for a filing required to be submitted in electronic format if the filing cannot be filed without undue burden or expense. As provided by the regulation, such written application **shall be made at least ten business days before the required due date of a filing** or within such shorter period as may be permitted. 17 CFR §232.202(a).

Digital Brand has not filed any periodic reports since the period ended May 31, 2015. (Simpson Tr. 15:5-21; Div. Demonstrative Ex. 1; Div. Ex. 7). In its Answer, Digital Brand admitted that "it fell behind in Respondent's Periodic Reporting obligations" (Answer, ¶ 9), and requested that a hardship exemption now be granted as to all of its delinquent filings, ignoring the very specific timing requirement of the regulation, *i.e.*, that written application must be made at least ten business days before the required due date. Based on the clear language of 17 CFR §232.202, there is no authority for such a request. Digital Brand never applied for the hardship exemption under this provision, and introduced no evidence at the hearing to support an application of the hardship exemption.

V. Revocation is the Appropriate Remedy for Digital Brand.

As demonstrated above, a full analysis of the *Gateway* factors establishes that revocation is the appropriate remedy for Digital Brand's long-standing violations of the periodic filings requirements, particularly since the company's stock has continued to

trade on the over-the-counter markets. (Div. Ex. 10). Digital Brand's recurrent failures to file its periodic reports have not been outweighed by "a strongly compelling showing with respect to the other factors" which "would justify a lesser sanction than revocation." *Impax Laboratories, Inc.,* 2008 SEC LEXIS 1197 at *27.

Moreover, revocation will not be overly harmful to whatever business operations, finances, or shareholders Digital Brand may have. The remedy of revocation will not cause Digital Brand to cease being whatever kind of company it was before its securities registration was revoked. The remedy instead will ensure that until Digital Brand becomes current and compliant on its past and current filings, its shares cannot trade publicly on the open market (but may be traded privately). *See Eagletech Communications, Inc.,* Exchange Act Rel. No. 54095, 2006 SEC LEXIS 1534, at *9 (July 5, 2006) (revocation would lessen, but not eliminate, shareholders' ability to transfer their securities). Revocation will not only protect current and future investors in Digital Brand, who presently lack the necessary information about Digital Brand because of the issuer's failure to make Exchange Act filings; it will also deter other similar companies from becoming lax in their reporting obligations.

A new registration process will place all investors on an even playing field. All current investors will still own the same amount of shares in Digital Brand that they did before registration, though their shares will no longer be devalued because of the company's delinquent status. All investors, current and future alike, will also benefit from the legitimacy, reliability, and transparency of a company in compliance. The time-out will protect the status quo, and will give Digital Brand the opportunity to come into full compliance, to calmly and thoroughly work through all of its remaining issues with

its attorney, consultants, auditors, and management, and to complete its financial statements in compliance with Regulations S-K and S-X.

Conclusion

For the reasons set forth above, the Division respectfully requests that the Administrative Law Judge revoke the registration of each class of Digital Brand's securities registered under Exchange Act Section 12.

Dated: September 29, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true copies of the Division of Enforcement's Post-Hearing Brief were served on the following on this 29th day of September, 2017, in the manner indicated below:

By Email:

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