UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19787

In the Matter of

NANO MAGIC INC.,

Respondent.

OPENING BRIEF OF PETITIONER NANO MAGIC INC. ADDRESSING NON-MOOTNESS OF RULE 550 PETITION TO TERMINATE 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, addresses the single issue for supplemental briefing identified in the Commission's April 17, 2024 Order Requesting Additional Briefs – whether Nano Magic's Rule 550 Petition now is moot as a result of the restoration of the piggyback exemption and the associated resumed quotation of Nano Magic's stock.[1] Despite the restoration of the piggyback exemption, the harm to Nano Magic continues to this day. In submission after submission to the Commission, Nano Magic has articulated with specificity the irreparable harm created by a trading suspension. The Commission's own published Order relied on the Division of Enforcement's Philadelphia Regional Office ("Division") misleading – "misleading" either intentionally or by gross negligence – the Commission to obtain the trading suspension.[2] Should the Commission declare the Petition moot, the Commission will have avoided – or strategically evaded – deciding two unresolved motions, failed to grant the relief to which Nano Magic is legally entitled, violated Nano Magic's constitutional rights, and deprived Nano Magic of its legal right to pursue fees. In fact, the mere suggestion that the Petition may be moot and could deprive Nano Magic of its right to file a claim for fees under the Equal Access to Justice Act, and in turn absolving the Commission of a potential obligation to pay fees, evidences a conflict of interest for the Commission such that the Commission should recuse itself and have this entire matter now adjudicated by the United States Court of Appeals for the District of Columbia Circuit.[3]

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[1] *Nano Magic Inc.*, Exchange Act Release No. 99980, 2024 WL 1672043 (April 17, 2024) ("April 2024 Order").

[2] Discussed *infra*. *See* Supplemental Briefing in Further Support of Motion to Compel Production of Information before the Commission at the Time of Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934 (May 16, 2022) (available at www.sec.gov/files/litigation/apdocuments/3-19787-2022-05-16-supplemental-briefing.pdf).

[3] 5 U.S.C. § 504. *See Aronov v. Napolitano*, 562 F.3d 84, 88 (1st Cir. 2009) (The statute aims to "ensure that certain individuals ... will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved.")

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There are five forms of relief to which Nano Magic is entitled and justifies the Commission deciding the trading suspension in Nano Magic's favor, each of which Nano Magic discusses below. They are the Commission (1) declaring the trading suspension vacated upon Nano Magic's filing of the Petition; (2) declaring that Nano Magic should not have lost its piggy-back exemption, *ab initio*; (3) making a finding that the Commission has concluded any investigation of Nano Magic; (4) recognizing the applicable constitutional principle of "capable of repetition yet evading review;" and (5) rendering a decision thereby enabling Nano Magic to pursue an EAJA claim for fees. For the Commission to dismiss the matter as moot would reflect the SEC acting in its own financial interest to the detriment of Nano Magic and other potential future similarly situated claimants. This is not about a Pyrrhic effect of vacating the trading suspension; instead, for Nano Magic this is about making whole the company and the company's shareholders by enabling restoration of the company's pre-trading suspension market value and other rights, and for Nano Magic and other companies the constitutional protection from such action repeating with the Commission sweeping under the rug the need for adjudicative review.

A. <u>The History of This Proceeding Highlights the Prejudice to Nano Magic.</u>

Nearly four years since the date of the imposition of the trading suspension (April 30, 2020), the Commission now queries the continuing harm to Nano Magic. A review of the filings history establishes with clarity and objectively why the Commission must decide the unresolved motions and, *inter alia*, declare inappropriately imposed (by terminating) the trading suspension.

1. May 7, 2020: Petition to Terminate Trading Suspension

On May 7, 2020, Nano Magic filed timely a 31-page detailed Petition to Terminate the Trading Suspension.[4] The Commission, in its first scheduling Order, wrote "[i]n view of the detail provided in NMGX's petition and supporting exhibits, the apparent narrowness of the

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factual matters in dispute, and NMGX's request for expedited consideration, the Division shall file, by May 21, 2020, a substantive response to the petition, which is not to exceed 8,000 words."[5]

2. May 8, 2020: Motion to Expedite Scheduling (Never Decided)

On May 8, 2020, Nano Magic filed a Motion to Expedite Schedule for Submissions in Consideration of Sworn Petition to Terminate Trading Suspension.[6] After the Commission issued its initial Order Requesting Additional Submissions,[7] Nano Magic requested expedited scheduling and proposed a reasonable yet aggressive briefing schedule that would enable the Commission to resolve fully the Petition within the ten-day trading suspension period. The Division did not even respond, such that the Commission should have interpreted the Motion as unopposed. The Commission never has ruled on this Motion which would have optimized investor protection and ensured timely resolution for Nano Magic.

