UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 6, 2020

File No. 500-1

In the Matter of Nano Magic, Inc. Petitioner.	SWORN PETITION TO TERMINATE TRADING SUSPENSION ISSUED PURSUANT TO SECTION 12(k)(1)(A) OF THE SECURITIES EXCHANGE ACT OF 1934

Nano Magic Inc., by this sworn Petition of its President and Chief Executive Officer Tom J. Berman, Esq., through undersigned counsel, pursuant to 17 C.F.R. 201.550(a), Rule 550(a) of the Commission's Rules of Practice, petitions the Securities and Exchange Commission to terminate the suspension in the trading of the securities of Nano Magic Inc. ordered on April 30, 2020. Petitioner files timely this Petition given that the order suspending trading "terminat[es] at 11:59 p.m. EDT on May 14, 2020." The expiration of the trading suspension is six business days subsequent to this filing. Accordingly, Petitioner further requests that the Commission act expeditiously to consider this Petition and resolve this Petition prior to the termination of the period of the trading suspension.

I. Introduction and Summary

On April 30, 2020, the Commission suspended trading of the securities of Nano Magic Inc. (OTCMKT: NMGX) ("Nano Magic") for ten days because of

> questions regarding the accuracy and adequacy of information in the marketplace since at least February 24, 2020 … [relating to] publicly available information concerning NMGX including: (a) information in the

> marketplace claiming that the Company has a patent for a disinfectant that kills "coronavirus"; and (b) a statement made by NMG on April 7, 2020 regarding the Company's involvement in the fight against COVID-19.

The reference to "information in the marketplace" appears to refer to message board postings. Nano Magic, including its officers and directors and persons authorized to act for the company, never – never – has posted to a stock message board. Moreover, the Company nowhere makes or ever has made a claim that its patented disinfectant "kills 'coronavirus.'" As to Nano Magic's CEO's statement on April 7, 2020 in a press release, discussed in detail below, nowhere did Nano Magic or its CEO say that the company was "involved in the fight against COVID-19." The CEO did state that the company is "eager to join the Covid-19 fight," a true statement addressed below.

This petition does not challenge the authority of the Commission to exercise its discretion, mindful that the Commission's investor protection function "will at times require that we act *before* there has been an opportunity to fully develop information about a situation."[1] However, Nano Magic appeals – in all senses of the word – directly to the Commission to terminate the trading suspension pursuant to Rule of Practice 550 based on the facts presented in this Petition, which Nano Magic believes are extensive facts previously unknown to the Commission. Regrettably, Nano Magic submits that adequate inquiry by the investigating Staff prior to the Staff making a recommendation to the Commission would have resulted in either Senior Staff at the Commission not supporting the recommendation or the Commission questioning hard whether a trading suspension was warranted in the first place.[2]

[1] *Bravo Enters. Ltd.*, Exchange Act Release No. 75775 at 7 (Aug. 7, 2015).

[2] Undersigned counsel spent nine and one-half years on the staff of the Division of Enforcement and, during his tenure, wrote a recommendation to the Commission that resulted in the suspension of trading of two issuers. Counsel notes this fact as reflective of his familiarity with the process and appreciation of the

As important as what is Nano Magic, equally and possibly more important is what Nano Magic is not. This was never a shell company. There was no reverse merger. There are no promoters, e-mail spammers, newsletters, touts or call rooms. The company never has published materially false and misleading information. As to availability of current and accurate information, the company is in the process of completing its Form 10-K for filing on or before May 14, 2020, with a quality regional firm as its independent auditor. This is a real company with quality management, not a recycling of "bad guys" under a new roof. It is regrettable that the understandable hyper-sensitivity to anything "Covid-19" and "coronavirus" here resulted in premature and inappropriate action. The facts surrounding all the other 20 plus companies the securities of which were or continue to be the subject of ten-day trading suspensions are distinguishable. Meanwhile, Nano Magic, a company that just started turning the corner towards success as a result of the past 18 months of hard work, now is confronting severe adverse consequences, including reputational harm, as a result of the securities trading suspension.

II. The Issuer and Key Principals

A. Nano Magic Inc.

Nano Magic, in its current form, is a six-year old company with 13 employees, with principal offices in Bloomfield Hills, Michigan. Nano Magic also has offices and laboratory and manufacturing space in in Brooklyn Heights, Ohio, offices and laboratory space in Austin, Texas and a sales office in the Detroit, Michigan metropolitan area. The

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thought at the Commission level attendant to a trading suspension determination. Counsel recognizes that the Commission must rely on the quality of the information presented; this Petition presents relevant facts that Counsel submits should have been part of the mix of information available for the Commission's consideration.

principal business of Nano Magic for the past six years has been and continues to be the sales of consumer and industrial products powered by nanotechnology and contract research for government and private customers, including the award of five patents from the United States Patent and Trademark Office. In 2019, Nano Magic had approximately $2,400,000 in revenue from its broad customer base. Over the five-year period January 1, 2015 through December 31, 2019, Nano Magic had $32.7 million in total revenue. All products that Nano Magic sells are proprietary products using technology developed by Nano Magic's subsidiaries and manufactured and packaged by the company.

More specific with respect to the business of Nano Magic, the company is a leader in creating and bringing to market cutting-edge nanotechnology powered applications formulated and packaged in the United States with special expertise in liquid products to apply to surfaces such as glass, porcelain, and ceramic. The company's consumer products that are in-use in the marketplace include lens care, electronic device hygiene and protection, anti-fog solutions (sport and safety), household cleaning and auto protection. Additional detail regarding the company's products and products use is in Section III.A., *infra.* Nano Magic's Innovation and Technology Center in Austin, Texas engages in contract research and development work for government and private customers. And from a social consciousness perspective, Nano Magic also focuses on innovative and advanced product solutions harnessing the capabilities of nanotechnology to create safer and higher performing products.

In February 2020, the OTCQB re-admitted Nano Magic for quotations and trading. Nano Magic has approximately 350 stockholders of record and approximately 3,700 beneficial owners. There are 7,200,000 shares of Class A common stock

authorized and 7,199,941 shares outstanding.[3] The directors, three of whom also are officers, own or control a substantial majority of the outstanding common stock, approximately 85% to be precise, such that there is a limited supply of stock available for trading.

