UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19787

In the Matter of

NANO MAGIC INC.,

Respondent.

REPLY 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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This is the Commission's "Debt Box" in the Commission's adjudicative capacity.[1] By the Commission's Order published April 28, 2022, *Nano Magic Inc.,* Exchange Act Release No. 94818, 2022 WL 1288188 (April 28, 2022), the Commission identified a blatantly material misrepresentation by the Philadelphia Regional Office, Division of Enforcement ("Division") as among the Division's justifications for seeking a trading suspension *ab initio*. In its Answering Brief, similar to other past briefing in this matter, the Division unabashedly ignores its grievous misconduct in misleading the Commission. Nano Magic Inc. ("Nano Magic" or "NMGX") has been waiting for more than four years for a ruling on its Petition to Terminate Trading Suspension ("Petition"). Should the matter now be declared moot, the result would be to sweep under the rug the Division's misconduct in obtaining a trading suspension in the early days of Covid where a trading suspension never was warranted. To protect the integrity of the Commission's trading suspension authority and the perception of fairness that the Commission should enjoy as an adjudicatory body, the Commission must not declare the Petition moot, must grant the Petition, and must provide the relief that Nano Magic seeks.

Nano Magic explained in its Opening Brief that its Petition is not moot based on ongoing and potential injuries, and based on the well-settled exception to mootness doctrines when the injury in question is "capable of repetition yet evading review." (*See generally* Op. Br.). In response, the Division goes out of its own way to argue that Nano Magic "does not have a continuing cognizable injury," yet the Division ***agrees*** with Nano Magic that the Commission should "reach the merits" of Nano Magic's Petition. (Ans. Br. at 1). The message of the Division's Answering Brief is clear: "We did our damage; we really don't care anymore what you, the Commission, do next." The Division no longer even takes exception with the

[1] *SEC v. Digital Licensing Inc. (d/b/a "Debt Box"), et al.*, No. 2:23-cv-00482-RJS-DBP (Memorandum Decision and Order entered May 28, 2024).

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proposition that it made a material false statement to the Commission to induce the trading suspension. On this, its Reply is silent; the point is not contested. The SEC's Office of General Counsel told the United States Court of Appeal in 2022 that a ruling was imminent.[2] More than two years ago, the Office of General Counsel promised a ruling that has not issued; now, the Division joins Nano Magic in encouraging a ruling.

This is Nano Magic's reply by and through undersigned counsel, submitted in accordance with the Commission's April 17, 2024 Order Requesting Additional Briefs ("May 2024 Order"). Nano Magic submits that its Petition is not moot and that the Commission should grant all relief that Nano Magic has requested.

A. <u>The Expiration of the Trading Suspension does not Render the Petition Moot.</u>

The Division first argues that "the trading suspension of [Nano Magic] has long since expired," and that consideration of Nano Magic's Petition "at this point in time is academic and would not provide [Nano Magic] with any meaningful relief." (Ans. Br. at 2). The Division similarly argues that a declaration that Nano Magic should not have lost its piggyback exemptions "also would not remedy a continuing harm to [Nano Magic] because it already obtained its piggyback exemption eligibility." (*Id*. at 3). In the same vein, the Division argues that Nano Magic's request that "the Commission make a finding that the Commission had concluded any investigation" of Nano Magic "does nothing to advance the company's position of non-mootness." (*Id*.) Neither the Division's arguments nor the authority it cites in support are persuasive.

[2] In its Opposition to Nano Magic's Mandamus Petition filed on May 2, 2022 in the United States Court of Appeals for the District of Columbia Circuit, the Commission represented affirmatively that it "ha[d] made significant progress toward a decision on the petition to terminate and Commission staff expects the Commission to issue a decision in the coming months." That was more than two years ago.

In support of its argument, the Division cites only to *Tara Gold Res. Corp. v. S.E.C.*, 678 F.3d 557, 558 (7th Cir. 2012), a readily distinguishable case. There, Tara Gold Resources Corp. ("Tara Gold"), brought an action for judicial review requesting the court to vacate a section 12(j) revocation of securities order the Commission issued. *Id*. Tara Gold argued that its petition was not moot because, although Tara Gold securities were re-registered after filing a new registration statement under section 10 of the Securities Act of 1933 at the time the Company brought the petition for judicial review, a setting aside of the prior revocation decision would cause FINRA to "no longer be interested in the comments the SEC's staff made following Tara Gold's new registration statement." *Id*. at 559. The Seventh Circuit rejected Tara Gold's argument because "[t]he only relief Tara Gold [sought was] against the SEC," and FINRA was "not a party to the proceeding." *Id*. Thus, the court determined that "nothing [it] could do would expunge the staff's comment letter, let alone the SEC's opinion; a judicial decision would affect only the agency's order." *Id*.

