UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of **NANO MAGIC INC.**	**Administrative Proceeding** **File No. 3-19787**

DIVISION OF ENFORCEMENT'S RESPONSE TO NANO MAGIC, INC.'S SUPPLEMENTAL BRIEFING AS TO THE MOOTNESS OF ITS RULE 550 PETITION TO TERMINATE THE TRADING SUSPENSION

Respectfully submitted,
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The Division of Enforcement ("Division") hereby submits this response to Nano Magic, Inc's Supplemental Briefing as to the Mootness of its Rule 550 Petition to Terminate the Trading Suspension in accordance with the Securities and Exchange Commission's April 17, 2024, Order Requesting Additional Briefs. For all the reasons set forth herein, although the Division respectfully submits that NMGX does not have a continuing cognizable injury capable of redress in this proceeding, it is in the public interest pursuant to the substantial discretion afforded to the Commission in controlling its case docket for it to reach the merits and deny NMGX's petition because, at the time of the suspension, there was not sufficient public information regarding NMGX about which to base an informed investment decision, and the market for NMGX appeared to reflect manipulative or deceptive activities.

Consistent with its position throughout this proceeding, the Division maintains that "[t]he Securities and Exchange Commission ("Commission") appropriately suspended trading in the securities of Nano Magic Inc. ("NMGX" or "the company") on April 30, 2020 because the facts clearly show that misleading information was circulating in the marketplace concerning the role that the company and its products could play in the fight against the virus that causes COVID-19." Div. Opp. Br. dated May 21, 2020, at 2. In arguing to the contrary, Petitioner "NMGX not only seeks to rewrite the legal standards governing when trading suspensions are appropriate, but also asks the Commission to ignore what appears to be a coordinated campaign to manipulate the price of NMGX stock and, potentially, the resulting harm suffered by NMGX investors buying company stock at inflated prices." *Id*. The merits of the underlying action, however, are not the subject of this supplemental briefing. Rather, the Commission has asked the parties simply to address: (1) whether the Commission should dismiss Nano Magic's Rule

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550 petition as moot; and (2) whether Nano Magic continues to sustain a legally cognizable injury and, if so, whether the Commission could in this proceeding redress it.[1]

In its opening brief, NMGX claims that "[t]here are five forms of relief to which Nano Magic is entitled," which it identifies as: "(1) declaring the trading suspension vacated upon Nano Magic's filing of the Petition; (2) declaring that Nano Magic should not have lost its piggyback 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." NMGX Mootness Br. at. 2. None of these is a continuing legally cognizable injury capable of redress in this proceeding.

First, the trading suspension in the securities of NMGX has long since expired.[2] Even assuming, *arguendo*, the trading suspension were wrongfully entered, vacating it at this point in time is academic and would not provide NMGX with any meaningful relief. *Tara Gold Res. Corp. v. SEC*, 678 F.3d 557, 560 (7th Cir. 2012) (rejecting Petitioner's argument and dismissing petition for review as moot given that "[t]he SEC's revocation expired when Tara Gold re-registered its securities."). Therefore, as noted in the Commission's April 17, 2024, Order Requesting Additional Briefs, the present inquiry turns on the existence of a different ***continuing*** legal injury to NMGX.

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1 In its brief, NMGX goes far beyond the narrow issues on which the Commission requested briefing, and instead continues to argue the merits of its underlying petition. The Division's refusal to engage on these inappropriate arguments and contentions should not and cannot be taken as its agreement to any of them.

2 Contrary to NMGX's suggestion, the Commission only imposed one 10-day trading suspension as to NMGX, and thus took no action that conflicted with the Supreme Court's holding in *SEC v. Sloan*, 436 U.S. 103 (1978).

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Second, and similarly, any declaration by the Commission that NMGX should not have lost its piggyback exemptions, *ab initio*, also would not remedy a continuing harm to NMGX because it already obtained its piggyback exemption eligibility. This, too, fails to demonstrate a continuing legal injury to NMGX.

Third, NMGX's demand that the Commission make a finding that the Commission had concluded any investigation of NMGX is, quite simply, not at issue in this petition to terminate a trading suspension. As a result, this purported continuing injury by NMGX also is not redressable through this proceeding and does nothing to advance the company's position of non-mootness.

Fourth, NMGX has not cited case law that demonstrates that the constitutional principle of "capable of repetition yet evading review" applies in this context. The Supreme Court has held that the doctrine "applies only in exceptional situations," *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), "where the following two circumstances [are] simultaneously present: "'(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again,'" *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481 (1990) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482, (1982) (*per curiam*) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (*per curiam*))). The dispute in this case is simply whether the Commission appropriately suspended trading in the securities of NMGX at a time when the market was being flooded with false information claiming that NMGX held a patent for a product that kills human coronavirus. *See* Div. Opp. Br. dated May 21, 2020, at 4-5. The implication that the particular facts in this case—requiring imposition of yet another trading suspension against NMGX at a time when the market is again being flooded with inaccurate information claiming that NMGX

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held a patent for a product that kills human coronavirus—are reasonably likely to be repeated with respect to NMGX strains credulity.