3. May 18, 2020: Motion to Compel Production of Information (Unresolved)

On May 18, 2020, Nano Magic filed a Motion to Compel Production of Information Before the Commission at the Time of Trading Suspension.[8] Motivating this Motion was the Division's language in its Information before the Commission at the Time of the Trading Suspension[9] ignoring its statutory obligation and instead "setting forth [only what in the Division's subjective view were] the **substantive facts** before the Commission at the time it issued the order suspending trading in Nano Magic Inc. securities on April 30, 2020." (emphasis

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[4] www.sec.gov/files/litigation/apdocuments/3-19787-event-2020-05-07-petition-terminate-trading-suspension.pdf.
[5] *Nano Magic Inc.*, Exchange Act Release No. 88841, 2020 WL 2310946 at 2 (May 8, 2020).
[6] www.sec.gov/files/litigation/apdocuments/3-19787-event-2020-05-08-motion-expedite-schedule-submissions.pdf.
[7] *Id.*
[8] www.sec.gov/files/litigation/apdocuments/3-19787-event-2020-05-18-motion-compel-filing.pdf.
[9] www.sec.gov/files/litigation/apdocuments/3-19787-event-2020-05-15-information-commission-time-trading-suspension.pdf.

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added). As detailed below, the Commission ultimately ruled on this Motion[10] only after Nano Magic filed and a Writ of Mandamus Petition was pending in the United States Court of Appeals for the District of Columbia Circuit. In that ruling, the Commission publicly disclosed that the Division had misstated facts and thus misled the Commission as to a reason for suspending trading. Following supplemental briefing in 2022, discussed below, this Motion remains unresolved.

4. May 27, 2020: Closing Submission in Support of Terminating Trading Suspension

On May 27, 2020, Nano Magic filed its 31-page detailed Closing Submission in Support of Termination of Trading Suspension with Exhibits A-C, and requested that the Commission provide relief in the form of (1) declaring the trading suspension vacated upon Nano Magic's original filing of the Petition; (2) declaring that Nano Magic should not have lost its piggy-back exemption, *ab initio*; and (3) making a finding that the Commission has concluded any investigation of Nano Magic.[11] Four years later, the Commission still has not adjudicated the trading suspension or addressed any of the three reasonable forms of relief requested.

5. September 1, 2021: Briefing on Prejudicial Effect of Trading Suspension

On September 1, 2021, in response to a letter from undersigned counsel to the Commission inquiring about a ruling on the Petition and the Commission's perceived indifference to the harm to Nano Magic by what was then a 16 month failure to rule, and a Commission Order in response requesting additional written submissions to explain the prejudice to the company,[12] Nano Magic filed its Supplemental Filing Addressing Prejudice and Timeliness of Commission Consideration of Sworn Petition to Terminate Trading Suspension

[10] *Nano Magic Inc.*, Exchange Act Release No. 94818, 2022 WL 1288188 (April 28, 2022).
[11] www.sec.gov/files/litigation/apdocuments/3-19787-event-2020-05-27-petitioners-closing-submission-support-termination-trading-suspension.pdf.

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Issued Pursuant to Section 12.[13] Nano Magic's submission included an expert opinion regarding the adverse effect of the Commission's failure to rule on Nano Magic's stock and its shareholders.[14]

6. February 14, 2022: Petition for Writ of Mandamus Filed with DC Circuit

On February 14, 2022, after nearly two years of indifference to Nano Magic's plight from the Commission not having ruled, Nano Magic filed a Petition for Writ of Mandamus (Agency Action Unreasonably Delayed) with the United States Court of Appeal for the First Circuit.[15]

7. April 28, 2022: Commission Order Reveals Division Staff Misled Commission

On April 28, 2022, almost two years to the day of the Commission having issued the trading suspension, the Commission entered its Order Denying Motion to Compel [Production of the Information Before the Commission at the Time of Trading Suspension].[16] In that Order, perhaps believing that it was helping the Division by pointing out what the Commission deemed four innocuous facts that the Division omitted from its obligatory filing to disclose to petitioner the information before the Commission at the time of the trading suspension, the Commission instead revealed that the Division, either intentionally or through gross negligence, conclusively misled the Commission. The Division Staff attorney, in a sworn declaration, asserted that one of the directors of Nano Magic had traded during the period underlying the trading suspension. In fact, the director had <u>not</u> traded, and so informed the Commission in a Declaration filed on May 16, 2022.[17]

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[12] *Nano Magic Inc.*, Exchange Act Release No. 92703, 2021 WL 3666995 at 2 (Aug. 18, 2021).
[13] www.sec.gov/files/litigation/apdocuments/3-19787-2021-09-01-supplemental-filing-petitioner-nano-magic.pdf.
[14] *Id. at Ex. B.*
[15] *In re Nano Magic Holdings, Inc.*, No. 22-1021 (Petition filed Feb. 14, 2022).
[16] *Nano Magic Inc.*, Exchange Act Release No. 94818, 2022 WL 1288188 (April 28, 2022).
[17] Ex. A, www.sec.gov/files/litigation/apdocuments/3-19787-2022-05-16-supplemental-briefing.pdf.

