

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 16, 2022

Admin. Proc. File No. 3-19787

In the Matter of Nano Magic, Inc. Petitioner.	SUPPLEMENTAL BRIEFING IN FURTHER SUPPORT OF MOTION TO COMPEL PRODUCTION OF INFORMATION BEFORE THE COMMISSION AT TIME OF TRADING SUSPENSION ISSUED PURSUANT TO SECTION 12(k)(1)(A) OF THE SECURITIES EXCHANGE ACT OF 1934
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Nano Magic Inc. (“Nano Magic”), by and through undersigned counsel, files this supplemental briefing as permitted under the Commission’s Order Denying Motion to Compel (“Denial Order”).¹ Nano Magic does so because the Denial Order sets forth precisely why it is imperative that the Commission reconsider and reverse its ruling and order that Nano Magic receive a facts-only redacted version of the Action Memorandum. The Denial Order plainly and unequivocally establishes that the Staff of the Philadelphia Regional Office (“PRO”) included as “fact” at least one material statement that was outright untrue. Nano Magic’s overarching argument for the Commission to set aside the trading suspension was that the PRO played fast and loose with the facts; now we know the PRO’s manipulation of the facts was so fast and loose as to include false representations to the Commission. Withholding the Action Memo deprived Nano Magic of being able to argue the PRO Staff’s per se ethical violation for misleading the

¹ *Nano Magic Inc.*, Exchange Act Release No. 94818, 2022 WL 1288188 at *2 (April 28, 2022) (“the parties may ... file supplemental briefs ... addressing any matter directly implicated by the resolution of Nano Magic’s motion....”)

Commission and likely other manipulations of fact that formed the basis of an unwarranted 10-day trading suspension.

The Denial Order establishes expressly that “the following factual information was also before the Commission in the action memorandum: ... During the period March 2 through March 30, 2020, which coincides with the suspicious promotional activity, two trading accounts held by Ronald Berman sold 1,310 NMGX shares, recognizing trading profits of \$3,367.” The attached Declaration of Ronald Berman, a Director of Nano Magic and father of the company’s CEO (“Ron Berman”), establishes that Ron Berman did not sell any Nano Magic shares in March 2020, or for that matter in 2019, 2020 or 2021. (“Ron’s Declaration,” Ex. A, Para. 12-16). Robert Berman, Ron Berman’s brother (now deceased), sold that precise number of shares on the ascribed dates that the Staff incorrectly attributes to Ron Berman. Ex. A., Para. 12-13; Ex. B (redacted monthly statement reflecting both sales). The simple investigative step that the Staff needed to take was to read Robert Berman’s brokerage statement, not just see the “Berman” name and erroneously attribute the trading to Ron Berman. Instead, not only did the Commission rely on this false statement and other unreliable representations to suspend trading in Nano Magic, but the PRO also caused the Commission to inflict reputational harm to a distinguished member of the Bars of Michigan and Florida by publishing an untrue statement accusing him of making trades that he did not make.

For the Commission to allow its Denial Order to become effective would establish precedent that no Agency should find tolerable. The Denial Order already stands for the proposition that the language of a Commission Order is merely a suggestion if the Division of Enforcement Staff unilaterally chooses not to follow the Order. As set forth

in previous briefing, the Commission’s May 8, 2020 scheduling and briefing Order required the Division of Enforcement (“Division”) to “file **all** the information that was before the Commission at the time of the Trading Suspension Order’s issuance.”² (emphasis added) The Commission covers for the Division’s disregard of the scheduling and briefing Order by pronouncing that “all” truly means “nearly all,” particularly where “all” would reveal a material false representation.³ If the Commission now does not grant access to the action memorandum, having established by its own review “compar[ing] the unredacted action memorandum with the Information Statement and the Declaration” that the PRO provided untrue information to the Commission,⁴ then the Commission will be adopting the position that state Codes of Professional Responsibility requiring “Candor to the Tribunal” also do not apply to Division Staff, at least when seeking trading suspensions.

The Pennsylvania Code of Professional Responsibility, “Candor to Tribunal,”⁵ provides, in pertinent part, that “[a] lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer ... or (3) offer evidence that the lawyer knows to be false.” *Id.* at sec. 3.3(a)(1), (3). Moreover, in an ex parte proceeding such as a trading suspension, the Pennsylvania Code of Professional Responsibility requires “a lawyer [to] inform the tribunal of all material facts known to

² 17 C.F.R. § 201.550(b); Nano Magic Inc., Exchange Act Release No. 88841, 2020 WL 2310946 at *1 (May 8, 2020). The use of the Pennsylvania Code is because the PRO sought the trading suspension.