The Tara Gold court went on to recognize, however, that courts "say the collateral consequences of a decision prevent mootness," and such collateral consequences must be "established by proof." *Id*. Here, Nano Magic has submitted two uncontroverted insightful declarations in support of its Opening Brief explaining the existing collateral consequences causing injury. (Op. Br., Ex. A, Declaration of Tom J. Berman ("Berman Decl.") ¶ 8 ("As President and CEO, I believe that Nano Magic would have had and would continue to have much more sales revenue if not for our trading suspension and its continuing adverse effect."); *id* ¶ 11 ("Nano Magic now again has the benefit of the piggy-back exemption, but the extended period of time that our trading was suspended and the surviving stigma associated with the trading suspension during these ongoing proceedings has caused significant out of pocket costs,

diversion of management time and delayed implementation of our business plan and growth.")); *see also* Op. Br., Ex. B, Declaration of Ronald J. Berman ("Berman Decl.") ¶ 4 ("The trading suspension has caused reputational harm to the company, its management and directors."); *id*. ¶ 5 ("[I]f Nano Magic's Petition to Set Aside the Trading Suspension is declared moot, then that will leave a cloud over the company and those responsible for the company when the trading suspension issued.")).

The collateral consequences present in this action, and Nano Magic's unrefuted evidence of the same, make a finding of mootness inappropriate. Indeed, the Commission has recognized that while "[n]o statutory provision explicitly gives the Commission authority to reconsider temporary suspension orders, . . . an agency's power to revisit prior determinations is inherent in its jurisdiction over a controversy." *In the Matter of Accredited Bus. Consolidators Corp*., Release No. 73420 (Oct. 23, 2014) (citing *West v. Standard Oil Co*., 278 U.S. 200, 210 (1929) ("[S]o long as the Department retains jurisdiction of the [matter], administrative orders concerning it are subject to revision."); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360 (Fed. Cir. 2008) ("The power to reconsider is inherent in the power to decide.")). Because Nano Magic has offered undisputed and compelling evidence of continuing, cognizable injury, its Petition is not moot under the circumstances.

B. <u>"Capable of Repetition Yet Evading Review" Applies in this Context.</u>

The Division next argues that the constitutional principal of "capable of repetition yet evading review" does not apply in this context because the circumstances surrounding this dispute are unlikely to reoccur, and because "the imposition of a trading suspension does not require – and thus imply – wrongdoing by the company whose securities were suspended." (Ans. Br. at 3-4). In fact, a close reading of the Division's arguments border on the suggestion that

constitutional harm is impossible in SEC administrative proceedings. Again, the Division is wrong.

"A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307-08 (2012) (cleaned up). And a case remains live under the "'capable of repetition, yet evading review' doctrine" when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (cleaned up); *see Turner v. Rogers*, 564 U.S. 431, 439-40 (2011).

Here, the Division conflates Nano Magic's ongoing injury from the failure to decide the Petition with the substance of the Petition itself. Indeed, with respect to the duration of the challenged action, as Nano Magic explained in its Opening Brief, a ten-day trading suspension is too short to be fully litigated prior to its cessation or expiration. Moreover, the Commission expressly elected by its indifference not to decide the entire matter within the ten-day period, despite receiving the express opportunity and request to do so. On May 8, 2020, Nano Magic filed a Motion to Expedite Schedule for Submissions in Consideration of Sworn Petition to Terminate Trading Suspension. ("Motion to Expedite").[3] After the Division ignored entirely Nano Magic's prompt request for a Meet and Confer to discuss the Motion to Expedite, Nano Magic filed its Motion to Expedite in fewer than four hours after the Commission filed its Order Requesting Additional Written Submissions and in which the Commission wrote "[i]n view of the detail provided in NMGX's petition and supporting exhibits, the apparent narrowness of the