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8. May 16, 2022: Supplemental Briefing Seeking Information before Commission

On May 16, 2022, Nano Magic filed its Supplemental Briefing in Further Support of Motion to Compel Production of Information before the Commission at the Time of Trading Suspension[18] in response to the Commission's Order Denying Motion to Compel and included opportunity for "the parties [to] file supplemental briefs, of not more than 2,000 words, addressing any matter directly implicated by the resolution of Nano Magic's motion as set forth herein."[19] Nano Magic asserted that for the Commission to allow its denial Order to become effective would establish precedent that no federal agency should find tolerable, which is permitting its staff to provide patently false information as a definitive basis for agency action. Moreover, Nano Magic argued that the denial Order already stood for the proposition that the language of a Commission Order is merely a suggestion if the Division Staff unilaterally chooses not to follow the Order, let alone follow the law, by protecting staff who did not provide to petitioner <u>all</u> information presented to the Commission to induce entry of the trading suspension. By failing to include all information, the Division did not afford Nano Magic the opportunity to correct the "facts" misstated by the Division. Nano Magic argued and unambiguously requested that the Commission reconsider its Order and order the Division to produce forthwith to Nano Magic the Division's Action Memorandum, with non-factual content redacted, relating and giving rise to the trading suspension. The Commission did not rule on the express request for reconsideration.

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[18] www.sec.gov/files/litigation/apdocuments/3-19787-2022-05-16-supplemental-briefing.pdf.

[19] *Nano Magic Inc.*, Exchange Act Release No. 94818, 2022 WL 1288188 at 3 (April 28, 2022).

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9. June 29, 2022: DC Circuit Opinion Expects Commission to Rule within Months

On June 29, 2022, the United States Court of Appeals, Per Curiam, in a non-published decision dismissed as moot in part and denied in part the Writ of Mandamus.[20] The Panel specifically noted that it relied on the fact that "the SEC has indicated that it has made significant progress towards a decision on the petition to terminate and expects to issue a decision in the coming months."[21] Almost two full years later, the Commission has not yet ruled.

Unresolved, besides the trading suspension itself, are two Motions that compounded the harm to Nano Magic by the Division having represented as a material fact something that was patently false to the Commission that resulted in the trading suspension and by delaying now for four years an unopposed Motion that reasonably sought resolution of the trading suspension during the initial ten-day period of the trading suspension. What is obvious here is that the Commission has sought to avoid ruling for as long as possible with the hope that it would not need to admit error, and that a real company with real products would simply die and go away.

B. The Commission Must Redress the Continuing and Sustained Injury to Nano Magic by Deciding the Trading Suspension in Favor of Nano Magic and Granting Redress to the Company.

The Commission openly acknowledges in previous opinions regarding trading suspensions, as well as in its May 2012 Investor Bulletin, the potential significant prejudice that can result from a Commission-imposed trading suspension.[22] That is the precise situation presented here. Establishing with specificity the sustained and unwarranted Division-caused harm to Nano Magic, accompanying this Opening Brief are declarations from Nano Magic's

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[20] *In re Nano Magic Holdings, Inc., Per Curiam*, No. 22-1021 (D.C. Cir., filed June 29, 2022).
[21] *Id.*
[22] *E.g.*, *Apotheca Biosciences Inc.*, Exchange Act Release No. 90779, 2020 WL 7632296 (Dec. 22, 2020); *Bravo Enters. Ltd.*, Exchange Act Release No. 75775, 2015 WL 5047983 (Aug. 27, 2015); *Efuel EFN Corp.*, Exchange Act Release No. 86307, 2019 WL 2903941 (July 5, 2019); *Immunotech Labs., Inc.*, Exchange Act Release No.

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President and Chief Executive Officer, Tom Berman (Ex. A), and one of Nano Magic's Directors, Ron Berman, a highly respected lawyer of 40 years (Ex. B). Rather than include *in haec verba* the recitation of harm, Nano Magic refers the Commission to the two accompanying Declarations and incorporates them by reference in full herein.