³ Denial Order at *2.

⁴ Denial Order at *1.

⁵<http://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/204/chapter81/s3.3.html>.

the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.” *Id.* at sec. 3.3(d). Comment 2 to Rule 3.3 concludes by explaining that “the lawyer must not allow the tribunal to be misled by false statements of ... fact or evidence that the lawyer knows to be false.” *Id.* at Comment 2. Reading a brokerage statement and correctly representing to the Commission simple sales of stock is a most basic concept in Division practice. Falsely representing and attributing trades as part of an effort to induce the Commission to suspend trading undermines the integrity of the administrative trading suspension process and authority.

As discussed in previous briefing, a trading suspension is neither an enforcement action nor an enforcement proceeding. The Commission makes very clear that “[a] trading suspension is not an enforcement action and is not a finding of wrongdoing.”⁶ In fact, in its Denial Order, the Commission understandably does not cite to the inapposite case law relating to discovery demands for production of action memoranda in Division litigation. Nevertheless, the Commission should consider its own established principle associated with the production of exculpatory evidence as further justification for ordering production of the facts-only action memorandum. Commission Rule of Practice 230(b)(2) provides that “[n]othing in this paragraph (b) authorizes the Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence.” Arguably, how the Commission has used the trading suspension so prejudicially against Nano Magic essentially has converted an administrative action into a de facto disciplinary action. By the Denial Order, and as

established by the Ron Berman Declaration, the action memorandum contains material exculpatory facts which the Division intentionally excluded from its Information Statement and Declaration, further prejudicing Nano Magic. If Nano Magic had known the strategically withheld facts prior to filing its Closing Submission more than 23 months ago, then Nano Magic certainly would have argued vigorously as to their misleading, false or irrelevant nature.

The PRO's patently false factual representation to the Commission alone is sufficient to justify requiring production of the facts-unredacted portion of the action memorandum. Beyond publicly attributing to Ron Berman trades that he never made, the Commission's Denial Order identifies three other pieces of factual information that the PRO put "before [the Commission] when we suspended trading in Nano Magic's securities" (Denial Order at *1) and that the Commission after 23 months determined now warranted publication. One is that "NMGX had opportunities to correct the confusion created by the promotional activity, following both its correspondence with FINRA regarding the issue and an April 24, 2020 conversation with Commission staff, but NMGX did not issue a clarifying statement after either of those interactions." Denial Order at *2. The mistaken presumption in the statement is that Nano Magic was engaged in promotional activity, which it was not. Another erroneous presumption is that there was confusion, which there was not. Ron Berman corrects this statement as well in his Declaration. "This statement is erroneous because NMGX was not engaged in any 'promotional activity.' Nano Magic issued one press release after two years of silence. The likeliest explanation for any increase in stock volume and price rise was investors

⁶ U.S. SEC. & EXCH. COMM'N, Information Regarding Trading Suspensions and COVID-

observed that Nano Magic had improved its financial situation, had strengthened its executive team and Board with new team members, become current in its SEC filings and ‘uplisted’ back to OTCQB.” Ex. A at Para. 20.

The next disclosed fact is “[i]n the staff’s April 24, 2020 conversation with NMGX CEO Tom Berman, Berman did not state whether NMGX was relying on Regulation D with respect to its June 2019 and March 2020 private capital raises.” Denial Order at *2. Put differently, the PRO asserted that a justification for the Commission suspending trading is that Tom Berman did not provide a response to a question that the Staff did not ask. More to the point, as set forth in Ron Berman’s Declaration, “[i]t is fundamental to offerings that are exempt from registration that Regulation D is a non-exclusive exemption.” Ex. A at Para. 21. The PRO including this fact was disingenuous in suggesting that Tom Berman did not address an issue that was non-responsive to issues raised during discussions with him.

The third additional point, is “[a]ccording to NMGX’s Form 10-K, filed with the Commission on November 14, 2019, Ronald Berman (a NMGX Director since May 1996 and the father of NMGX’s CEO, Tom Berman) beneficially owns 10.2% of NMGX’s common stock.” Denial Order at *2. That statement factually represents Ron Berman’s beneficial ownership of Nano Magic stock as of the date of the relevant Form 10-K. The only plausible purpose of including that representation is to create innuendo around two securities trades that the Commission has held out to the world that Ron Berman made which, in fact, did not happen.