B. Tom J. Berman, President and Chief Executive Officer

Tom Berman is the President and Chief Executive Officer and a director of the company. Mr. Berman received a Juris Doctor in 2004 from the University of Detroit Mercy School of Law, and is licensed to practice law in Michigan. Out of law school, Mr. Berman formed a general practice law firm in Bloomfield Hills, Michigan specializing in business representation and corporate and real estate transactions. In late 2011 through early 2012, Mr. Berman served as Bedrock Detroit's initial General Counsel and "Parking Guru", a company that Dan Gilbert formed and led to focus on revitalizing the City of Detroit.[4]

In February 2012, Mr. Berman joined Ascion, LLC d/b/a Reverie, a Michigan based Sleep Technology company in Bloomfield Hills, Michigan, as its Chief Business Development Officer and General Counsel. Mr. Berman helped lead Reverie's growth and development of its Direct-to-Consumer business unit and brand. Mr. Berman eventually served as Reverie's Chief Administrative Officer and General Counsel,

[3] The certificate of incorporation also authorizes blank check preferred; the company never has issued any. There are also two other authorized classes of common stock, Class B common stock and Class Z common stock. All shares previously issued of the Class B and Class Z common stock has converted into Class A common stock. At a Board of Directors meeting scheduled for Wednesday, May 4, 2020, the Board is planning to consider and is expected to approve restating the certificate of incorporation to eliminate the Class B and Class Z common stock and authorize more Class A common stock. The Board anticipates submitting such changes for written action of and approval by the stockholders. The company is preparing a preliminary Schedule 14C to file with the SEC on or around May 13, 2020 to provide the required notice to stockholders of the changes.

[4] Dan Gilbert is the founder and Chairman of Quicken Loans, Rock Ventures and majority owner of the Cleveland Cavaliers National Basketball Association team.

responsible for helping develop Reverie's overall business strategy while also handling day-to-day affairs related to all legal matters. Mr. Berman's in-house counsel function at Reverie included its intellectual property portfolio and real estate management, as well as leading the Human Resources and Information Technology departments.

Beyond his work background, Mr. Berman was elected to and served on the Oakland County, Michigan Board of Commissioners from 2016-2018, representing approximately 60,000 constituents in five communities. Previously, Mr. Berman was an elected member of the Keego Harbor City Council, for which he served a three-year term. Mr. Berman is a past President of the Michigan Chapter of the Crohn's and Colitis Foundation and is currently on the Leaders for Kids Children's Hospital of Michigan Foundation Advisory Board.

C. Jeanne Rickert, Esq., General Counsel

Jeanne Rickert, the General Counsel and a Director, was a partner in the Cleveland, Ohio office of Jones Day for 25 years before joining Nano Magic in 2014. Ms. Rickert joined Jones Day immediately following a two-year clerkship in the United States District Court for the Northern District of Ohio. She is a past chair of the Corporation Law Committee of the Ohio State Bar Association and chaired the subcommittee that wrote Ohio's first limited liability company statute. Ms. Rickert's law practice focused on joint ventures and mergers and acquisitions. Earlier in her legal career, she focused on private placements, private mergers and acquisitions and general corporate and commercial matters for corporate clients.

D. Other Officers and Directors

The Nano Magic Board has six directors, including Mr. Berman and Ms. Rickert. The other four directors are:

Todd Lunsford, presently the CEO of Rocket Loans, a national marketplace lender specializing in online personal loans and part of the Quicken Loans/Rocket Mortgage family of companies. Mr. Lunsford was a founder of Rocket Loans in 2015 and was its CEO through December 2017. From 2018 until returning to Rocket Loans in February 2020, Mr. Lunsford was a strategic advisor to the Quicken Loans family of companies.

Howard Westerman, presently the Chief Executive Officer of JW Energy Company, a privately held energy development and energy services company headquartered in Dallas, Texas. Mr. Westerman joined JW Energy in 1978 and became its CEO in 1999. Under Mr. Westerman's leadership as CEO, the JW Energy's revenues increased from approximately $70 million to $1 billion.

Ronald Berman, who co-founded Rock Financial (now Quicken Loans) in 1985 and was a member of its Board of Directors. Ronald Berman also co-founded BEG Enterprises and served as its President from 1989 to 1998. Mr. Berman has served on Boards of Directors of many publicly-held and private companies. Mr. Berman is a licensed attorney in Michigan and Florida for almost 40 years, and currently practices law as a sole practitioner.

Scott Rickert, former Professor at Case Western Reserve University, pioneered research in nanotechnology and founded the Cleveland, Ohio based company that was part of the combination of companies in 2014 that now is Nano Magic. Mr. Rickert was the Ohio company's President from 1985 until 2014. He then continued as President and CEO of Nano Magic until Tom Berman joined Nano Magic.

III. Business of Nano Magic Inc. and Disclosures

A. History of the Company

The company that is now Nano Magic Inc. was created in 2014 by the combination of two operating nanotechnology companies -- Applied Nanotech, Inc. of Austin, Texas, and PEN Brands LLC (formerly Nanofilm Ltd.) of Cleveland, Ohio. Both companies had successful independent operating histories dating back to the 1980s. The Cleveland company used nanotechnology formulas to create products sold primarily to the optical industry, with annual sales in 2013 of approximately $10 million. The Austin company was a public company, trading under the symbol ANHI, that worked to develop commercial products from its extensive contract research work performed for the government and private entities. In 2013, Applied Nanotech's revenue from government contracts was approximately $2.0 million, and revenue for other contract research was approximately $1.0 million. In 2014, the two companies combined to create PEN Inc., an acronym for Products Enabled by Nanotechnology. The common stock of the combined company traded on the OTCQB.

The combined Applied Nanotech and PEN Brands company confronted business integration challenges. Moreover, in the first half of 2018, a series of major business missteps resulted in the company losing the business of its large customers in the retail optical business. These optical business segment customers represented 38% of Nano Magic's revenue for 2018 and 39% of revenue in 2017. When Nano Magic lost its major customers in 2018, the company fell behind in its SEC reporting and was demoted to the Pink Sheets in May 2018.