1. The Commission Should Declare the Trading Suspension Vacated upon Nano Magic's Filing of the Petition.

Commission precedent – the Commission's own frequently cited precedent – recognizes that it "may vacate an expired trading-suspension order in appropriate circumstances."[23] Here, Nano Magic took every procedural step possible before the Commission and with deference to the Commission to seek resolution during the trading suspension's pendency, and well beyond. The narrative in the Petition and the Closing Submission set forth the compelling and appropriate circumstances for the Commission to have vacated the trading suspension. Four years ago, on May 27, 2020, Nano Magic put before the Commission this issue and as justification for prompt adjudication, and this requested relief is part of the record through and in Nano Magic's Closing Submission.[24]

2. The Commission Should Declare that Nano Magic Should Not Have Lost its Piggy-Back Exemption, *Ab Initio.*

The Commission is correct that Nano Magic, entirely through its own exhaustive efforts that detracted and distracted from the company building its business, was able to find a broker-dealer to resume making a market in the company's stock and enable restoration of the piggy-back exemption. That fact alone should not render moot the Petition, because this is the precise situation to which the federal constitutional principle of "capable of repetition yet evading

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75790, 2015 WL 5081237 (Aug. 26, 2015); "Investor Bulletin: Trading Suspensions," SEC Office of Investor Education and Advocacy (May 2012), available at https://www.sec.gov/files/tradingsuspensions.pdf.

[23] *Efuel EFN Corp.*, Exchange Act Release No. 86307, 2019 WL 2903941 at *2, *citing Bravo Enters. Ltd.*, Exchange Act Release No. 75775, 2015 WL 5047983 at *6.

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review," discussed *infra* at B.4., applies. The Declarations of President and CEO Tom Berman (Ex. A) and Director Ron Berman (Ex. B) explain the harm that continues to this day by the imposition of the trading suspension and the more than three-year loss of the company's piggy-back exemption. Nano Magic lost its piggy-back exemption despite that fact that it was current in May 2020 with its Exchange Act (34 Act) periodic reports, having ensured full satisfaction of the information requirements broker-dealers needed to maintain pursuant to Rule 15c2-11(a)(5). Nevertheless, the toxicity of the loss of the piggy-back exemption has harmed Nano Magic irreparably. In its Closing Submission, Nano Magic requested that the Commission declare restored the piggyback exemption and do so retroactive to April 30, 2020 to ensure no break in time, such that market-makers could comfortably resume making a market in Nano Magic securities without the requirement of submitting a new Form 211 pursuant to FINRA Rule 6432.[25] Four years ago, on May 27, 2020, Nano Magic put before the Commission this issue and as justification for prompt adjudication, and this requested relief is part of the record through and in Nano Magic's Closing Submission.[26]

The Commission's own authority regarding the potential mootness of Nano Magic's Petition supports the proposition that the Petition remains poised for review. For example, the Commission cites to *Zoom Companies, Inc.*,[27] for the proposition that there need not be a determination as to whether a proceedings is "moot in an Article III sense." The *Zoom Companies* decision recognizes that an agency's discretion in determining whether the resolution

[24] www.sec.gov/files/litigation/apdocuments/3-19787-event-2020-05-27-petitioners-closing-submission-support-termination-trading-suspension.pdf at 26.
[25] *See* 17 C.F.R. § 240.15c2-11(b)(3)(i).
[26] www.sec.gov/files/litigation/apdocuments/3-19787-event-2020-05-27-petitioners-closing-submission-support-termination-trading-suspension.pdf at 28-29.
[27] Exchange Act No. 87383, 2019 WL 5395561, at *1 n.3 (Oct. 22, 2019).

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of an issue before it is precluded must be informed by "the policies that underlie the 'case or controversy' requirement of Article III."[28]

The Commission also cites *Marshall Fin., Inc.*,[29] for the proposition that a Petition should be dismissed as moot where "a party's desire for helpful precedent, without anything more substantial at stake in the controversy" forms the basis for the petition. Again, *Marshall Fin., Inc.* is readily distinguishable, as the particularized harm at issue in the instant Petition represents more than a standalone "desire for helpful precedent." Instead, as explained herein and in the supporting declarations, Nano Magic has been and will continue to be harmed by the lack of a prompt and final adjudication in this matter. In other words, the instant Petition does not represent the sort of request for some "tangential benefit" as was at issue in the decisions in its Order seeking this submission.

3. The Commission Should Find Affirmatively and Declare that the Commission has Concluded Any Investigation of Nano Magic.

The Commission has the authority to declare "terminated" any investigation, which, if one even existed, would and should remain a nonpublic fact in perpetuity. On September 27, 1972, the Commission articulated procedures that it believes are necessary and proper to attain, where practicable, procedures for terminating Division investigations.[30] The Commission wrote that "where such action appears appropriate, [Division Staff] may advise a person under inquiry that its formal investigation has been terminated….[T]his conclusion may be based upon various reasons, some which … are clearly irrelevant to the merits of any subsequent action."[31] The Division by misleading the Commission created a dark cloud over Nano Magic, as expressed in

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[28] *Zoom Companies, Inc.*, Exchange Act Release No. 87383, 2019 WL 5395561, at *1 n.3 (Oct. 22, 2019) (citing *Climax Molybdenum Co. v. MSHA*, 703 F.2d 447, 451 (10th Cir. 1983)).
[29] Exchange Act Release No. 50343 (Sept. 10, 2004).
[30] Procedures Relating to the Commencement of Enforcement Proceedings and Termination of Staff Investigations, Securities Act Release No. 5310, Exchange Act Release No. 9796, Investment Company Act Release No. 7390, Investment Advisors Act Release No. 336, Fed. Sec. L. Rep. (CCH) ¶ 79,010 (Sept. 27, 1972).

