

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 90978 / January 25, 2021

Admin. Proc. File No. 3-17990

In the Matter of

DIGITAL BRAND MEDIA &
MARKETING GROUP, INC.

ORDER DENYING MOTION FOR SUMMARY AFFIRMANCE, GRANTING PETITION
FOR REVIEW, AND SCHEDULING BRIEFS

On November 12, 2019, an administrative law judge issued an initial decision dismissing administrative proceedings against Digital Brand Media & Marketing Group, Inc.¹ The Division of Enforcement filed a timely petition for review on December 3, 2019, and Digital Brand filed a likewise timely motion for summary affirmance on December 20, 2019. For the reasons that follow, we deny Digital Brand's motion for summary affirmance, grant the Division's petition for review, and set a briefing schedule for this appeal.

I.

In 2017, the Commission instituted proceedings against Digital Brand pursuant to Section 12(j) of the Securities Exchange Act of 1934. In relevant part, Section 12(j) authorizes the Commission to suspend or to revoke the registration of a security if the issuer has failed to comply with any provision of the Exchange Act or the rules and regulations thereunder.² The order instituting proceedings alleged that Digital Brand violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder by failing to file required Form 10-K and 10-Q periodic reports for a period of about two years before the institution of proceedings.³

¹ *Digital Brand Media & Marketing Group, Inc.*, Initial Decision Release No. 1389, 2019 WL 6118538 (Nov. 12, 2019).

² *Digital Brand Media & Marketing Group, Inc.*, Exchange Act Release No. 80701, 2017 WL 2130823, at *1 (May 16, 2017) (citing 15 U.S.C. § 78l(j)).

³ *Id.* at *1-2 (citing 15 U.S.C. § 78m(a); 17 C.F.R. §§ 240.13a-1, .13a-13).

After procedural developments immaterial here,⁴ the ALJ issued an initial decision finding that Digital Brand “failed to file required periodic reports with the Commission between 2015 and 2018,” and so “violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-13.”⁵ The ALJ agreed with the Division that these violations were “serious” as well as “recurrent,” with the consequence that “investors did not have [current] information for about two years.”⁶ Nevertheless, the ALJ also found that mitigating factors were present, including that Digital Brand had “filed overdue reports and remained current” since the institution of proceedings.⁷ The ALJ found both that “all deficiencies identified [in staff comment letters] . . . have been cured” and that Digital Brand still had not provided “interim [quarterly] financial information” from the period of the delinquency.⁸ The initial decision concluded that “neither of the available sanctions [under Exchange Act Section 12(j)]—revocation or suspension of the registration of Digital Brand’s securities—is appropriate for the facts in this case.”⁹

The Division’s petition for review identified two issues: (1) that the ALJ failed to correctly apply the standard for determining sanctions in a Section 12(j) proceeding and (2) that the ALJ erred in finding that Digital Brand had cured its prior filing delinquencies and was in fact “current” in its reporting obligations. As to the first issue, the Division asserts that Commission precedent establishes that when, as the ALJ found, the reporting violations are serious and recurrent, only a “strongly compelling” showing in mitigation justifies a sanction less than revocation. As to the second issue, the Division asserts that Digital Brand’s ostensibly curative filings either did not comply, or only partially complied, with reporting requirements, including with respect to “requirements for reporting internal controls over financial reporting (‘ICFR’), which the Commission has repeatedly held is material.”

In moving for summary affirmance, Digital Brand argues that the Division has inaccurately characterized Commission precedent as requiring “automatic” revocation in any Section 12(j) proceeding where the issuer repeatedly disregarded its past reporting obligations. Digital Brand contends that the initial decision reflects an “appropriate and straightforward application of undisputed facts” to the applicable legal standard. According to Digital Brand, that legal standard calls for the “weighing and combination of circumstances . . . in deciding the

⁴ See, e.g., *Digital Brand Media & Marketing Group, Inc.*, Initial Decision Release No. 1226, 2017 WL 5516325 (Nov. 16, 2017) (revoking registration), *vacated and remanded*, *Pending Administrative Proceedings*, Exchange Act Release No. 83907, 2018 WL 4003609 (Aug. 22, 2018), *specifying procedures*, *Digital Brand Media & Marketing Group, Inc.*, Admin. Proc. Rulings Release No. 6082, 2018 WL 8414556 (Sep. 25, 2018).

⁵ *Digital Brand Media & Marketing Group, Inc.*, 2019 WL 6118538, at *1, 4.

⁶ *Id.* at *5, 7.

⁷ *Id.* at *1, 6.

⁸ *Id.* at *5, 7.

⁹ *Id.* at *1.

appropriateness of revocation.” Digital Brand also claims that it “received approval” from staff in the Division of Corporation Finance regarding the “amendments that were filed to cure deficiencies” identified in the past-due reports that it eventually filed.