19, https://www.sec.gov/files/information-regarding-trading-suspensions-covid-19_1.pdf.

Nano Magic appreciates the Commission affording the Company the opportunity to make this supplemental submission. By doing so, the Commission has enabled Nano Magic to reiterate that there never was justification for imposing a trading suspension in the first place and the PRO needed to incorporate into its action memorandum a statement that was not true. Meanwhile, Nano Magic continues to be prejudiced by the Commission's failure to rule on the Petition to Set Aside the Trading Suspension. Any suggestion to the contrary by Commission Staff reflects a lack of understanding of the reality of the small cap market. As Ron Berman wrote, "in my role as a Director, I have tried diligently for well over one year to assist Nano Magic with securing a market maker to file a Form 211. Every broker-dealer that we approached has rejected Nano Magic's request. Moreover, the lack of a public trading market is making it more difficult to raise private equity capital." Ex. A, Para 22.

The Commission, by its Denial Order, has demonstrated the shocking unreliability of the PRO's non-investigation and diligence devoid action memorandum that resulted in the damaging trading suspension and now two-year long prejudice. Moreover, the Denial Order confirmed the necessity of the instant motion, recounting omitted facts and establishing that the PRO did not disclose "all the information that was before the Commission." Nano Magic, not the Commission, is best positioned to determine what additional, if any, stretched or manipulated facts, misrepresentations and material omissions contributed to the Commission's misinformed decision to suspend trading of Nano Magic securities more than two years ago. The PRO played games with its submission, and the Commission should find doing so unacceptable. The Denial Order is a peek into the true quality of the evidence that the PRO put before the Commission on

which the Commission relied to impose an unwarranted trading suspension. And, by withholding the facts that the Commission published in the Denial Order, the PRO deprived Nano Magic of including addressing these items in the action memo briefing and in its Closing Submission.

WHEREFORE, Nano Magic respectfully requests that the Commission reconsider its Denial Order and order the PRO to produce forthwith to Nano Magic the Division's Action Memorandum, with non-factual content redacted, relating to the Commission's trading suspension of Nano Magic.

Dated: May 16, 2022, Washington, DC



Jacob S. Frenkel
Dickinson Wright PLLC
International Square Building
1825 I St., N.W., Suite 900
Washington, DC 20006
Phone: (202) 466-5953
E-mail: jfrenkel@dickinsonwright.com
Counsel to Nano Magic Inc.

Certificate of Service

The undersigned filed with the Commission this Supplemental Briefing in Further Support of Motion to Compel Production of Information before the Commission at Time of Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934 via the eFap filing system and served or delivered courtesy copies to the following parties and other persons entitled to notice in the manner set forth to the right of each served party:

Securities and Exchange Commission
c/o Hon. Vanessa A. Countryman, Secretary (via e-mail)
100 F St., N.E.
Washington, DC 20549

Division of Enforcement
Philadelphia Regional Office
Securities and Exchange Commission
Attn: Jennifer Barry, Esq. (via e-mail)
Attn: Christopher Kelly, Esq. (via e-mail)
Attn: Kingdon Kase, Esq. (via e-mail)
Attn: Cecilia Connor, Esq. (via e-mail)
Attn: Edward Fallacaro, Esq. (via e-mail)
1617 John F. Kennedy Blvd., Suite 520
Philadelphia, PA 19103

Dated: May 16, 2022, Washington, DC



Jacob S. Frenkel
Dickinson Wright PLLC
International Square Building
1825 I St., N.W., Suite 900
Washington, DC 20006
Phone: (202) 466-5953
E-mail: jfrenkel@dickinsonwright.com
Counsel to Nano Magic Inc.

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EXHIBIT A

Jacob S. Frenkel
Dickinson Wright PLLC
International Square Building
1825 I St., N.W., Suite 900
Washington, DC 20006
Phone: (202) 466-5953
E-mail: jfrenkel@dickinsonwright.com
Counsel to Nano Magic Inc.