Loss of the revenue from major customers required that the company find another source of cash for operations. The company had a revolving credit line, but interest charges and fees were another cash drain, so the company undertook several private placements in 2018 and 2019. The 2018 placement resulted in proceeds of $1.0 million, and, among other uses of the funds, enabled the company to pay off its revolving credit note in January 2019. After the final closing on the second placement at the end of March 2020, proceeds from that offering aggregated $1,345,000.

Efforts in 2018 and early 2019 to regain that optical business segment customers proved unsuccessful. To grow the revenue again to support operations, the company needed to look for other markets and new distribution. Recognizing consumer sales as a logical market for its surface cleaning and anti-fog products, the company since has focused its sales efforts on direct to consumer sales and on working to establish relationships with big box retailers. Mr. Berman, who joined the company in October 2018 as President and CEO, also brought consumer product experience to the company.

To ensure that the company capitalized on any success in consumer sales and to build repeat business, the company also studied and pursued a rebranding of its product line, looking to find a brand name that would be both memorable for and easily recognizable to consumers. In the summer of 2019, the new brand name "Nano Magic" was selected. In August 2019, the company filed with the United States Patent and Trademark Office ("USPTO") a trademark application for a trademark on the "Nano Magic" name. The USPTO issued the trademark in January 2020.

Since taking on its turnaround efforts in October 2018, led by Mr. Berman, the directors and management have considered that a trading market for the company's stock

is important to the company's shareholders. Therefore, the company announced its goal of returning for quotation and trading on the OTCQB. To that end, the company filed Forms 10-Q for the first three quarters of 2018 in May 2019 and its Form 10-K for the year-ended December 31, 2018 in June 2019. In January 2020, the company became current with its SEC filings having filed its Form 10-Q for the first three quarters of 2019. In February 2020, Nano Magic applied for quotation and trading eligibility on the OTCQB and was accepted.

To signal to shareholders and customers the progress the company had made to reposition its products, to strengthen its balance sheet, to become current in its SEC filings and to return to the OTCQB for price quotation and trading, the company also decided to adopt as its corporate name going forward the new brand name Nano Magic. The formal name changed followed the company's receipt of a trademark, and trademark protection therewith, in January 2020. The Board deferred formal action until March 2020 so that the timing would dovetail with the preparation and anticipated filing of the company's Form 10-K for the year-ended December 31, 2019.

Today, Nano Magic creates and brings to market nanotechnology powered products formulated and packaged in the U.S.A. with special expertise in liquid products to apply to surfaces such as glass, porcelain, and ceramic. Consumer products include lens care, electronic device cleaning and protection, and anti-fog solutions (sport and safety), as well as household cleaning and auto protection. Some products are sold under Company brand names, others are private labeled for customers who resell under their own brand name. Anti-fog products are also sold to institutional customers for industrial and military safety applications. Other applications for Nano Magic products include,

interior and exterior display panels, touch screens, glass displays and screens, windshields, solar panels, glass countertops and display cases, china, porcelain, glass tableware, toilets, sinks, and shower doors. These products are made and packaged for shipment to customers at Nano Magic's facility in Brooklyn Heights, a suburb of Cleveland, Ohio. Nano Magic also has a sales office in the Detroit metropolitan area focused on sales of these products.

Nano Magic also develops, manufactures and sells metallic inks and pastes to a variety of customers around the world. The product formulations are compatible with the nozzles used in digital printing, including 3D printing. In the medical field, Nano Magic sells thin carbon foil made of layers of graphene for use in cyclotron accelerators that produce nuclear pharmaceuticals, as used by the medical field in Positron Emission Tomography (PET) imaging. These products are developed and produced at the facility in Austin, Texas.

Nano Magic's Innovation and Technology Center is also at the Austin location, where Nano Magic continues to perform contract research and development work for government and private customers. Nano Magic focuses on innovative and advanced product solutions harnessing the power of nanotechnology with a philosophical objective and goal of creating a safer, more socially conscious, and higher performing world.

B. Patents and products

In 2015 Nano Magic developed a product using copper iodide in a liquid suspension in solution with germ fighting properties. The name originally assigned to the product was "Halo." Briefly, the company internally renamed the product "CU stay clean." With further product development, the company came to refer to the product

internally as "Potion," although many inside the company still refer to it as "Halo." The company has not yet started offering that product for commercial sale.

The company applied to and received from the USPTO four patents with respect to this liquid suspension in solution with germ-fighting technology. The patent numbers, dates of issuance and titles are (with a hyperlink to the patent at the USPTO in each of the corresponding footnotes):

- US 9,615,572, issued April 11, 2017, Disinfectant Spray Comprising Copper Iodide;[5]
- US 9,617,040, issued April 11, 2017, Disinfectant Material Comprising Copper Iodide;[6]
- US 10,123,540, issued November 13, 2018, Disinfectant Material;[7] and
- US 10,440,958, issued October 15, 2019, Disinfectant Material Comprising a Copper Halide Salt and Surfactant.[8]

Each of these published patents refers to testing performed in support of the patent claims. Specifically, each says: "Example 8 Experimental Test Against H1N1 Influenza A, Strain A-California, and Human Corona Virus 229E." In the case of H1N1 Influenza A, towelettes embedded with water-based solution of copper iodide at 20 mg/L showed according to modified test AATCC 100 a 99.7% reduction vs. time zero control. In the case of Human Corona Virus 229E according to modified ASTM E1053 the percent

[5] http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=%2Fnetahtml%2FPTO%2Fsrchnum.htm&r=1&f=G&l=50&s1=9615572.PN.&OS=PN/9615572&RS=PN/9615572
[6] http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=%2Fnetahtml%2FPTO%2Fsrchnum.htm&r=1&f=G&l=50&s1=9617040.PN.&OS=PN/9617040&RS=PN/9617040
[7] http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=%2Fnetahtml%2FPTO%2Fsrchnum.htm&r=1&f=G&l=50&s1=10123540.PN.&OS=PN/10123540&RS=PN/10123540
[8] http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=%2Fnetahtml%2FPTO%2Fsrchnum.htm&r=1&f=G&l=50&s1=10440958.PN.&OS=PN/10440958&RS=PN/10440958

reduction was 99.99% in 10 minutes." When the testing in support of the patent claims was performed, Human Corona Virus 229E was an accepted surrogate to test for efficacy against MERS.[9] MERS is the acronym for Middle East Respiratory Syndrome, an illness caused by a virus, more specifically a coronavirus (MERS-CoV), according to the Center for Disease Control and Prevention ("CDC").[10]

The company has not sought to qualify or register with the United States Environmental Protection Agency ("EPA") the copper iodide used in the Nano Magic product formulation for use as a surface cleaner, disinfectant or sanitizer. The reason is the expense of the required tests for that qualification would make it prohibitive for Nano Magic to undertake this effort. That process would require 12 months or longer.