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the Declarations of Tom Berman (Ex. A) and Ron Berman (Ex. B). The Commission formally declaring terminated any investigation, regardless of whether there ever was one, alone will give market-makers, the company's investors and the marketplace confidence that it can defer to the company and evaluate fairly the company as a possible investment. Four years ago, on May 27, 2020, Nano Magic put before the Commission this issue and as justification for prompt adjudication, and this requested relief is part of the record through and in Nano Magic's Closing Submission.[32]

4. The Commission Must Recognize the Constitutional Exception to the Mootness Doctrine of "Capable of Repetition Yet Evading Review" as Justification for Deciding the Trading Suspension.

Injured parties' grievances are not moot and can be redressed where those injuries are capable of repetition yet evading review. This well-recognized exception to the mootness doctrine applies where "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again."[33] First, with respect to timing, "[a] challenged action evades review if it is too short in duration to be fully litigated in the United States Supreme Court before it expires."[34] A ten-day trading suspension fits squarely within this category. Second, there is a "reasonable expectation" that Nano Magic could become subject to the same "legal wrong" again.[35] For the same reasons that Nano Magic has standing to challenge the Commission's unlawful refusal to issue a final decision, there is a "reasonable

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[31] *Id.* at 3.
[32] www.sec.gov/files/litigation/apdocuments/3-19787-event-2020-05-27-petitioners-closing-submission-support-termination-trading-suspension.pdf at 26.
[33] *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009) (*quoting Clarke v. United States*, 915 F.2d 699, 704 (D.C. Cir. 1990) (*en banc*)).
[34] *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 321 (D.C. Cir. 2014); *see also Del Monte*, 570 F.3d at 322 (as a rule of thumb, "agency actions of less than two years' duration cannot be 'fully litigated' prior to cessation or expiration").

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expectation," no different than any other small cap issuer, that Nano Magic could become subject again to the same legal wrong, should there be no restraint on the Commission continuing to impose its unlawful approach to trading suspensions.[36] Accordingly, the well-recognized exception to the mootness doctrine of capable of repetition yet evading review applies to the Commission's misuse of its trading suspension authority as here.

5. The Commission Must Recognize Nano Magic's Legal Right to Pursue Fees under the Equal Access to Justice Act and Should Not Preempt Exercise of the Right by Finding the Petition Moot.

The Equal Access to Justice Act, 5 U.S.C. § 504 ("EAJA") expressly applies to Commission proceedings.[37] The Commission recognizes that "EAJA provides that eligible respondents who prevail over an agency in an adversary adjudication may recover reasonable attorneys' fees and expenses, unless the agency's position in the underlying action was 'substantially justified' or 'special circumstances make an award unjust.'"[38] EAJA not only aims to "ensure that certain individuals ... will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved,[39] but the statute also "reduces the disparity in resources between individuals ... and the federal government."[40]

The Commission's published Order establishing with compelling alacrity that company Director Ron Berman traded Nano Magic stock when he unequivocally did not, along with the other reasons set forth in Nano Magic's painstakingly detailed Petition and Closing Submission, support persuasively why the Commission never should have imposed a trading suspension in

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[35] *Del Monte*, 570 F.3d at 322, 324; *see also Doe v. Sullivan*, 938 F.2d 1370, 1378-79 (D.C. Cir. 1991) ("It is enough ... that the litigant faces some likelihood of becoming involved in the same controversy in the future.").
[36] *Del Monte*, 570 F.3d at 322; *see Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir. 1990) (exception applies where there is "a more-than-speculative chance of [the agency's unlawful policy] affecting [the relevant party] in the future").
[37] *See* 17 C.F.R. §201.31, *et seq.*
[38] *In re Russo Securities Inc.*, Exchange Act Release 42121 (Nov. 10, 1999) viewed at https://www.sec.gov/files/litigation/opinions/3442121.htm#P46_1595.
[39] *Aronov v. Napolitano*, 562 F.3d 84, 88 (1st Cir. 2009).

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the first place. Given that neither the Division's recommendation nor the trading suspension itself were warranted, the Commission will not be able to argue credibly that the agency action was substantially justified. If the Commission would declare the trading suspension "moot", then it would preempt Nano Magic's right to claim and collect fees under EAJA. Declaring "moot" the trading suspension would be in the direct pecuniary interest of the Commission to the detriment of Nano Magic in this specific matter, thus presenting a conflict for the Commission. In this instance, if the Commission is predisposed to declare "moot" the trading suspension, then the Commission must recuse itself altogether from further adjudication, given the agency's inherent and obvious conflict and pecuniary self-interest to find "moot" the trading suspension.