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." *Nano Magic Inc*., Exchange Act Release No. 88841, 2020 WL 2310946 (May 8, 2020). In its Motion to Expedite, Nano Magic provided a clear and rationalized timetable that would "enable the Commission to decide this matter, if it so chooses, prior to the expiration of the trading suspension on Thursday night, May 14, 2020, at 11:59 p.m. EDT." Motion to Expedite at 4. The Commission by inaction declined to provide the requested "true relief and bona fide appropriate relief [by] terminating the trading suspension while it remain[ed] in effect." Motion to Expedite at 2. Essentially, the Commission by failing to rule by May 14, 2020 now seeks to deem moot the Motion to Expedite that has been pending for four years unlike the Motion to Expedite which Nano Magic filed within four hours.

Just as a federal court found the proxy review process presents a scenario capable-of-repetition-yet-evading-review, the same constitutional principle applies equally to a ten-day trading suspension. The United States District Court for the District of Delaware unsurprisingly opined that the proxy review process is a classic scenario for the capable-of-repetition-yet-evading-review doctrine. *See Trinity Wall St. v. Wal-Mart Stores, Inc*., 75 F. Supp. 3d 617, 627 (D. Del. 2014). And the Supreme Court held in *Turner*, albeit in a different context, that even a one-year window was too short to ensure full litigation, applying this constitutional doctrine. *Turner*, 564 U.S. at 439-40. The ten-day window here is far shorter.

With respect to the reoccurrence of the same action, Nano Magic explained in its Opening Brief that there is a reasonable expectation that Nano Magic could become subject to the same legal wrong, "should there be no restraint on the Commission continuing to impose its unlawful approach to trading suspension." (Op. Br. at 11-12). This likely-to-reoccur legal wrong

[3] www.sec.gov/files/litigation/apdocuments/3-19787-event-2020-05-08-motion-expedite-schedule-submissions.pdf.

not only has to do with the suspension in the first instance, but also the "Commission's unlawful refusal to issue a final decision" (*Id*. at 11) and dereliction of its investor protection responsibility to Nano Magic's investors by not ruling as it could have before the trading suspension expired. The Division responds with a gross overstatement of what Nano Magic must argue in support of the reoccurring legal wrong that may occur if the Petition is not decided on the merits, and suggests that, because the Petition presents a unique set of circumstances, the "capable of repetition yet evading review" doctrine does not apply. But Nano Magic need not show that that such repetition is almost certain to occur, nor even that it will "probabl[y]" occur. *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 324 (D.C. Cir. 2014). "[S]ome likelihood" suffices. *Doe v. Sullivan*, 938 F.2d 1370, 1379 (D.C. Cir. 1991). Nor does Nano Magic need to show the exact same fact pattern will repeat; a reasonable expectation that different facts will produce the same legal controversy between the same parties is enough. *See Ralls Corp*., 758 F.3d at 324. Indeed, courts recognize that an agency's "refusal to admit the illegality of its past conduct heightens the probability that the agency will once again" commit the same violation. *In re Ctr. for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986).

The concept of capable-of-repetition-yet-evading-review is essentially what occurred in *SEC v. Sloan*, 436 U.S. 103 (1978) where the Commission imposed seriatim trading suspensions. In *Sloan*, the Supreme Court recognized the Commission's right to suspend trading summarily as "an awesome power with a potentially devastating impact on the issuer, its shareholders and other investors," and the imposition of limits is necessary to protect both the congressional mandate and the rights of the "issuer, its shareholders and other investors." 436 U.S. at 112. The Supreme Court recognized that "Congress, in weighing the public interest against the burden imposed upon private parties, has concluded that 10 days is sufficient for gathering necessary

evidence." *Id.* By electing not to decide the Nano Magic trading suspension and now contemplating its failure to do so as moot, the Commission seeks not only to repeat what occurred in *Sloan* but also to violate the constitutional doctrine of capable-of-repetition-yet-evading-review. *See id*. ("Effective judicial review is precluded during the life of the [suspension] orders because a series of consecutive suspension orders may last no more than 20 days.").