In February 2020, under new leadership, the company launched an internal evaluation of its readiness to produce the CuI product in commercial quantities and the supply chain support that would be needed. The acronym CuI is for "copper and iodide" and is the formula covered by the four patents. The company also began examining the requirements that apply to labelling the product as a sanitizer or disinfectant and the legality of making claims about the killing power of the product. In connection with the labelling determination and the claims that the company could make, the company retained outside counsel who provided legal advice. Based on the legal advice received,

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[9] https://www.journalofhospitalinfection.com/article/S0195-6701(20)30046-3/fulltext. Human Corona Virus 229E also is an accepted surrogate to test for efficacy against COVID-19. *Id.* *See* https://www.tga.gov.au/surrogate-viruses-use-disinfectant-efficacy-tests-justify-claims-against-covid-19. Nano Magic's patented formulation, without any additions probably is effective against COVID-19. However, the regulatory procedures required to make that claim are beyond its resources. Notwithstanding this, the Company has made no public statement regarding the possible effectiveness of its patented formulation as effective against COVID-19.

[10] https://www.cdc.gov/coronavirus/mers/about/index.html. "Most MERS patients developed severe respiratory illness with symptoms of fever, cough and shortness of breath. About 3 or 4 out of every 10 patients reported with MERS have died…. CDC recognizes the potential for MERS-CoV to spread further and cause more cases globally and in the U.S." *Id.*

the company has positioned itself to ensure that it makes accurate representations about its products.

In the course of its work relating to the patented CuI product, the company developed a revised formula that incorporates povidone-iodine (PVP-I), a broad-spectrum antiseptic that is generally used for skin disinfection before and after surgery. PVP-I is a widely-used and is just as widely recognized as a germ fighting agent, most notably known as the active ingredient in the product commonly known as Betadine.[11] Mundipharma, the manufacturer of Betadine products, makes affirmative claims that Betadine kills 99.9% of bacteria and viruses.[12]

Nano Magic has been working tirelessly for months and has internal communications related to the company's accelerated research and development efforts relating to its revised formula that incorporates PVP-I. Moreover, the company has had e-mail exchanges with a number of EPA personnel and several phone conversations with EPA consultants seeking guidance to determine the process the company should follow to obtain the necessary efficacy data and approval for labels to be used on its PVP-I surface sanitizer towelette and spray surface cleaner. Subsequent to its teleconference with the EPA, the company received quotations from several certified independent testing laboratories that could perform the testing that would become part of the EPA approval process. Notably, the EPA, as it did for MERS (discussed above), will accept test results for tests against Human Corona Virus 229E, which is similar to SARS-COV-2, as a

[11] http://ph.betadine.com/en/about-betadine-brand.
[12] *Id.*

surrogate for the COVID-19 virus.[13] The company already has ordered the compounds used in the product and materials necessary to package the product.

C. Information in the Marketplace between February 24, 2020 and April 30, 2020

Information in the marketplace between February 24, 2020 and the announcement of the trading suspension falls into three categories, including the statement by the company of April 7, 2020 that the Commission references in the trading suspension. The categories are information that the company has issued, information in the marketplace that does not originate from the company, and the company's public statement of April 7, 2020. All of the information in the marketplace, including the April 7, 2020 press release, is accurate.[14]

1. Information from the Company in the Public Domain

In calendar year 2020, so predating the February 24, 2020 date referenced in the trading suspension, the company made seven filings with the Commission[15] and issued

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[13] https://www.epa.gov/coronavirus/how-does-epa-know-products-list-n-work-sars-cov-2. In fact, the CDC is using SARS-CoV-2 to test serum collected from people who have recovered from COVID-19 to look for antibody that might block viral infections and to determine when people shed live virus during the disease, all to shape the CDC's guidance on when to discontinue transmission-based precautions for patients. https://www.cdc.gov/coronavirus/2019-ncov/php/grows-virus-cell-culture.html

[14] On May 6, 2020, the company issued a press release, attached hereto as Exhibit A, stating that the company was not -- and its officers and directors were not -- the source of "information in the marketplace claiming that the Company has a patent for a disinfectant that kills 'coronavirus'" as referenced in the trading suspension. The Company expressed its belief that the location of the "information" that the Commission references is internet message boards and third-party postings to those message boards. The press release further cautions investors to rely only on information released by the company in its current and periodic reports filed with the Commission and in press releases that the company may issue. The press release notes the company's strict policy of not communicating on internet message boards and policy of not communicating with persons seeking to obtain information from the company outside of the company's public filings and official statements. Additionally, the company included reference to the Commission's 2013 published warning for investors about the Commission's concerns relating to messages on online bulletin boards, chat rooms, and mass e-mails.

[15] With respect to the company's seven filings with the Commission, rather than repeat what likely is detailed for the Commission in the Staff's narrative seeking the trading suspension and informing the Commission about each of the filings, this note limits reference to the company having filed a Form 10-Q

only one press release, on April 7, 2020. The company is actively in the process of preparing for filing its Form 10-K for the year ended December 31, 2019, which the company intends to file with the Commission.