DECLARATION OF RONALD BERMAN

Pursuant to Title 28, section 1746, subsection (2) of the United States Code, I, Ronald Berman, hereby declare as follows and make the following express representations and warranties:

1. I am a citizen of the United States and am a resident of the city of Palm Beach Gardens, Florida. I make this declaration based on my personal knowledge of the facts in this Declaration, unless otherwise indicated below.
2. I am a lawyer admitted to the State Bar of Michigan in November 1980 and the State Bar of Florida in March 1982. I am 65 years old.
3. My son, Tom Berman, also is a lawyer, admitted to practice law in the State of Michigan. Since April 3, 2019, Tom has been the President, Chief Executive Officer and a Director of Nano Magic Holdings, Inc., formerly known as Nano Magic, Inc. ("Nano Magic").
4. Shares of Nano Magic trade under the symbol NMGX. Despite the trading symbol, retail securities brokerage firms are not allowing the purchase or trading of shares of Nano Magic because there continues to be a "caveat emptor" designation attached to the security because of the trading suspension.
5. Since approximately May 1996, I have been a Director of Nano Magic. When I first became a Director of what is now Nano Magic, the name of the company was SI Diamond Technology, shares of which traded under the symbol SIDT. The name of the company subsequently changed to Applied Nanotech Holdings Inc., which traded under the symbol ANHI. I remained a director of the company after the business combination in 2014 when the name of the company was changed to PEN Inc. ("PEN") and the trading symbol became PENC.
6. Nano Magic voluntarily files periodic reports with the Securities and Exchange Commission ("SEC" or "Commission") under section 12(g) of the Securities Exchange Act of 1934 and is current with its filings.
7. On or about March 2, 2020, Nano Magic changed its name from PEN to Nano Magic to reflect the rebranding of the company's products with the Nano Magic name. Persons who acquired shares in what is now Nano Magic after August 2014 and prior to March 2, 2020 would be holders of shares in the name of PEN, and shares held in their securities brokerage accounts would be holders under the symbol PENC.
8. As disclosed in Nano Magic's Form 10-K filed with the Commission on November 14, 2019, I then beneficially owned 10.2% of Nano Magic's common stock.
9. In 2019, 2020, 2021 and 2022, I did not sell any shares of Nano Magic. Further, no shares that I beneficially owned, directly or indirectly, were sold on my behalf in 2019, 2020, 2021 and 2022.
10. One of my brothers was Robert S. Berman ("Robert"). Robert was [REDACTED]
[REDACTED]
[REDACTED]
11. While Robert was alive, Robert actively traded securities. At no time did I or did Tom advise, invite, encourage, request or suggest that Robert purchase or sell shares of PEN (or Nano

Magic) in open market transactions. At my request, on April 28, 2022, Deanna provided me copies of certain securities brokerage statements reflecting securities beneficially owned and securities traded by Robert.

12. On trade date March 2, 2020, settlement date March 4, 2020, in a joint account titled Deanna Berman & Robert S Berman JT TEN TOD at TD Ameritrade, in an account the last four digits of which is 8296 ("TD Ameritrade Account"), Robert sold 560 shares of Nano Magic, which were held in his account under the symbol PENC, at \$3.20 per share for net proceeds of \$1,787.39. Account statement page 3 of 25 of Exhibit A attached hereto is the page from Robert's TD Ameritrade Account reflecting this trade.

13. On trade date March 30, 2020, settlement date April 1, 2020, in the same TD Ameritrade Account, Robert sold 750 shares of Nano Magic, which were held in his account under the symbol PENC, at \$2.10 per share for net proceeds of \$1,570.38. Account statement page 23 of 25 of Exhibit A attached hereto is the page from Robert's TD Ameritrade Account reflecting this trade.

14. I had no knowledge that Robert sold 500 shares of Nano Magic on March 2, 2020 or on March 30, 2020 until I received from Deanna a copy of the TD America Account statement.

15. The TD Ameritrade Account statement for the period March 1, 2020 through March 30, 2020 reflects that Robert effected 318 securities trades, of which two were in Nano Magic for a total of 1,250 shares.

16. I have reviewed all securities brokerage accounts in my name or in which I have a direct or indirect beneficial ownership interest for the period March 1 through March 30, 2020. I did not purchase or sell any shares of Nano Magic stock during that period.

17. I first learned of the suggestion or implication that I may have sold Nano Magic shares in March 2020 when I read the Commission's Order Denying Motion to Compel, Exchange Act Release No. 94818, April 28, 2022 ("Action Memo Order").