Moreover, the Supreme Court has refused to apply this doctrine even to the improper revocation of parole—and thus the unlawful incarceration of an individual—expressly stating: "we have hitherto refused to extend our presumption of collateral consequences (or our willingness to accept hypothetical consequences) to the area of parole revocation." *Spencer v. Kemna*, 523 U.S. 1, 12 (1998). Given this, it is doubtful this doctrine should be extended to this petition to terminate a trading suspension, especially given the fact that the imposition of a trading suspension does not require—and thus imply—wrongdoing by the company whose securities were suspended. *Immunotech Laboratories, Inc.*, Exch. Act Release No. 34-75790, 2015 WL 5081237, at *7 (Aug. 28, 2015) ("Regardless of the culpable party, potentially manipulative or deceptive trading implicates the public interest and [the Commission's] objective to maintain fair and orderly markets in which investors can make informed investment decisions."); *Efuel EFN Corp.*, Exch. Act Rel. No. 34-86307, 2019 WL 2903941, at *5 (July 5, 2019) (The Commission "may suspend trading even 'based on the conduct of unrelated third parties when that conduct threatens a fair and orderly marketplace.' Put another way, any alleged uncertainty in the identity of the party directly responsible for spreading materially false information does not detract from the Commission's interest in maintaining fair and orderly markets in which investors can make informed investment decisions.") (citation omitted).

Finally, NMGX's claim of continuing legal harm on the grounds that it is entitled to fees under the Equal Access to Justice Act is also speculative, at best. As an initial matter, NMGX would need to prevail on its petition to terminate the trading suspension—which, again, lacks merit based on the applicable legal standard and the record in this proceeding for all the reasons set forth in the Division's Opposition Brief In the Matter of Nano Magic Inc. Moreover, the

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position of the agency must also be found to be not "substantially justified" or "that special circumstances [do not] make an award unjust." 5 U.S.C. § 504(a)(1). This standard, quite simply, is not met here. Regardless, however, the Supreme Court has found that a potential damages action under 42 U.S.C. § 1983 does not otherwise create a continuing cognizable harm to an otherwise moot legal action. *Spencer*, 523 U.S. at 17 ("First, [Petitioner] contends that since our decision in *Heck v. Humphrey*, 512 U.S. 477, 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994), would foreclose him from pursuing a damages action under 42 U.S.C. § 1983 unless he can establish the invalidity of his parole revocation, his action to establish that invalidity cannot be moot. This is a great *non sequitur*, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available."). The same logic should apply here such that a potential claim under the Equal Access to Justice Act does not, on its own, create a continuing cognizable injury to a party, thus requiring the issuance of an advisory opinion from an administrative agency even when the original supposed harm has been cured and thus no longer capable of redress.

Notwithstanding all this, the Division respectfully requests that the Commission not dismiss NMGX's petition as moot, and instead rule on the merits and deny the petition. Given that the Commission's administrative proceedings are not Article III courts, the issue here is not one of Constitutional standing under the requirement that there be a "case or controversy." *Ass'n of Bus. Advocating Tariff Equity v. Hanzlik*, 779 F.2d 697, 700 and n.5 (D.C. Cir. 1985) ("[C]onstitutionally-based mootness is not the issue here, for the simple reason that administrative agencies are not creatures of Article III."). Moreover, "[i]t is too well-established to be seriously questioned that agencies are empowered to order their own proceedings and control their own dockets." *Id*. at 701. *See also FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265 (1949) (docket management a matter for agency discretion); *Climax Molybdenum Co.*

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v. MSHA, 703 F.2d 447, 451 (10th Cir. 1983) ("[A]n agency possesses substantial discretion in determining whether the resolution of an issue before it is precluded" by principles analogous to "mootness."); *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1056 (D.C. Cir. 1979) ("An agency is allowed to be master of its own house, lest effective agency decisionmaking not occur in any proceeding . . . ."). None of this is to say that NMGX has a legal right to a decision in this case. Indeed, case law suggests otherwise, and that it is up to the agency's discretion as to whether or not to issue a decision. *Hanzlik*, 779 F.2d at 700-01 ("The precise question is, rather, whether the Administrator could, in the exercise of discretion, refrain from resolving issues in an administrative proceeding where the underlying project has been shelved, at least for the time being. We do not hesitate in concluding that he can do so, and that the exercise of discretion here was neither arbitrary nor capricious under section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982) . . . ."). Regardless, based on the particular facts of this case, the Division respectfully requests that the public interest would be served if the Commission were to rule on NMGX's petition to terminate. In so doing, the Commission could resolve this dispute fully and finally, which makes practical sense given the time, effort, and energy that the parties and the Commission have already committed to this matter.

For all these reasons, the Division respectfully requests that the Commission use its substantial discretion in controlling its case docket to reach the underlying merits of NMGX's petition to terminate the trading suspension and deny that petition because, at the time of the suspension, there was not sufficient public information regarding NMGX about which to base an

informed investment decision, and the market for NMGX appeared to reflect manipulative or deceptive activities.

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CERTIFICATION PURSUANT TO SEC RULE OF PRACTICE 151(e)(3)

I hereby certify that any information described in paragraph (e) of SEC Rule of Practice 151 has been omitted or redacted from this filing.

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STATEMENT OF ELECTRONIC FILING AND CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of May, 2024, with respect to In the Matter of Nano Magic Inc., Administrative Proceeding File No. 3-19787, I caused to be filed with the Commission the foregoing Division of Enforcement's Response to Nano Magic, Inc.'s Supplemental Briefing as to the Mootness of its Rule 550 Petition to Terminate the Trading Suspension via eFap filing system. I hereby further certify that I caused a true and correct copy of the foregoing Division of Enforcement's Response to Nano Magic, Inc.'s Supplemental Briefing as to the Mootness of its Rule 550 Petition to Terminate the Trading Suspension to be served upon the following via email:

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