2. Information on Internet Message Boards is not from the Company

The trading suspension references "information in the marketplace claiming that the Company has a patent for a disinfectant that kills 'coronavirus'." Nano Magic disavows knowledge of the source of such information in the marketplace. The company has a strict policy of not communicating on internet message boards and a policy of not communicating with persons seeking to obtain information from the company outside of the company's public filings and official statements. In fact, Mr. Berman, during the period of concern to the Commission, received several e-mails from persons unknown to him inquiring about Nano Magic's products and their efficacy with respect to current virus concerns. Mr. Berman did not disclose corporate proprietary information to persons not associated with the company.

In light of and given the company's two referenced policies, and in the interest of completeness, Ms. Rickert, the company's General Counsel, inquired of each officer and director whether he or she has (1) published any information about the company on any internet message board; (2) responded to any message posted on an internet message board about the company; or (3) arranged or procured, directly or indirectly, for any person(s) or entity to publish or communicate information about the company on any

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on January 8, 2020, another Form 10-Q on January 14, 2020, and Forms 8-K on each of January 27, February 14, March 30, April 7 and April 28, 2020.

internet message board or by any other electronic medium. Each officer and director responded in the negative, confirming compliance with company policy.[16]

3. The April 7, 2020 Public Statement by Nano Magic is Accurate

On April 7, 2020, the company issued a press release the sole purpose and design of which was to focus on the announcement of the company's new trademarked corporate name, the new trading symbol and the anticipated launch of the new, rebranded product line. Exhibit B. This was the culmination of more than a year of work to reposition the company's identity in the eyes of its customers and to share with stockholders the progress in the business. As noted above, the company filed for trademark protection in August 2019 for the "Nano Magic" and received the issued trademark in January 2020. The company subsequently prepared for the roll-out of the name change by (1) filing legal documents with states of incorporation, (2) changing bank accounts, (3) updating all internal and customer facing documents such as purchase orders, order acknowledgments, invoices, letterhead, email addresses, and website, and (4) preparing the design of the company's new product line. These were exciting developments, and, in management's view, warranted the first press release in several years.

In the press release, Mr. Berman made the statement that the company was "eager to join the Covid-19 fight." Mr. Berman also stated that "we have accelerated the development and commercialization efforts of our household cleaning and protectant solutions in order to help create a cleaner and safer world." Both of these statements, the zeal to join the COVID-19 fight and the acceleration of product development and

[16] Ms. Rickert also inquired whether, since February 24, 2020, any of the officers and directors effected any open market transactions in the company's stock. One director, on April 8, 2020, effected one purchase of 1100 shares. There was no blackout period or other trading limitation in effect that day. No other officer or director purchased or sold stock in the market or effected a private transaction in the company's stock.

commercialization were entirely true statements. There was no statement, as set forth in the trading suspension, that the company had any "involvement in the fight against COVID-19."

Mr. Berman's statement was true. The company has been working diligently since February 2020 to determine the correct specifications for the PVP-I formula and the quality control parameters. The company has conducted laboratory testing, received a consulting attorney's advice and legal memorandum, and consulted with EPA certified consultants. In March 2020, the company expanded its effort to consider product labeling requirements for its PVP-I products. Also, in March 2020, the company more directly involved the company's production team that operates manufacturing and procurement to address enabling the company's equipment to produce the proposed new PVP-I spray and towelette products and the related supply chain. All of this work was and is in-house at Nano Magic. And, in April 2020, the product label requirements and EPA regulations for the PVP-I products became a key focus of the team's efforts. In addition to e-mails and telephone calls with the EPA, the company met remotely with EPA staff for further guidance.

The company has been working on an extremely aggressive and accelerated timeline for its PVP-I products. In the ordinary course of business, many of these tasks would be done in series not simultaneously. That is the "accelerated [] development and commercialization efforts of our household cleaning and protectant solutions in order to help create a cleaner and safer world" to which Mr. Berman referred in the press release.

The press release headline did not mention "Covid-19." The body of the press release did not highlight "Covid-19." In all internal communications at Nano Magic with the product and production team, Mr. Berman has indicated that he wants to ensure that the company launches a product that performs as the company says it does, that is entirely consistent with product representations, any only after substantiating the efficacy of the product. The press release was not misleading; neither Mr. Berman, nor the Company intended to or did mislead or mispresent anything. To the contrary, the only reason for mentioning "Covid-19" was many people familiar with the company's existing products, past product development history and related publicly-known patents had been asking about whether the PVP-I product was being worked on and if it was going to come to market. The interest among people familiar with Nano Magic's products are contemplating the PVP-I product's potential relevance as a surface disinfectant that could be used during this time of popular concern around the new strain of coronavirus.

The company wanted its shareholders and customers to know in one communication – not in selective communications – that its mission is to create a safer and cleaner world and desired be part of that fight. In fact, the company's' anti-fog products actually help in that fight by providing a solution to front line healthcare professionals and others wearing masks while their glasses fog up or their face shields fogging up, impairing their ability to see or perform. That is the company's new identity and in the company's DNA. The focus of the press release was on the new name, trading symbol and rebrand and new product line. And, in-house and external counsel reviewed this press release before its issuance.

IV. FINRA Referral and Limited Division of Enforcement Investigation did not Support the Commission Ordering a Trading Suspension

The first capital markets regulatory inquiry in the company's history was a telephone call and follow-up e-mail and letter with 14 questions on April 14, 2020 from an investigator in FINRA's Office of Fraud Detection and Market Intelligence. Exhibit C. There is no reference to a particular broker-dealer trading the stock or questions relating to particular capital markets trading activity that might give rise to FINRA's jurisdiction, which does not extend to an issuer such as Nano Magic. Notwithstanding that it had no obligation whatsoever to do so, on April 17, 2020 the company sent a letter answering the questions posed in the letter. Exhibit D. FINRA did not request any documents from the company. Mr. Sims acknowledged receipt and confirmed he would be in touch regarding any follow-up questions. There were none.

