UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 18, 2020

Admin. Proc. File No. 3-19787

In the Matter of Nano Magic, Inc. Petitioner.	MOTION TO COMPEL PRODUCTION OF INFORMATION BEFORE THE COMMISSION AT TIME OF TRADING SUSPENSION ISSUED PURSUANT TO SECTION 12(k)(1)(A) OF THE SECURITIES EXCHANGE ACT OF 1934

Nano Magic Inc. ("Nano Magic"), by and through undersigned counsel, pursuant to and consistent with 17 C.F.R. § 201.550, Rule 550 of the Commission's Rules of Practice, and pursuant to Rule 154(a)[1] of the Rules of Practice (17 C.F.R. § 201.154(a)) files this Motion to Compel Production of Information Before the Commission at Time of Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934 filed via e-mail with the Commission on May 6, 2020 at 3:13 P.M. EDT ("Petition").

On May 8, 2020, in accordance with Rule of Practice 550(b), the Commission requested additional written submissions, the first of which was the Commission's Order that "[b]y May 14, 2020, the Division of Enforcement shall file **all** the information that was before the Commission at the time of the Trading Suspension Order's issuance." (emphasis added, footnote omitted) On May 14, 2020, staff of the Philadelphia Regional Office, Division of Enforcement ("PRO") filed its "Information Before the Commission at the Time of the Trading Suspension," representing to the Commission that its

accompanying declaration is "setting forth **the substantive facts before the Commission** at the time it issued the order suspending trading in Nano Magic Inc. securities on April 30, 2020." (emphasis added). The Commission did not invite the Staff to exercise its subjective judgment as to "substantive facts" as a substitute for the Commission's Order to "file all the information" that was before the Commission. In fact, it is that same disregard for detail and cavalier interposition of subjective belief without factual foundation that has caused substantive business and reputational harm and unnecessary costs for Nano Magic. Accordingly, and to ensure compliance with the Commission's Order rather than the PRO's cavalier "we'll cherry pick what to say" submission, Nano Magic moves the Commission to order the PRO to produce to Nano Magic a redacted copy of the Action Memorandum so that Nano Magic can view "all the information" before the Commission, redacted to provide only the facts before the Commission. The narrow request for a redacted copy is to comply fully with footnote 5 of the Commission's Order Requesting Additional Written Submissions and to enable Nano Magic to address "the information that was before the Commission" in Nano Magic's final written submission due on May 28, 2020.

On May 15, 2020, undersigned counsel sent to the PRO a "meet and confer" e-mail requesting production of a redacted copy of the Action Memorandum. *See* Exhibit A. The PRO responded that it has "complied with its obligations under the Order, and [counsel's] request for additional information is misconceived." The PRO also expressed that "action memoranda are privileged." Nano Magic does not dispute that Action Memoranda contain privileged content, and Nano Magic is <u>not</u> seeking disclosure of the

[1] Nano Magic is not filing this Motion to Compel under Rule 230(a)(2) of the Commission's Rules of Practice (17 C.F.R. § 230(a)(2)) because this is not an Enforcement or Disciplinary proceeding.

Staff's privileged analysis, sensitive information about the staff's investigation methods, or information the disclosure of which would otherwise violate applicable federal law or regulations. Nano Magic simply wants and has a right to the facts – unfiltered – as were before the Commission for the Commission's consideration.

In support of this Motion to Compel, Nano Magic files herewith a Memorandum of Points and Authorities.

WHEREFORE, Nano Magic respectfully requests that the Commission order the PRO to produce as an Exhibit to its substantive response to the Petition due on May 21, 2020, its Action Memorandum seeking the trading suspension redacted such that only the facts presented to the Commission are provided to Nano Magic.

Dated: May 18, 2020, Washington, DC

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

Statement of Filing by E-Mail

I hereby certify that on May 18, 2020, I caused a true and correct copy of the foregoing Motion to Compel Production of Information Before the Commission at Time of Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934 and Memorandum of Points and Authorities in Support of Motion to Compel Production of Information Before the Commission at Time of Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934 to be filed via e-mail, in Administrative Proceeding File No. 3-19787, *In the Matter of Nano Magic Inc.*, with the Office of the Secretary of the United States Securities and Exchange Commission. This e-mail filing is pursuant to the SEC's Order of March 8, 2020, *In re Pending Administrative Proceedings.* I sent this filing to the e-mail address APFilings@sec.gov.

Dated: May 18, 2020, Washington, DC

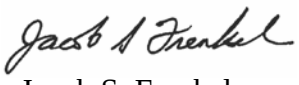
Jacob S. Frenkel
Dickinson Wright PLLC
International Square Building
1825 I St., N.W., Suite 900
Washington, DC 20006
Phone: (202) 466-5953
E-mail: jfrenkel@dickinsonwright.com
Counsel to Nano Magic Inc.

Certificate of Service

On May 18, 2020, this I hereby certify that on May 18, 2020, I caused a true and correct copy of the foregoing Motion to Compel Production of Information Before the Commission at Time of Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934, Memorandum of Points and Authorities in Support of Motion to Compel Production of Information Before the Commission at Time of Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934 and Statement of Filing by E-Mail, to be served upon, and other persons entitled to notice in the manner set forth to the right of each served party:

Division of Enforcement (via e-mail)
Philadelphia Regional Office
Securities and Exchange Commission
Attn: Kingdon Kase, