UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 96116 / October 20,2022

Admin. Proc. File No. 3-21137

In the Matter of

GROWN ROGUE INTERNATIONAL INC.
(fka NOVICIUS CORPORATION)

RESPONDENT GROWN ROGUE INTERNATIONAL INC.'S RESPONSE TO THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AND BRIEF IN SUPPORT

Respondent Grown Rogue International Inc. ("Respondent" or "Grown Rogue") files this Response to the Motion for Summary Disposition and Brief in Support filed by the Division of Enforcement (the "Division") on September 6, 2023.

I. RESPONSE AND REQUESTED RELIEF

A. Summary of Response

The Division's Motion for Summary Disposition (the "Motion") should be denied because Grown Rogue has made extensive efforts to remedy its past violations by becoming current in its filings and to protect against future violations. Grown Rogue has also made a compelling showing that its assurances against future violations are credible. Revocation is not necessary or appropriate in this case.

B. Applicable Standard

In assessing the summary disposition record, the facts, as well as the reasonable inferences that may be drawn from them, must be viewed in the light most favorable to the non-moving party. *Diatect Int'l Corp.*, Initial Decisions No. 344, 2008 SEC LEXIS 208, *12 (Jan. 30, 2008) (citing

Felix v. N.Y. City Transit Auth., 324 F.3d 103, 104 (2d Cir. 2003); *O'Shea v. Yellow Tech. Svcs., Inc.*, 185 F. 3d 1093, 1096 (10th Cir. 1999); *Cooperman v. Individual, Inc.*, 171 F.3d 43, 46 (1st Cir. 1999)).

By analogy to Rule 56 of the Federal Rules of Civil Procedure, a factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. *Id.* (internal citations omitted). The opposing party must set forth specific facts showing a genuine issue for a hearing and may not rest upon the mere allegations or denials of its pleadings. At the summary disposition stage, the hearing officer's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for resolution at a hearing. *Id.* (internal citation omitted).

As explained below, Grown Rogue has raised a genuine issue of material fact such that the Division's Motion should be denied.

C. Grown Rogue Has Made a Strongly Compelling Showing Under the *Gateway* Factors Such That Revocation Is Not Necessary or Appropriate.

In *Gateway Int'l Holdings, Inc.*, 88 SEC Docket 430, 439 (May 31, 2006), the Commission stated that, in determining the appropriate sanction in a Section 12(j) proceeding, it "will consider, among other things, the seriousness of the issuer's violations, the isolated or recurrent nature of the violations, the degree of culpability involved, the extent of the issuer's efforts to remedy its past violations and ensure future compliance, and the credibility of assurances, if any, against further violations."

The Division first claims that Grown Rogue's violations are serious and recurrent and that there is a rebuttable presumption "that only revocation can adequately protect investors." Division's Motion, p. 1.[1] Next, the Division takes Grown Rogue to task for having *not yet*

[1] Presumably, the Division is not referring to Grown Rogue's current investors, who will be punished, not protected, by revocation.

adequately rebutted that presumption. *Id.* But what is a hearing or summary judgment proceeding for? Grown Rogue has not yet had its opportunity to rebut the presumption. With the filing of this Response, Grown Rogue has now made a strongly compelling showing as to the other factors, such that neither revocation nor suspension is a necessary or appropriate sanction.

1. The Division Has Not Established a High Degree of Culpability.

The Division contends that Grown Rogue had a high degree of culpability because it supposedly persisted in its noncompliance after receiving multiple warnings. But the Division's evidence on this point is lacking.

The Division asserts that Corporation Finance sent a notice to Grown Rogue that "was returned to sender due to GRUSF's apparent failure to maintain a valid address as required by Commission rules." Division's Motion, p. 7, Ex. 3, Harris Decl. But this is mere speculation. The Division, of course, does not have any personal knowledge of the reason this notice was returned. Hence, the Division uses the phrase "apparent failure." *Id.* Furthermore, Grown Rogue maintained a valid address in Canada, which is the address for its accountant and former Chief Financial Officer. *See* Declaration of Jesse "Obie" Strickler, attached hereto as Exhibit A, ¶ 13, dated September 14, 2023.

The Division has not presented any competent evidence that such notice was received. Absent proof of notice, there is a genuine issue of material fact as to Grown Rogue's culpability, especially since Grown Rogue has supplied proof that it *did* maintain a valid address.

2. Grown Rogue's Extensive Efforts to Remedy its Past Violations and Ensure Future Compliance.

Here is where the test turns heavily against the Division's request for revocation. Contrary to the Division's assertions, Grown Rogue has made significant and comprehensive efforts to remedy its formerly delinquent filings and to ensure future compliance. *See* Ex. A, ¶¶ 8(a) – (c). "Although the Commission demands strict compliance with Section 13(a) and its rules, a

company's 'subsequent filing history is an important factor to be considered in determining whether revocation is necessary or appropriate for the protection of investors.'" *Can-Cal Res. Ltd.*, Release No. 6525, 2019 SEC LEXIS 655, *13-14 (Mar. 28, 2019) (quoting *e-Smart, Tech's, Inc.*, Exchange Act Release No. 50514, 2004 SEC LEXIS 2361, *10 (Oct. 12, 2004)). Indeed, "[r]evocation is not automatic, particularly when the company has made significant efforts to come into compliance." *Can-Cal Res. Ltd.*, Release No. 6525, 2019 SEC LEXIS 655, *13-14 (Mar. 28, 2019) (citing *e-Smart Techs. Inc.*, at * 10 *(*remanding proceeding to the administrative law judge because after the initial decision was issued the company filed its most recent reports and "ha[d] begun to fill the gaps in its reporting history by" filing delinquent reports)).

After going public through a reverse takeover in November 2018, Grown Rogue mistakenly did not file Form 15-F which resulted in ongoing disclosure requirements. Ex. A, ¶ 2. After various attempts to remedy this in 2020 (the first year it was required to file the 2019 Form 20-F), it was determined the Grown Rogue would need to re-audit the 2017 and 2018 audits since the original audits were completed under Canadian Auditing Standards (CAS) and not the standards under the Public Company Accounting Oversight Board (PCAOB). Ex. A, ¶ 3. Grown Rogue worked diligently to complete this work starting in 2021, which required engaging new auditors for the period. Ex. A, ¶ 4. Since the completion of the audits, Grown Rogue worked timely to file the delinquent Forms 20-F which included coordination with four separate auditors (including auditors prior to the going-public event that were engaged by the predecessor company) and several legal firms. Ex. A, ¶ 5. The 2018 Form 20-F was completed and filed in June 2022. Ex. A, ¶ 6; *see also*, Division's Motion, Ex. 4.

In addition, the 2019 and 2020 Forms 20-F were provided to the auditor who completed the 2019 and 2020 audits in June 2022. Although Grown Rogue accepts the ultimate responsibility for its earlier non-compliance, such non-compliance was not due to a lack of effort. Grown Rogue

had prepared the Forms 20-F, but it simply could not file them until the previous auditor had signed off as the Forms would have been deficient. Ex. A, ¶ 7. Unlike the two auditors working on the 2018 Form 20-F who finished their review and sign off in a matter of weeks, the 2019 and 2020 auditor had been slow to respond and was non-communicative for months regarding completing its review of the Forms 20-F. Ex. A, ¶ 7. While this auditor had been contractually engaged months earlier and paid a retainer, it made several verbal commitments to finish the work promptly in July/August of 2022 then became non-communicative despite repeated attempts by Grown Rogue via phone call, emails, and text messages, and ultimately delayed and failed to meet professional standards for timely completion. Ex. A, ¶ 7. Moreover, having everything reaudited was not an option because it would have only lengthened the process and compounded the expense. Ex. A, ¶ 7. Instead, Grown Rogue needed the former auditor to do its job. After months of imploring by Grown Rogue, the previous auditor finally approved the Forms 20-F, and on November 4, 2022, Grown Rogue filed its 2019, 2020, and 2021 Forms 20-F. *Id.*; *see also*, Division's Motion, Ex.4.[2]

It is important to note that Grown Rogue is also registered with the Canadian Stock Exchange ("CSE"). During the relevant period, Grown Rogue's financial information, including audited and interim financial statements, were available on the CSE's website. Ex. A, ¶ 12.; *see also* CSE, available at https://thecse.com/en/listings/life-sciences/grown-rogue-international-inc. (last visited Sept. 12, 2023). Thus, unlike the cases cited by the Division, potential and current investors had access to Grown Rogue's financial information.

Grown Rogue's subsequent filing history should also be taken into consideration. It is undisputed that Grown Rogue is now in compliance by providing current financial information on Forms 20F, "which . . . fulfilled the purpose behind the periodic reporting requirements.

[2] Grown Rogue's constant beseeching of its former auditor to cooperate also evidences a low degree of culpability on the part of Grown Rogue.

Subsequent [ ] filings (current as well as those past due) have provided additional information to investors, furnishing them with a fuller picture of the company's condition." *e-Smart Techs. Inc.*, Initial Decisions Rel. No. 272, 2005 SEC LEXIS 253, * 21-22 (Feb. 3, 2005). It has also consistently made other filings, such as Forms 6-K. Ex. A, ¶ 8(a); *see also* Division's Motion, Ex.4. Based on Grown Rogue's remedial efforts, and its subsequent filing history, the Division's Motion should be denied.

3. Grown Rogue's Indisputably Credible Assurances to the Commission Against Future Violations.

Grown Rogue has become current in its filings and intends to remain current while continuing to work to ensure against future violations. Ex. A, ¶¶ 9-10. Grown Rogue's assurances against future violations are credible because it has previously met its self-imposed deadline. Indeed, they are not only credible; they are conclusive. It is beyond dispute that Grown Rogue has continued to satisfy its assurances of future compliance.

"[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) (internal quotations and citations omitted). For example, in *e-Smart*, the law judge revoked the registration of e-Smart's securities for failure to make timely annual and quarterly filings. *e-Smart Tech's Inc.*, Initial Decision Rel. No. 247 (Mar. 4, 2004), 82 SEC Docket 1194. In ordering revocation, the law judge rejected as overly optimistic e-Smart's claim that it intended to bring itself into full compliance with the Exchange Act's reporting requirements and submit audited financial statements by a certain date. Shortly after the law judge issued her decision, e-Smart filed audited annual reports, as it represented that it would. On remand, the law judge found that "despite the egregiousness and recurrent nature of e-Smart's violations . . . the likelihood of future violations [were] absent and the need for a strong sanction

[were] no longer necessary." *e-Smart Tech's, Inc.*, Initial Decisions Release No. 272, 2005 SEC LEXIS 253, *23 (Feb. 3, 2005). The law judge therefore denied the Division's request for revocation of the registration of e-Smart's common stock. *Id.*

Additionally, in *Diatech Int'l Corp.*, Initial Decisions No. 344, 2008 SEC LEXIS 208 (Jan. 30, 2008), the company failed to file nine periodic reports over a two-year period. However, "Diatect provided a schedule for becoming current. Over the past few months, it ha[d] kept its commitments." *Diatech Int'l Corp.*, 2008 SEC LEXIS 208, *11-12. In fact, "Diatect was entitled to credit for becoming current, even if it did not begin to take its filing obligations seriously until after the Commission issued the OIP." *Id.* at *12. Because the investing public had access to past and current audited financial information, neither revocation nor suspension were necessary or appropriate. *Id.* at *12-13.

Similarly, Grown Rogue met its self-imposed deadline to become current in its filings. In its Response to the Order to Show Cause, Grown Rogue founder and CEO, Jesse "Obie" Strickler, maintained in his November 3, 2022 Declaration that "[Grown Rogue] intends to file all delinquent Forms 20-F in the near future and likely within the *next two weeks*." Respondent's Response to Order to Show Cause, Ex. A, ¶ 3 (emphasis added). Without waiting two weeks, Grown Rogue kept its promise and filed its 2019, 2020, and 2021 Forms 20-F the following day. Ex. A, ¶ 7; *see also*, Division's Motion, Ex.4. Thus, Grown Rogue more than met its self-imposed deadline, which lends credibility to Grown Rogue's assurances against future violations. *See Diatect Int'l Corp.*, Initial Decision Decisions No. 344, 2008 SEC LEXIS 208, *12 (Jan. 30, 2008); *e-Smart Tech's Inc.*, Initial Decisions Release No. 272, 2005 SEC LEXIS 253, *21-22 (Feb. 3, 2005). Indeed, Grown Rogue is "entitled to credit for becoming current." *Diatect Int'l Corp.*, Initial Decisions No. 344, 2008 SEC LEXIS 208, *12 (Jan. 30, 2008).

Furthermore, unlike many of the shell companies that have been the subject of revocation orders, Grown Rogue has adequate operating revenue and available capital to meet its periodic filing obligations. Ex. A, ¶ 11. Accordingly, this factor weighs substantially in Grown Rogue's favor, and the Division's request for revocation should be denied.

D. Revocation is Not an Appropriate Sanction Here.

Revocation is a harsh sanction.[3] *See* 2 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 9.2[1][B] (4th ed. 2002) ("It will require serious violations to lead the SEC to conclude that eliminating a public market for the securities best serves the interest of investors."); 4 Louis Loss & Joel Seligman, Securities Regulation 1892 (3d ed,, rev. vol. 2000) (opining that involuntary revocation of a security's registration is draconian, harmful to innocent security holders, and unnecessary because other regulatory tools are available to the Commission to ensure the filing of adequate reports). Revoking the registration of an issuer's securities is essentially the "death penalty" for any public company.

Furthermore, "in any deregistration current shareholders could be harmed by a diminution in the liquidity and value of their stock by virtue of deregistration." *Eagletech Communications, Inc.*, Exchange Act. Rel. No. 54095, 2006 SEC LEXIS 1534, *13 (July 5, 2006). Imposing a sanction here would punish its current shareholders because Grown Rogue is now in full compliance with the periodic reporting requirements of the Exchange Act and thus investors have access to past and current financial information.[4]

[3] We note that, in addition to revocation or suspension of registration under Section 12(j), the Exchange Act provides other, less extreme, remedies to address reporting violations. *See* Exchange Act Section 12(c)(4), 15 U.S.C. § 78o(c)(4) (allowing Commission to issue order requiring issuer to comply with reporting requirements, upon specified terms and conditions and within specified time; if necessary, the Commission may apply to a United States District Court for enforcement of such an order, Exchange Act Section 21(e), 15 U.S.C. § 78p(e); Exchange Act Section 21C, 15 U.S.C. § 78u-3 (allowing Commission to impose cease-and-desist order).

[4] Again, Grown Rogue's financial information was available on the CSE's website during the relevant period.

Accordingly, neither revocation nor suspension is an appropriate remedy here. Suspension is only slightly less draconian than revocation and would deny Grown Rogue the required "credit for becoming current." *Diatech Int'l Corp.*, 2008 SEC LEXIS 208, *12. It would also punish current investors. Alternatively, while still inappropriate and punishing to investors, a short suspension is clearly a more appropriate sanction than revocation. *See Steadman*, 603 F.2d 1126, 1139 (5th Cir. 1979) (holding that "the greater the sanction the Commission decides to impose, the greater is its burden of justification"). In addition, because the Division does not request a suspension in its Motion, that remedy is not available on summary disposition.

II.
CONCLUSION

Considering the foregoing, Respondent Grown Rogue International Inc. requests that the Division of Enforcement's Motion for Summary Disposition be denied.

Respectfully submitted,

By: */s/ Toby M. Galloway*

Toby M. Galloway
State Bar No. 00790733
tgalloway@winstead.com
Jamie M. Lacy
State Bar No. 24099874
jlacy@winstead.com
Winstead PC
300 Throckmorton Street, Suite 1700
Fort Worth, Texas 76102
Telephone No.: (817) 420-8200
Facsimile No.: (817) 420-8201

ATTORNEYS FOR GROWN ROGUE INTERNATIONAL INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served on all counsel of record via email on September 18, 2023 as follows:

Samantha Williams
williamssam@sec.gov
Sandhya C. Harris
harrissan@sec.gov
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-6011

Counsel for the Division of Enforcement

/s/ Toby M. Galloway
Toby M. Galloway