C. The Commission's Four-Year Delay was an End-Around of Supreme Court Precedent and Deprived Nano Magic of its Due Process Rights.

The Commission's now four-year delay in deciding the instant Petition and two Motions that can impact more broadly the litigation of trading suspensions is a blatant end-around of the United States Supreme Court's unanimous decision in *SEC v. Sloan,* 436 U.S. 103 (1978). The Supreme Court ruled in *Sloan*, where the Commission entered seriatim trading suspensions, that the Commission only had authority to suspend trading for "a period not exceeding 10 days."[41] Here, by the Commission's failure to rule within the ten days of the trading suspension simply by ignoring a motion to expedite the proceeding, where the Division did not file an objection or opposition, the Commission did indirectly what the Supreme Court wrote the Commission cannot do directly. The Court described the Commission's right to suspend trading summarily as "an awesome power with a potentially devastating impact on the issuer."[42] Here, all the Commission needs to do is read the Declarations of Tom Berman (Ex. A) and Ron Berman (Ex.

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[40] *Id*. (citing H.R. Rep. No. 99–120(I), at 4 and 1985 U.S.C.C.A.N. at 133).
[41] *Sloan*, 436 U.S. at 111-12 (1978) (*quoting* 15 U.S.C. §78*l*(k) (1976 ed.)).
[42] *Id*. at 112.

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B) and the entire record of this matter before the Commission to realize the devastating impact to Nano Magic.

As discussed in a previous submission, the Supreme Court's allusion in *Sloan* to other remedies that the Commission can access underscores the due process implications of what effectively has been the imposition of a three-plus year trading suspension imposed on Nano Magic under Section 12(k). Nano Magic has had no recourse other than to await a Commission ruling, which four years later has not occurred. And, when Nano Magic opted for a Writ of Mandamus, the Commission's litigator wrote that "[t]he Commission has, and is, working diligently and in good faith to resolve Nano Magic's request to terminate the trading suspension, having already ruled on its motion to compel," in which the Commission "innocently" and probably unintentionally made known that the Division misled the Commission. The Commission's litigator signed and submitted that brief to the DC Circuit on May 2, 2022. There is no jurist or adjudicatory panel on earth told "working diligently and in good faith" and concludes from such a representation in writing a Per Curiam Order that the Commission "expects to issue a decision in the coming months" would consider more than two years to constitute either "working diligently" or "in good faith." Nor would a jurist or court expect that after such a delay the ruling would be to declare the matter "moot." The Commission for four years has deprived Nano Magic of any hearing (or final adjudication), and it is a fundamental precept of constitutional law that:

> [t]he right to a prior hearing has long been recognized . . . under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing appropriate to the nature of the case, and depending upon the importance of the interests involved and the nature of the subsequent proceedings (if any), the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.

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Fuentes v. Shevin, 407 U.S. 67, 82 (1972) (internal quotation marks and citations omitted). The Federal Rules of Civil Procedure provide that all litigants are entitled to "the just, speedy, and inexpensive determination of every action and proceeding."[43] Here, the Commission has provided none of these three legal entitlements.

The Commission's own Rules of Practice governing SEC administrative law judges ("ALJs") recognize the patent unfairness associated with the protracted delay in ruling on the Petition and Motions. The timetable for ALJs to issue an initial decision is within one of 30, 75 or 120 days after either post-hearing briefing or the completion of briefing if there is no hearing. 17 C.F.R. § 201.360(a)(2). The Commission's standard for determining when the initial decision is due is "after consideration of the nature, complexity and urgency of the subject matter, and with due regard for the public interest and the protection of investors." *Id.* In issuing the trading suspension, the Commission acted with urgency as to "the subject matter," after having been misled into forming an "opinion that the public interest and the protection of investors require a suspension of trading."[44] In the language of the rule governing initial decisions by ALJs, there was no more urgent "subject matter" for Nano Magic's investors than resolving the trading suspension with the same level of expeditiousness with which the Commission readily acted on material false representations from Division Staff to impose the trading suspension *ab initio*.[45] May 27, 2020 is the date on which full briefing was complete before the Commission. We now are approaching four years. This case is the Commission having abdicated its responsibility to the same investors the Commission claims to protect. For the Commission not to decide in favor of Nano Magic should result in the Commission's investor protection refrain to ring hollow.

[43] Fed. R. Civ. P. 1.
[44] *Nano Magic*, Exchange Act Release No. 88841, 2020 WL 2310946 at *1 (May 8, 2020).
[45] *See* Closing Submission at 30.