C. Nano Magic Should not be Stripped of an Opportunity to Seek Fees under the EAJA.

In its Opening Brief, Nano Magic explained that a declaration from the Commission that the Petition is moot would effectively strip Nano Magic of its opportunity to seek an award of fees and expenses under the Equal Access to Justice Act (5 U.S.C. § 504, *et seq.*) ("EAJA"), and a decision that the Petition is moot would be in the Commission's direct pecuniary interest. Thus, Nano Magic implored the Commission to recognize that right in determining whether the Petition is moot. In response, the Division argues that a potential claim for fees and expenses under the EAJA does not "on its own, create a continuing cognizable injury to a party." (Ans. Br. at 5). Obviously, the Division misconstrues Nano Magic's argument.

Nano Magic never argued that a potential claim for fees and expenses under the EAJA constitutes a cognizable injury. Nor could it. A successful claim for fees and expenses under the EAJA is necessarily predicated on a determination that the government's position in the underlying action was not "substantially justified." *See Comm'r v. Jean*, 496 U.S. 154, 156 & n. 1 (1990) (Under the EAJA, a private party may be entitled to an award of "'fees and other expenses'" if he or she "prevail[s] in litigation against the United States [and] if, among other conditions, the position of the United States was not 'substantially justified.'" (quoting 28 U.S.C. § 2412(d)(1)(A)). Thus, in order to qualify for an award of fees and expenses under the EAJA,

the government must have taken a position ***against*** a party in the first instance, and that position must be determined to have not been substantially justified. In other words, Nano Magic's potential claim for an award of fees and expenses under the EAJA stems entirely from the Commission's trading suspension in the first instance, and its continued refusal to decide the Petition on the merits. ***That*** is what continues to harm Nano Magic, and ***that*** will be the basis for Nano Magic's EAJA fee application if the Petition is granted.[4]

D. <u>The Division Concedes that the Petition be Granted.</u>

Except for the arguments addressed *supra*, the Division wholly ignores the remainder of Nano Magic's arguments regarding mootness. In a feeble attempt to preserve any arguments in response to the bulk of Nano Magic's Opening Brief, the Division, in a footnote, merely states that its failure to respond to Nano Magic's arguments "should not and cannot be taken as its agreement to any of them." (Ans. Br. FN 1). The Division's contention ignores the May 2024 Order language that "[t]he Commission may deem waived or forfeited any argument or contention not advanced in these briefs," (Order at 2), which is consistent with the Division's well-documented disrespect for the Commission in this proceeding as evidenced by its failure to follow the law and disclose <u>all</u> information before the Commission, as but one glaring example and as the Commission made known publicly.[5] Then, after the Division makes its case for why it thinks the Petition is moot, the Division does a complete about-face and "respectfully requests that the Commission not dismiss [Nano Magic's] petition as moot, and instead rule on the merits and deny the petition." (*Id*. at 5). On at least part of the Division's position, Nano Magic agrees – the Commission should not deny the Petition as moot and should instead decide the Petition on

[4] Nano Magic argued in its Opening Brief, and the Division did not address in its Answering Brief, that a dismissal of the Petition either as moot or on any other grounds at this juncture would put the Commission in the conflicted position of acting in its own pecuniary interest, thereby necessitating the Commission recusing itself as adjudicator.
[5] *Nano Magic Inc.,* Exchange Act Release No. 94818, 2022 WL 1288188 (April 28, 2022).

the merits. The Division's concession that the Petition should not be denied as moot should, at bottom, control, and the Commission should consider, and grant, the Petition on the merits.

E. Conclusion

The Division wrote in its reply that the Commission ruling on the Petition to Terminate, which the Division invites, "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." (Ans. Br. at 6). The Division is delusional. Just as Nano Magic once before sought relief from the United States Court of Appeals, the Commission should be confident that a ruling adverse to Nano Magic, which is not called for with these unique facts, will result in a return to the United States Court of Appeals. No different than this matter qualifying as the Commission's adjudicative "Debt Box," the Division has caused considerable harm to Nano Magic, and Nano Magic intends to pursue all relief to which the company is entitled.[6] The first step is for the Commission to grant all relief that Nano Magic seeks herewith.

For the foregoing reasons, and as explained in Nano Magic's Opening Brief, the Commission should not deny Nano Magic's Petition as moot, and should instead grant the Petition and the relief that Nano Magic seeks on their merits.

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[6] Relief for the Division Staff's failure to comply with relevant Codes of Professional Responsibility, regardless of whether the Commission considers internal disciplinary action, is within the purview of State Bar associations and is not the subject of this briefing on Mootness.

Respectfully submitted,

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Dated: June 5, 2024

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:

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