The next communication to the company was from Cecelia Connor from the Commission's Philadelphia Regional Office, Division of Enforcement ("PRO"). On April 23, 2020, Ms. Connor called the company and sent a follow-up e-mail requesting a telephone call that day or the following day. The company's General Counsel, Ms. Rickert, called back Ms. Connor, who added PRO Assistant Regional Director Kingdon Kase to the call. Mr. Kase and Ms. Connor elected not to proceed with their questions, preferring instead to speak with Mr. Berman. Later that afternoon, Ms. Rickert, confirmed a call for the following afternoon with Mr. Kase, Ms. Connor, Mr. Kase, Mr. Berman and Ms. Rickert. Notwithstanding Ms. Rickert's depth of knowledge of the issues, role as in-house counsel, and having reviewed the April 7, 2020 press release before the company issued it, the Staff never directed one substantive question to Ms. Rickert.

On April 24, 2020, the PRO Staff conducted a telephone call of approximately 40 minutes with Mr. Berman, and Ms. Rickert was on the call as well. Ms. Connor asked Mr. Berman some general background questions and for general information about the company's products. Mr. Kase took over the substance of the questioning when the discussion turned to products related to COVID-19. Mr. Berman indicated the company has been talking with the EPA about its proposed new product. There was no discussion during the telephonic interview about the type of product, its uses, packaging or marketing and distribution plans or the accelerated product development. Both Mr. Berman and Ms. Rickert could have addressed those important points in painstaking detail. Instead, Mr. Kase then proceeded to ask about the concept of a fast-track program for Covid-19 fighting products. Mr. Berman responded that the company was not pursuing a program which creates a market opportunity with a very short window in which products can be sold. There were no questions related to status of product development, applicability of the patents, relevant product testing or actual customer base and interest. With the EPA reference in the FINRA response, the Staff inquired about communications with the EPA, and Mr. Berman provided the name and e-mail address of Eric Meiderhoff, Nano Magic's contact at the EPA. The Staff then concluded the call.

The Staff made no follow-up request verbally or in writing for more information. The Staff never requested any documents from the issuer. The Staff did not pose names or monikers, as it so often does when the is a concern about possible promotion, touting or improper trading, of persons who have traded in posted information about the securities of Nano Magic. The Staff did not even identify the name of one message board to ascertain whether Mr. Berman had familiarity with it. Mr. Berman told the Staff that

he was not aware of any promotional activities about the company or its products, whether by the company or others, on internet message boards. There were no questions about newsletters or other vehicles often used for promoting small cap securities. In short, some of the most basic questions that the Staff conceptually and realistically could have asked and should have asked in order to present fairly the facts to the Commission never were asked of the issuer, its CEO or its General Counsel. Notwithstanding this, six days later the Commission announced the trading suspension.

Even more surprising, and certainly not intended as a request or invitation, is that as of the time undersigned counsel has transmitted via e-mail this Petition to the full service of notice list below, the PRO Staff has not issued a voluntary document request or a subpoena for documents. The company is not requesting an investigation; in fact, there is no reason for the Staff to conduct one. Instead, senior Division of Enforcement Staff and the Commission hopefully shares the dismay that issuer conduct appearing to the PRO Staff as so serious as to warrant a recommendation of a trading suspension based on what appears to be very little information and nearly no investigation does not rise to a level of an expeditious inquiry, should there be one.

V. Legal Analysis: Applicable Statute, Rules and Applicable Case Law

Petitioner recognizes that the decision whether to issue a trading suspension is a subjective determination by the Commission based on the information presented by the Staff to the Commission for consideration as to what may be necessary as in the public interest and for the protection of investors. Petitioner is not challenging the Commission's exercise of its authority; in fact, Petitioner recognizes readily why the Commission may have suspended trading in the securities of more than 20 issuers based

on the face of the claims. Here, however, Petitioner believes that the Commission not only had incomplete and possibly incorrect facts, but also may have reached an entirely different subjective conclusion had the facts presented in this Petition been known to the Commission.[17] For that reason, the discussion focuses more on termination of the suspension and consideration of this Petition.

A. Trading Suspension

Section 12(k)(1) of the Securities Exchange Act of 1934, 15 U.S.C. §78*l*(k)(1), the source of the Commission's trading suspension authority, provides that "[i]f in [the Commission's] opinion the public interest and the protection of investors so require, the Commission is authorized by order … summarily to suspend trading in any security … for a period not exceeding 10 business days.." Chief Justice Rehnquist, in discussing the Commission's trading authority, wrote that "[t]he power to summarily suspend trading in a security even for 10 days, without any notice, opportunity to be heard, or findings based upon a record, is an awesome power with a potentially devastating impact on the issuer, its shareholders, and other investors." *SEC v. Sloan*, 436 U.S. 103, 112 (1978). The Chief Justice further wrote that "in this area, Congress considered summary restrictions to be somewhat drastic, and properly used only for very brief periods of time." *Id.*

Justice Rehnquist's language, in rejecting the Commission's argument in support of successive suspension orders in *Sloan* (which is not the issue here), stressed that the Commission's argument in *Sloan* "amounts to little more than the notion that §12(k) *ought* to be a panacea for every type of problem which may beset the

[17] In deference to the Senior Staff of the Division of Enforcement in Washington, Petitioner through counsel believes that the Division may not have forwarded to the Commission a recommendation for a trading suspension had the information presented in this Petition, and information that readily would have been provided to the PRO Staff had the PRO Staff made the request for it, been known to the Senior Staff.

marketplace." *Id.* at 116. Query, for the Commission's reflection, using Justice Rehnquist's language, whether the Commission's use of section 12(k) may be a panacea tied to an acute concern for issuers making representations about or representations about issuers relating to COVID-19 solutions. Here, albeit imposed for the permitted statutory duration, the Commission's decision to suspend trading without the benefit of the instant facts that could have and should have been presented by the PRO staff to the Commission may have resulted in the conclusion not to suspend trading in Nano Magic's common stock.

Further to this point, the Commission's discharge of its 10-day trading suspension function "will at times require that [the Commission] act *before* there has been an opportunity to fully develop information about a situation." *Bravo Enters. Ltd.*, Exchange Act Release No. 75775 at 7 (Aug. 7, 2015). Moreover, the Commission's "authority to temporarily suspend trading without a predicate finding of a regulatory or statutory violation gives us flexibility to address novel or atypical scenarios that might arise in which such a measure was needed to protect investors. *Id.* at 7-8. Further, the issues presented involving Nano Magic do not involve either novel or atypical scenarios. In fact, here we have the polar opposite scenario in that unlike many or most of the Commission's 20 plus other trading suspensions involving COVID-19 solutions, Nano Magic is a real company, with tested and patented proprietary products about which the company made no representations that its products purport to be a COVID-19 solution. It is clear here that the Commission acted before the PRO Staff developed fully and presented to Senior Staff and the Commission comprehensive and precise information

about Nano Magic. For these reasons, it is entirely appropriate for the Commission to consider fairly and fully Petitioner's request to terminate the trading suspension.