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From the outset, because of the magnitude of the harm imposed by the trading suspension, Nano Magic impressed on the Commission the need for expeditious resolution of the trading suspension. The 10-day trading suspension became effective on Friday, May 1, 2020. On Wednesday, May 6, 2020 at 3:13 P.M. EDT, Nano Magic filed its Petition. On Thursday, May 7, 2020, Nano Magic filed a Motion for Expedited Consideration. Within four hours of the Commission issuing its scheduling order on May 8, 2020 for additional written submissions,[46] Nano Magic filed its Motion to Expedite Schedule. The Division did not oppose Nano Magic's Motion to Expedite Schedule; nevertheless, the Commission *sua sponte* not only ignored but never has ruled on the Motion to Expedite Schedule. Practically and procedurally, there was nothing more that Nano Magic could have done to impress on the Commission the gravity of the matter for Nano Magic and the urgent need for resolution given the misinformation and incomplete information that resulted in the trading suspension.

Despite the Commission's possible belief to the contrary, Nano Magic's Motion to Compel remains unresolved in determining the important legal right of a "victim" of a Commission trading suspension to a redacted Action Memorandum with the Division's recommendation. The Commission's indifference to this issue in May 2020 when Nano Magic filed its Motion to Compel in response to the Division "playing cute" with its disclosure language and obligation resulted in thousands of dollars of additional attorneys' fees that Nano Magic incurred. Had the Division's properly disclosed the fact that it had misled the Commission to believe that a Nano Magic Director traded Nano Magic stock during the relevant period, then Nano Magic could have addressed the issue in its Closing Submission. Instead, that issue is still open four years later and was the subject of extensive briefing once the Commission revealed the Division's either intentional or grossly negligent error.

[46] *Nano Magic*, Exchange Act Release No. 88841, 2020 WL 2310946 (May 8, 2020).

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The Commission, by not giving expedited consideration to the issues presented by and impacting directly Nano Magic, adjudicating pending motions and deciding the underlying Petition, deprived Nano Magic of its constitutional right to a hearing, in this case administrative adjudication. Nano Magic's due process right to a "prior hearing" is long recognized under the Fourteenth and Fifth Amendments to the Constitution. No federal court acting responsibly would have ignored critical motions. And, resolution of these same two motions – the unopposed Motion for an expedited timeline to resolve the matter entirely prior to expiration of the trading suspension and the Motion to compel production of a redacted action memorandum in a non-enforcement proceeding where enforcement precedent is inapplicable – would and could be critical to future parties to trading suspensions.[47]

Finally, and applying yet another constitutional due process principle, Nano Magic also is entitled to a final decision. Courts recognize that parties are entitled to a speedy, final decision as a matter of procedural due process, primarily so that appellate rights can be preserved and, if necessary, pursued.[48] Here, without a final adjudication, Nano Magic has no opportunity or forum in which to challenge any of the Commission's actions, and, correspondingly, has no opportunity to seek redress from any injuries it suffered from those actions. In other words, when

[47] In the interest of completeness as to the reference to "redacted," Nano Magic's Motion sought, *inter alia*, a redacted copy of the Action Memorandum so that Nano Magic can view "all the information" before the Commission, redacted to disclose only the facts before the Commission. The narrow request for a redacted copy was to comply fully with footnote 5 of the Commission's Order Requesting Additional Written Submissions and was to enable Nano Magic to address "the information that was before the Commission" in Nano Magic's final written submission of May 28, 2020. Rule of Practice 550(b) clearly provides that the Commission may resolve petitions to terminate a trading suspension "on the facts presented in the petition and *any other relevant facts known to the Commission.*" *Bravo Enters. Ltd.*, Exchange Act Release No. 75775, 2015 WL 5047982, at *20 (Aug. 7, 2015), citing Rule of Practice 550(b), 17 C.F.R. § 201.550(b). For purposes of this submission and this proceeding, Nano Magic continues to acknowledge that the case law protects the non-discoverability of an action memorandum attendant to an enforcement action. *E.g., SEC v. Somers*, No. 3:11-cv-00165-H, 2013 WL 4045295, at *2 (W.D. Ky. Aug. 8, 2013) (holding that an SEC action memorandum and associated documents "are created in anticipation of litigation, and at the very least, the attorney work product privilege protects them"). As the Commission readily and consistently acknowledges, although the trading suspension is a Commission administrative proceeding, it is not an enforcement action. U.S. SEC. & EXCH. COMM'N, Information Regarding Trading Suspensions and COVID-19, https://www.sec.gov/files/information-regarding-trading-suspensions-covid-19_1.pdf.

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a right is created by statute or regulation, parties are entitled to due process protections in exercising those rights.[49] The Commission's four-year failure to decide a matter that never should have been presented in the first place continues to deprive Nano Magic of its constitutional right to a final decision.