18. Whomever informed the Commission that I sold "1,310 NMGX shares, recognizing trading profits of \$3,367" during the period March 2 through March 30, 2020 made a false statement to the Commission. I did not sell or cause to be sold any shares of Nano Magic in March 2020, and, repeating what I wrote above, I have not sold any shares of Nano Magic that I beneficially own, directly or indirectly, in the past four years.

19. In addition to the Action Memo Order incorrectly stating that I sold shares in Nano Magic, two other statements in the Action Memo Order are incorrect and misleading.

20. The Commission represents that information before the Commission that the Philadelphia Regional Office ("PRO") omitted from the response to the Commission's Order that the PRO "file all the information that was before the Commission at the time of the Trading Suspension Order's issuance" that "NMGX had opportunities to correct the confusion created by the promotional activity, following both its correspondence with FINRA regarding the issue and an April 24, 2020 conversation with Commission staff, but NMGX did not issue a clarifying statement after either of those interactions." This statement is erroneous because NMGX was not engaged in any "promotional activity." Nano Magic issued one press release after two years of silence. The likeliest explanation for any increase in stock volume and price rise was investors observed that Nano Magic had improved its financial situation, had strengthened its executive team and Board with new team members, become current in its SEC filings and "uplisted" back to OTCQB.

21. The other statement in the Action Memo Order that is misleading is "In the staff's April 24, 2020 conversation with NMGX CEO Tom Berman, Berman did not state whether NMGX was relying on Regulation D with respect to its June 2019 and March 2020 private capital raises. OS Received 05/16/2022" that are exempt from registration that Regulation D is a

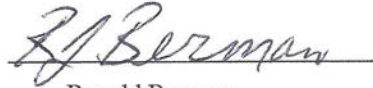
non-exclusive exemption.

22. Finally, in my role as a Director, I have tried diligently for well over one year to assist Nano Magic with securing a market maker to file a Form 211. Every broker-dealer that we approached has rejected Nano Magic's request. Moreover, the lack of a public trading market is making it more difficult to raise private equity capital.

23. In my opinion, and based on my work with Nano Magic, the fact of the trading suspension, as of my making this Declaration, has been a 23-month trading suspension of Nano Magic.

I declare under penalty of perjury that the foregoing is true and correct. I have executed this Declaration in Palm Beach Gardens, Florida on the date set forth below.

Executed on: 10 th day of May, 2022

A handwritten signature in cursive script, appearing to read "R. Berman", written over a horizontal line.

Ronald Berman

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EXHIBIT B

Jacob S. Frenkel
Dickinson Wright PLLC
International Square Building
1825 I St., N.W., Suite 900
Washington, DC 20006
Phone: (202) 466-5953
E-mail: jfrenkel@dickinsonwright.com
Counsel to Nano Magic Inc.



Ameritrade

PO BOX 2577
OMAHA NE 68103-2577

DEANNA BERMAN &
ROBERT S BERMAN JT TEN TOD





Statement Reporting Period:
03/01/20 - 03/31/20

800-669-3900
TD AMERITRADE
DIVISION OF TD AMERITRADE INC
PO BOX 2209
OMAHA, NE 68103-2209
TD Ameritrade Clearing, Inc., Member SIPC

Statement for Account [REDACTED] 8296

DEANNA BERMAN &
ROBERT S BERMAN JT TEN TOD
[REDACTED]

Portfolio Summary

Investment	Current Value	Prior Value	Period Change	% Change	Estimated Income	Estimated Yield	Portfolio Allocation
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[REDACTED]							
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Cash Activity Summary **Income & Expense Summary** **Performance Summary**

Current	YTD	Reportable	Non Reportable	YTD
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[REDACTED]				
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Statement for Account [REDACTED] 8296

03/01/20 - 03/31/20

Account Activity

Trade Date	Settle Date	Acct Type	Transaction/ Cash Activity*	Description	Symbol/ CUSIP	Quantity	Price	Amount	Balance
03/02/20	03/04/20	Margin	Sell - Securities Sold	PEN INC COM Commission/Fee 4.50 Regulatory Fee 0.11	PENC	560-	3.20	1,787.39	(9,513.01)

Statement for Account [REDACTED] 8296

03/01/20 - 03/31/20

TD Ameritrade Cash Interest Credit/Expense

[REDACTED]

Trades Pending Settlement

Investment Description	Account Type	Symbol/ CUSIP	Quantity	Price	Trade Date	Settle Date	Amount
SELL PEN INC COM	Margin	PENC	750-	2.10	03/30/20	04/01/20	1,570.38

[REDACTED]