

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-21137

<p>In the Matter of</p> <p>GROWN ROGUE INTERNATIONAL INC. (fka NOVICIUS CORPORATION),</p> <p>Respondent.</p>
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DIVISION OF ENFORCEMENT’S
REPLY IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

The Division of Enforcement (“Division”), by counsel, files this Reply in Support of its Motion for Summary Disposition.

I. STANDARDS APPLICABLE TO A MOTION FOR SUMMARY DISPOSITION

In its moving papers, the Division submitted evidence establishing “that there is no genuine issue with regard to any material fact and that the [the Division] is entitled to summary disposition as a matter of law.” 17 CFR 201.250. As Respondent concedes, it was required in its Opposition to “set forth specific facts showing a genuine issue for a hearing[.]” Opp. at 2. Respondent then does an about-face, arguing that it “has not yet had its opportunity to rebut the presumption” of revocation arising from the facts submitted by the Division. Opp. at 3. Respondent goes on to suggest that a hearing should be held at which Respondent might submit such evidence. *Id.* (“But what is a hearing or summary judgment proceeding for?”). Respondent does not claim to possess

such evidence or claim that it will present it at a hearing, only that Respondent should be given chance to do so.

The time for Respondent to notify the Division and the Commission of any evidentiary dispute was when Respondent filed its Opposition. 17 CFR 201.205. The Respondent did not take advantage of that opportunity, meaning that there is no dispute of material fact requiring resolution through an evidentiary hearing. The undisputed facts establish that revocation is required.

II. ARGUMENT

In determining the proper remedy for an issuer's violation of Section 13 of the Exchange Act, the Commission considers: (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. *Gateway International Holdings, Inc.*, Exchange Act Rel. No. 53907, 2006 SEC LEXIS 1288, at *19-20 (May 31, 2006). Where the issuer's violations are serious and recurrent, the Commission applies "a strong presumption in favor of revocation" that can only be rebutted by "a strongly compelling showing with respect to the other factors." *Absolute Potential, Inc.*, Exchange Act Rel. No. 71866, 2014 SEC LEXIS 1193, at *24 (April 4, 2014) (citation omitted).

A. **GRUSF has failed to put forth evidence establishing a dispute of fact over whether its delinquencies were serious and recurrent.**

The Division submitted evidence that GRUSF's delinquencies were recurrent. GRUSF failed to file three years of reports and that GRUSF's reporting violations were especially serious because they coincided with GRUSF going public through a reverse takeover in November 2018.

See Harris Decl. Ex.'s 4-5; Answer at 1.¹ GRUSF has submitted no evidence raising a factual dispute over the serious and recurrent nature of its violations. GRUSF's serious and recurrent violations give rise to a strong presumption in favor of revocation.

B. GRUSF has not submitted evidence raising a factual dispute over the remaining *Gateway* factors.

GRUSF has submitted no evidence raising a factual dispute over the remaining *Gateway* factors.

1. GRUSF's violations were knowingly committed, establishing a high degree of culpability.

The Division submitted evidence that GRUSF had a high degree of culpability because it understood that reports were required as evidenced by the fact that it filed eight Forms 20-F prior to the delinquencies giving rise to the OIP. Harris Decl. at Ex. 4. See also *LegacyXChange, Inc.*, Exchange Act Rel. No. 96401, 2022 WL 17345980, at *5 (Nov. 29, 2022) (“Legacy committed these violations with a high degree of culpability [where] Legacy demonstrated that it was aware of its periodic and other filing obligations . . . [y]et, despite such awareness, Legacy has repeatedly failed to file periodic reports” for more than four years); *China-Biotics, Inc.*, Exchange Act Rel. 70800, 2013 SEC LEXIS 3451, at *37 (Nov. 4, 2013) (culpability would be low if violations were inadvertent or accidental).

GRUSF has submitted no evidence that would support the conclusion that its violations were inadvertent or accidental as would be required to create a factual dispute on this issue. Instead, GRUSF claims that, because it did not receive Corporation Finance's delinquency notice, its culpability is mitigated. In filing its April 29, 2009 voluntary 12(g) registration with the

¹ The delinquencies cited in the OIP are not GRUSF's only delinquencies. Shortly before Corporation Finance notified GRUSF of the delinquencies at issue in the OIP, GRUSF filed a Form 20-F for the period ended August 31, 2018, over three years late. Harris Decl. Ex.'s 4-5.

Commission, GRUSF agreed to file with the Commission current and accurate information in periodic reports. *See* 17 C.F.R. §§ 240.13a-1. GRUSF's reporting requirements do not emanate from a delinquency notice from Corporation Finance, but from its obligations under Section 13(a) of the Exchange Act. Moreover, while a failure to cure after receiving a delinquency notice aggravates already high culpability, the absence of such evidence does not mitigate culpability. *See China-Biotics, Inc.*, 2013 SEC LEXIS 3451, at *24 (“[w]hile the presence of any ... aggravating circumstances justify[] an increase in sanctions, their absence is not mitigating”).