B. Standard for Terminating the Trading Suspension

Commission Rule of Practice 550(a), 17 C.F.R. §201.550(a), provides the procedure for petitioning for relief from a trading suspension that is in effect. Rule 550(a) provides that a person adversely affected by a ten-day trading suspension "who desires to show that such suspension is not necessary in the public interest or for the protection of investors may file a sworn petition with the Secretary, requesting that the suspension be terminated." *Id.* Petitioner files this Petition timely, that is while the trading suspension is in effect, and for the purpose of showing that the suspension is not necessary in the public interest or for the protection of investors. Additionally, the facts and arguments presented herein are Petitioner's statement, as required by Rule 550(a), "set[ting] forth the reasons why the petitioner believes that the suspension of trading should not continue and state with particularity the facts upon which the petitioner relies."

Commission Rule of Practice 550(b), 17 C.F.R. §201.550(b), provides for Commission consideration of this Petition. Rule 550(b) provides that "[t]he Commission, in its discretion, may schedule a hearing on the matter, request additional submissions, or decide the matter on the facts presented in the petition and any other relevant facts known to the Commission." *Id.* In consideration of Rule 550(b), Petitioner has endeavored to address all facts relevant to and responsive to the Commission's stated reasons for the trading suspension. Petitioner pledges its full and expedited cooperation to enable and

facilitate the Commission's consideration.[18] Should the Commission wish to schedule a hearing on this matter, counsel to Petitioner practices in Washington, DC and can appear in-person or via videoconference to be heard promptly. Given that the Commission was able to consider expeditiously the PRO Staff's recommendation to impose the trading suspension in fewer than four business days, and likely in less than one, Petitioner respectfully requests consideration and resolution of this timely-filed Petition prior to expiration of the trading suspension.[19]

There is a comprehensive body of Commission decisions rejecting petitions to terminate trading suspensions. Petitioner prays that the Commission will view this application differently.

C. Reliance on Counsel

As relating to the press release, the company and Mr. Berman relied on experienced in-house counsel for her review of the press release prior to the company's issuance of the release. In-house counsel knew that the release was factually sound, enabling her to place her imprimatur on the release. Under the United States District Court for the District of Columbia's holding in *SEC v. Howard*, 376 F.3d 1136 (D.C. Cir. 2004), the involvement of and reliance upon attorneys and other experts "constitute[s] powerful evidence that [defendant's] actions did not amount to an extreme departure from the standards of ordinary care so obvious that the actor must have been aware of

[18] Rule 550(b) further provides that "[i]f the petitioner fails to cooperate with, obstructs, or refuses to permit the making of an examination by the Commission, such conduct shall be grounds to deny the petition." That will not be an issue.

[19] As noted, the PRO Staff held the 40-minute telephone conference with Mr. Berman on Friday, April 24th. Presuming that the PRO Staff did not submit its recommendation on the 24th and the Commission entered the trading suspension on Thursday, April 30th, that elapsed time on its face is four business days. Recognizing that Commission consideration may have been expedited either for Duty Officer determination or for summary consideration at an already scheduled meeting of the Commission during the week of April 27, 2020, Petitioner requests the courtesy of an equally expeditious consideration and determination.

it."[20] Even where counsel's advice ultimately turns out to have been mistaken, or where there may have been a miscommunication between the attorney and his or her counsel, an individual who reasonably relied on counsel's advice has displayed evidence of good faith, which negates any finding of *scienter*. *Id.* at 1148 (quoting *SEC v. Steadman*, 967 F.2d 636, 641-42 (DC Cir. 1992)) (internal citations omitted). A party need not assert a "reliance on counsel" defense, which constitutes a waiver of privilege and requires proof that the party that purportedly had relied on the advice had fully informed counsel of all relevant facts and circumstances, in order to benefit from the holding in *Howard*. *See id.* at 1147. Accordingly, and respectfully, the Commission should not take issue with the press release because it is entirely accurate and the release was approved by counsel.

VI. Grave and Immediate Adverse Impact on Nano Magic Resulting from Trading Suspension

Nano Magic's reputation is suffering immediate and irreparable harm due to the trading suspension. Nano Magic is a legitimate company, with published patents, manufacturing and production facilities, legitimate products with established track records, and real customers and prospective customers. For the past 18 months, the company has been clawing its way back from a business challenge and has spent hundreds of thousands of dollars -- and countless hours -- to get current again with the Commission on its filings. The company is days away from filing its Form 10-K for the year-ended December 31, 2019, and that is on the heels of seven other filings in calendar year 2020. The company is on the cusp of becoming debt free and profitable through the

[20] Id. at 1148 (quoting SEC v. Steadman, 967 F.2d 636, 641-42 (DC Cir. 1992)) (internal citations omitted). A defendant or respondent need not assert a "reliance on counsel" defense, which constitutes a waiver of privilege and requires proof that the party that purportedly had relied on the advice had fully informed counsel of all relevant facts and circumstances, in order to benefit from the holding in Howard. See id. at 1147.

growth of current customers, the anticipated partnerships with prospective customers and from the support of the company's investors. All of that now is at risk.

The company's business timeline for product sales into big box retailers, an initiative underway at Nano Magic for approximately one year, is typically 12 to 18 months. Customers typically have a product review cycle for different product categories, and those set the time window for presentation of new products or for similar products made by new suppliers to be considered by the retailers. If the product is selected for potential shelf-space, then there is a qualification process to vet the supplier. Nano Magic has been working on sales to such potential customers since early and mid-2019. On March 30, 2020, after a more than three-month arduous and detailed process to complete business qualification requirements, Nano Magic signed a supply agreement with a major national drug store chain.[21] Additionally, Nano Magic is in active discussions with other well-known retailers for its anti-fog products, as there is greater demand for this product because of the increased use of face masks and face shields in so many workplace situations. The company submits that the trading suspension is jeopardizing potential relationships with many of these customers and big box retailers – including drug store chains, home improvement and building supply stores, and optical store chains. Similarly, the company has a well-placed concern that grocery store chain and healthcare provider customers in search of cleaning and anti-fog products may turn elsewhere.