II.

Under Commission Rule of Practice 411(e)(2), the Commission may grant summary affirmance if “no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument.”¹⁰ Rule 411(e)(2) provides further that summary affirmance will be denied if there is a “reasonable showing that a prejudicial error was committed in the conduct of the proceeding or that the decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review.”¹¹ “[S]ummary affirmance is rare,” given that “generally we have an interest in articulating our views on important matters of public interest,”¹² and it is not ordinarily granted in the absence of “compelling reasons” for concluding that briefing in the ordinary course would not assist the Commission in its consideration of the review proceeding.¹³

Based on our preliminary review of the initial decision and the parties’ submissions, we conclude that Digital Brand has failed to meet its burden of showing that briefing in the ordinary course would not assist the Commission. This appeal raises issues as to which we have an interest in articulating our views and important matters of public interest, including the proper application of the standard that governs determination of sanctions in a Section 12(j) proceeding. Furthermore, Digital Brand has not shown that the material facts are indeed undisputed,¹⁴

¹⁰ 17 C.F.R. § 201.411(e)(2).

¹¹ *Id.*

¹² *Theodore W. Urban*, Exchange Act Release No. 63456, 2010 WL 5092728, at *2 (Dec. 7, 2010) (internal quotations and citations omitted).

¹³ *Terry T. Steen*, Exchange Act Release No. 38675, 1997 WL 274955, at *1 (May 27, 1997); *see also Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (*per curiam*) (requiring showing that “no benefit will be gained from further briefing and argument of the issues presented”); *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158 (5th Cir. 1969) (explaining that summary affirmance may be appropriate where the position of the party that prevailed below “is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case,” as when “the appeal is frivolous”).

¹⁴ *Compare Eric S. Butler*, Exchange Act Release No. 65204, 2011 WL 3792730, at *2 n.2 (Aug. 26, 2011) (noting availability of summary affirmance when the “relevant facts are undisputed and the initial decision does not embody an important question of law or policy warranting further review by the Commission”), *with The Robare Group, Ltd.*, Exchange Act Release No. 75686, 2015 WL 4749145, at *2 (Aug. 12, 2015) (denying summary affirmance where there were “significant disagreements concerning material facts”) *and David F.*

including as to compliance with the requirements for reporting ICFR and those relating to the provision of interim quarterly financial information.¹⁵ We therefore deny Digital Brand's motion for summary affirmance and grant the Division's petition for review. Our denial should not be construed as suggesting any view as to the ultimate merits of the case.

* * *

Accordingly, IT IS ORDERED that Digital Brand's motion for summary affirmance is denied; and it is further

ORDERED, pursuant to Rule of Practice 411,¹⁶ that the Division of Enforcement's petition for review of the initial decision is granted, and that, pursuant to Rule 411(d),¹⁷ the Commission will determine what sanctions, if any, are appropriate in this matter; and it is further

ORDERED, pursuant to Rule of Practice 450(a),¹⁸ that the Division of Enforcement shall file a brief in support of the petition for review by February 24, 2021; Digital Brand shall file a brief in response by March 26, 2021; and any reply brief shall be filed by April 9, 2021.

Pursuant to Rule of Practice 180(c), failure to file a brief in support of the petition may result in dismissal of this review proceeding.¹⁹

By the Commission.

Vanessa A. Countryman
Secretary

Bandimere, Exchange Act Release No. 71333, 2014 WL 198175, at *3 (Jan. 16, 2014) (denying summary affirmance where the appeal raised "multiple factual challenges").

¹⁵ See *Digital Brand Media & Marketing Group, Inc.*, 2019 WL 6118538, at *6 ("Digital Brand's . . . comprehensive [curative] filings do not contain the interim financial information that would have been covered by the missing quarterly reports . . .").

¹⁶ 17 C.F.R. § 201.411(e)(2).

¹⁷ 17 C.F.R. § 201.411(d).

¹⁸ 17 C.F.R. § 201.450(a). As provided by Rule 450(a), no briefs in addition to those specified in this schedule may be filed without leave of the Commission. Attention is called to Rule of Practice 450(b) and (c), 17 C.F.R. § 201.450(b) and (c), with respect to content and length limitations, and Rules of Practice 150 - 153, 17 C.F.R. § 201.150 - 153, with respect to form and service, as well as the Commission's March 18, 2020 order providing further instructions regarding the filing and service of papers in appeals of initial decisions. See *Pending Administrative Proceedings*, Exchange Act Release No. 88415, <https://www.sec.gov/litigation/opinions/2020/33-10767.pdf>.

¹⁹ 17 C.F.R. § 201.180(c).