2. GRUSF's remedial measures are too late and it has not provided evidence of concrete measures to ensure future compliance.

(a) GRUSF's remedial measures are too late.

Citing the Commission's remand decision in *e-Smart Techs., Inc.*, GRUSF claims that revocation is improper when an issuer has cured all filing delinquencies. *e-Smart* is distinguishable on numerous grounds.

First, in *e-Smart*, the Commission did not find that an issuer's post-OIP compliance was dispositive on whether revocation was warranted. Rather, the Commission remanded a revocation decision to the administrative law judge to assess whether the issuer's compliance efforts merited a sanction less than revocation. *e-Smart Techs., Inc.*, Release No. 50514, 2005 WL 274086 (Oct. 12, 2004).

Second, *e-Smart* was decided before *Gateway*, in which the Commission adopted the *Gateway* factors and the presumption that serious and recurrent violations give rise to the presumption that revocation is required for the protection of investors. *Gateway International Holdings, Inc.*, Exchange Act Rel. No. 53907, 2006 SEC LEXIS 1288, at *19-20 (May 31, 2006).

Third, *e-Smart* was decided before *Natures Sunshine Prod., Inc.*, Exchange Act Rel. No. 59268, 2009 WL 137145 at *8 (Jan. 7, 2009), in which the Commission held that serious and

recurrent delinquencies that are only cured after the filing of an OIP require meaningful sanctions. To hold otherwise would “reward those issuers [like Grown Rogue] who fail to file required periodic reports when due over an extended period of time” and only seek to cure on the eve of a revocation ruling. *Id.* Since *Natures Sunshine*, the Commission has repeatedly held that, where an issuer’s violations are serious and recurrent and only cured after the issuance of an OIP, “[r]evocation is necessary to deter issuers from disregarding their obligations to present accurate and timely information to the investing public until spurred by the institution of proceedings,” *Advanced Life Sciences*, Exchange Act Rel. No. 81253, 2017 WL 3214455 at *5 (July 28, 2017), and to “address the broader systemic harm that follows from registrants who ‘game the system’ by complying with their unambiguous reporting obligations only when they are confronted by imminent revocation.” *Absolute Potential, Inc.*, Exchange Act Rel. No. 71866, 2014 SEC LEXIS 1193, at * 27 (April 4, 2014). *See also* Div. Mot. at 8 (citing additional cases in which the Commission held that an issuer’s post-OIP cure efforts were too late). The Commission recently reiterated this principal in *LegacyXChange*, where the Commission stated that filing “reports that were delinquent at the time of the OIP . . . does not provide a defense to the OIP’s allegations of reporting violations or preclude revoking the registration of” an issuer’s securities. 2022 WL 17345980, at *4. Because GRUSF’s delinquencies were serious recurrent, and cured only after the institution of this proceeding, under Commission precedent, revocation is warranted.²

(b) GRUSF has not made a compelling showing on future compliance.

To make a compelling showing on future compliance, GRUSF must demonstrate that it implemented concrete and effective measures to ameliorate the cause of its filing failures. *Phlo*

² Grown Rogue also cites a handful of ALJ decisions that it claims are inconsistent with the Commission’s decisions. The decision of a lower tribunal does not trump the Commission’s decisions.

Corp., Release No. 55562, 2007 WL 966943, at *16 (Mar. 30, 2007). According to the evidence submitted in its Opposition, GRUSF was required to file GAAP-audited financial statements for 2019, due on March 2, 2020. Strickler Decl. at ¶3; *see also* Harris Decl. at Ex.'s 4-5. GRUSF did not engage an auditor in advance of the due date or at any time in the year the filing was due. Instead, it was not until 2021 – anywhere from 10 to 22 months *after* the 2019 Form 20-F was due – that GRUSF engaged auditors to complete the required audits. *Id.* at ¶4. GRUSF does not explain what caused its lengthy delay in engaging an auditor or concrete measures it has taken to prevent such delays in future.

Instead, GRUSF attempts to cast the blame for the entire delay on one of its auditors. But a close look at GRUSF's affidavit only shows that the auditor was liable for five months of the twenty-nine-month delay from when the Form 20-F for 2019 was due to when it was completed. According to GRUSF, by at least 2020, GRUSF knew it needed to file GAAP-audited financials but did not engage auditors to complete the 2019 audit until sometime in 2021. Strickler Decl. at ¶4. The audits were complete by June of 2022 and GRUSF does not claim that the auditors took an unreasonable amount of time to complete their audits. *Id.* at ¶7. The only delay GRUSF attributes to the auditor is the delay between June 2022, when GRUSF asked one of the auditors who had already completed their assigned audit to sign the Form-20 F, and the time the auditor signed the Form 20-F, a date GRUSF does not provide, but that was sometime prior to November 4, 2022. *Id.* at ¶7.

The fact that an issuer's "has not accepted responsibility for its failure to meet its reporting obligations" and seeks to blame others for them, establishes that the issuer has made "insufficient efforts to ensure future compliance with the periodic reporting requirements." *Gateway Int'l Holdings, Inc.*, 2006 WL 1506286, at *5. That GRUSF has not explained the cause of its 10-22

month delay in engaging an auditor to complete the 2019 report and seeks to cast blame for the entire delay on the auditor establishes that GRUSF's efforts to prevent future delays are insufficient.

3. GRUSF's assurances against future violations are not credible.

In arguing that it has made a compelling showing that its assurances against future violations are credible, GRUSF claims that the fact that it met its self-imposed deadlines is "conclusive." Opp. at 6. But GRUSF's own authority shows that meeting self-imposed deadlines is just one factor in the analysis, not the conclusive one. "[I]n determining whether an issuer's assurances against future violations are credible, *one* factor we consider is whether the issuer is able to adhere to reasonable schedules that the issuer has proposed for the fulfillment of delinquent filing obligations." *Calais Res. Inc.*, Release No.67312, 2012 SEC 2023, *29 (June 29, 2012) (emphasis added) (cited in Opp. at 6).

Other relevant factors include GRUSF's past violations, including the very violation that led to the enforcement action. See *KPMG Peat Marwick LLP*, Exchange Act Rel. No. 44050, 2001 SEC LEXIS 422, at *21-22 (March 8, 2001). In addition, an issuer's failure "to recognize the importance of providing [required] information to its investors undermines the credibility of its assurances of future compliance with its reporting obligations," *Am. Stellar Energy, Inc. (n/k/a Tara Gold)*, Exchange Act Release No. 64897, 2011 WL 2783483, at *5 (July 18, 2011), *aff'd* at *Tara Gold Res. Corp. v. SEC*, 678 F.3d 557, 558 (7th Cir. 2012). GRUSF knew that it was required to file GAAP-audited financial statements with the Commission beginning with fiscal year 2019 and due on March 2, 2020. GRUSF did not even engage an auditor to prepare the 2019 audited financials until 10-22 months after they were due, a delay that would not have occurred had GRUSF considered its compliance obligations to be important.

4. GRUSF's remaining arguments have all been rejected by the Commission before.

GRUSF makes a handfdeul of arguments that are not relevant to the *Gateway* factors and that the Commission has repeatedly rejected.

GRUSF argues that revocation is not warranted because it is not a shell company. But the Commission explained that revocation is appropriate even against a “healthy, viable company with substantial revenues, assets, and operations.” *Natures Sunshine*, 2009 WL 137145 at *8. GRUSF also argues that it provided investors with information through its filings with the Canadian Stock Exchange and Forms 6-K. But providing investors with some information is no “substitute for periodic reports containing audited or reviewed financial statements.” *Natures Sunshine Prod., Inc.*, Release No. 337, 2007 WL 3331973, *5 (Nov. 8, 2007). *See also Markland Techs., Inc.*, Release No. 364, 2008 WL 5221033, *4 (Dec. 15, 2008) (same).

Finally, GRUSF argues that revocation is a corporate “death penalty” that will harm its current investors. *Opp.* at 8. Revocation of the registration of GRUSF's securities registration does not terminate GRUSF's corporate existence and GRUSF is free to re-register when it can comply with its reporting obligations. Moreover, in determining whether revocation will protect investors, the Commission considers, not just existing investors, but prospective investors and “the broader systemic harm” that follows from registrants who fail to comply with reporting requirements. *Absolute Potential, Inc.*, 2014 SEC LEXIS 1193, at *7. By imposing a sanction significant enough to deter other issuers from engaging in similar conduct, the Commission protects current and prospective investors of all public filers. And “[d]eterrence is effective only if a lengthy delinquency, in the absence of strongly compelling circumstances regarding the other *Gateway* factors, results in revocation.” *Advanced Life Sciences Holdings, Inc.*, 2017 WL 3214455 at *6.

IV. CONCLUSION

GRUSF has not identified any factual dispute on the *Gateway* factors that would require a hearing to resolve. The undisputed facts establish that GRUSF knew it was required to file GAAP-audited financial reports for fiscal year 2019, waited anywhere from 10 to 21 months after the report was due to engage an auditor, has not explained the reason for the delay, has not identified concrete measures implemented to prevent future delays in auditor engagement, and has blamed the auditor for GRUSF's own delay. Under Commission precedent, revocation is required for the protection of investors.

Dated: October 2, 2023

Respectfully submitted,

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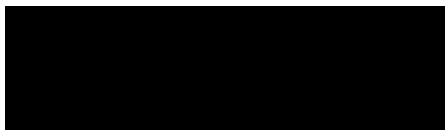
CERTIFICATE OF SERVICE

I hereby certify that I caused true copies of the Division of Enforcement's Reply in Support of Motion Summary Disposition to be served on the following on this 2nd day of October, 2023, in the manner indicated below:

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