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[21] On May 4, 2020, undersigned counsel e-mailed the Office of the Secretary to inquire whether a Petition filed under Rule 550 would or would not be part of the public record. Counsel received no reply. Given that some of Nano Magic's business partners have confidentiality provisions in their agreements, this Petition is not including the names. However, if requested by the Commission or by the Staff, then Nano Magic promptly will supplement this Petition with the names of its business partners.

An oft stated historical rationale of the Commission for dismissing petitions to terminate trading suspensions because issuers assert an anticipated adverse effect on the marketability of a company's securities and inability of a broker-dealer to publish quotations is that grey market trading still may be available to investors. *Bravo* at 21. That explanation is disingenuous. Empirical, albeit old, studies examining the impact of trading suspensions on equity markets reveal that trading suspensions in fact coincide with substantial devaluations of the suspended securities, and significant and prolonged negative abnormal returns are present in the post-trading suspension period.[22] The results of these studies contradict concepts of market efficiency.

The company believes that it has addressed satisfactorily and comprehensively the press release referenced in the trading suspension order. That brings the subject back to the "information in the marketplace." The company has established in this submission that it is current on its SEC filings, and is about to file its Form 10-K for the most recent calendar year. In fact, the Commission does not allege questions regarding the accuracy and adequacy of financial information about the company because that information is readily available. That in turn leaves the message boards. No officer or director has posted information to any message board. Nor has any officer or director responded to any message posted on an internet message board about the company. And, no officer or director arranged or procured, directly or indirectly, for any person(s) or entity to publish or communicate information about the company on any internet message board or by any other electronic medium. In short, the "information in the marketplace" is a "damned if

[22] Howe and Schlarbaum, "SEC Trading Suspensions: Empirical Evidence," 21 JOURNAL OF FINANCIAL AND QUANTITATIVE ANALYSIS 3 at 323-333, Cambridge Univ. Press (April 2009). See Ferris, Kumar and Wolfe, "The Effect of SEC Ordered Suspensions on Returns, Volatility, and Trading Volume," 27 THE FINANCIAL REVIEW 1 at 1-34 (1992).

they do, damned if they don't" allegation. The company has a strict policy against communicating on message boards, and that did not occur. Nevertheless, the Commission appears to be holding the company accountable for a medium the company and its officers and directors do not and cannot control and carefully avoid.[23] It is not appropriate to "punish" the company with a trading suspension under these circumstances.

VII. Conclusion

Assuming, *arguendo*, that the information before the Commission at the time of the trading suspension order's issuance provided grounds, in the Commission's subjective opinion, that the public interest and the protection of investors required a trading suspension, then information presented here to the Commission and during the pendency of the trading suspension provide compelling grounds to terminate the suspension. For a Commission that is trying to encourage facilitating and streamlining access to United States capital markets and projecting encouragement to quality entrepreneurial issuers, this trading suspension sends the wrong message. For a Commission that has the opportunity to acknowledge that a narrow and right set of facts is a basis for discontinuing a trading suspension, the instant facts enable such a statement.

The plain language of the statute does not require notice and opportunity for hearing, and the case law supports that concept. Nevertheless, as Justice Rehnquist stressed in *Sloan*, the Commission's ten-day trading suspension authority is "an awesome power with a potentially devastating impact on the issuer, its shareholders, and other

[23] At counsel's request, management reviewed the message board. Based on a general review of the content on the message board, management is of the opinion that there is nothing inaccurate or misleading in the postings. It appears to management as if there was research into the patents, and expressions of opinion by those posting about the company's strong team and patents.

investors." *Sloan* at 112. An action by the Commission that strips a company's shareholders of all value in the securities for 10 business days and creates an unmistakable air of grave suspicion – albeit misplaced here – about the company's behavior without affording the company notice and opportunity for hearing warrants expeditious reconsideration in a situation such as Nano Magic's. Certainly, fundamental fairness dictates that the basis for a trading suspension be something more than a 40-minute telephone call and no review of documents that would refute entirely the purported basis for the trading suspension.

Returning again to Justice Rehnquist's opinion in *Sloan* and his concern about the Commission's potential use of section 12(k) as "a panacea for every type of problem which may beset the marketplace," the Commission understandably is on heightened alert regarding public companies making representations about COVID-19 solutions. Here, Nano Magic did not make representations that it had a COVID-19 solution. Nano Magic submits that the instant facts are sufficiently narrow and different from all such other petitions that have come before the Commission such that the Commission should terminate the trading suspension, and do so prior to the expiration of the trading suspension.

Dated: May 6, 2020,
Washington, DC

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Jurat

I, Tom J. Berman, do affirm under penalty of perjury that the information in this document is true and correct to the best of my knowledge, information, and belief.

Tom J. Berman

Subscribed and sworn to before me this 6 day of May, 2020.

Notary Public

August 20 2020
My Commission Expires

AMY LEE THICKSTUN
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF OAKLAND
My Commission Expires Aug. 20, 2020
Acting in the County of Oakland

Certificate of Service

On May 6, 2020, this Sworn Petition to Terminate Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934 was delivered 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 (via e-mail)
c/o Hon. Vanessa A. Countryman, Secretary

Office of the General Counsel (via e-mail)
Securities and Exchange Commission
Attn: Robert Stebbins, Esq., General Counsel

Division of Enforcement (via e-mail)
Securities and Exchange Commission
Attn: Steven Peikin, Esq., Co-Director
Stephanie Avakian, Esq., Co-Director

Philadelphia Regional Office (via e-mail)
Securities and Exchange Commission
Attn: Kelly L. Gibson, Esq., Regional Director
Kingdon Kase, Esq., Assistant Regional Director

Dated: May 6, 2020, Washington, DC

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