D. Conclusion

Not to recognize the legal – and equitable – harm to Nano Magic and its shareholders requires blinders and ear plugs, or in the words of Sergeant Schultz in the television classic Hogan's Heroes "I hear nothing, I see nothing, I know nothing." By the four-year delay and inaction, the prejudice and harm to Nano Magic continue to be palpable. As stated in the Declarations, the lack of trading increased the cost of capital to Nano Magic, resulting in increased dilution to its stockholders; it also required additional time from management that could have been spent on building brand, growing sales and new products. With fundraising more difficult, it delayed the infusion of capital that in turn delayed implementation of business plans. Resolution of this trading suspension other than in favor of Nano Magic, including providing the relief requested, tests whether the Commission truly stands for investor protection or in fact is indifferent to documented investor harm. More than three years without the piggy-back exemption and staring at the undeserved and unwarranted – and itself unconstitutional – *caveat emptor* designation amounted to a punitive and still prejudicial three plus year trading suspension.

The legally cognizable injuries to Nano Magic are obvious. A mootness determination would violate the constitutional principle of "capable of repetition yet evading review." The Commission denied Nano Magic due process and outright ignored Supreme Court precedent. A

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[48] *Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir.1990).
[49] *Id*.

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mootness determination would preclude Nano Magic's ability to pursue an EAJA claim, and would constitute a conflicted self-interested pecuniary action by the Commission, similar to the concept of loss-avoidance insider trading cases. Nano Magic is entitled to a declaration that the trading suspension is deemed vacated no later than upon Nano Magic having filed its Petition (on May 6, 2020), a determination that Nano Magic should not have lost its piggy-back exemption, *ab initio*, and an affirmative finding that the Commission has concluded any investigation of Nano Magic. Thereafter, Nano Magic will be, as it should be, entitled to pursue an EAJA claim for fees.

Commission Division alumnus and distinguished legal scholar Russ Ryan wrote "[f]or decades, the SEC [has] assured courts and litigants that the notoriously paltry due process protection they offer in their captive, home-court administrative tribunals is worth the deprivations because administrative adjudication is so much more streamlined and efficient, thereby producing prompt decisions. The SEC's Hotel California docket demonstrates exactly the opposite reality."[50] The Commission's approach to Nano Magic has demonstrated this reality in a manner overtly harmful to Nano Magic and its investors. This case continues to present an unprecedented test for the fairness and integrity of Commission decision-making. Never – never – before has the Commission set aside a substantive merits-based Petition to terminate a trading suspension and provided the requested and due relief.[51] In the words of expert witness Frank Childress in the record of this proceeding, a trading suspension ensures a lifetime placement in

[50] https://nclalegal.org/2022/11/welcome-to-the-secs-hotel-california-docket/.

[51] Counsel has found instances when the Commission has set aside trading suspensions where the Commission erroneously believed that an issuer was a delinquent filer but in fact had filed a Form 15. *E.g. Encore Clear Energy, Inc.* (Commission withdrew a trading suspension before its expiration where the Commission mistakenly suspended trading in a security that five years earlier had filed a Form 15 to terminate voluntarily the registration of its securities under section 12(g) of the Exchange Act.) 77 Fed. Reg. 74520 (Dec. 14, 2012), 2012 WL 6185728 (Dec. 12, 2012).

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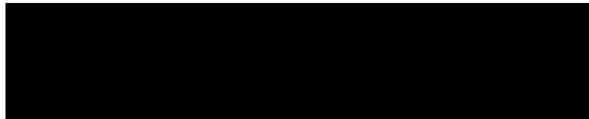
"trading and regulatory purgatory."[52] Those words, combined with the Commission's contemplation of considering this matter moot, only confirms the prescience of Mr. Childress' characterization. Prejudice to Nano Magic from the Commission's trading suspension has been real and palpable and continues to manifest a punitive effect. This is the Commission's final opportunity to right its wrong that resulted from the Division having misled the Commission, rule in favor of Nano Magic, and grant the relief that Nano Magic requests and to which it is entitled.

Respectfully submitted,



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Dated: May 8, 2024

[52] www.sec.gov/files/litigation/apdocuments/3-19787-2021-09-01-supplemental-filing-petitioner-nano-magic.pdf, Ex. B at 8.

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STATEMENT OF ELECTRONIC FILING AND CERTIFICATE OF SERVICE

The undersigned filed with the Commission this Supplemental Filing Addressing Prejudice and Timeliness of Commission Consideration of Sworn Petition to Terminate Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934 electronically via 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)
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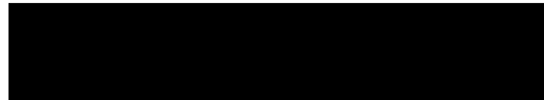
Attn: Edward Fallacaro, Esq. (via e-mail)
1617 John F. Kennedy Blvd., Suite 520
Philadelphia, PA 19103

Dated: May 8, 2024

Respectfully submitted,



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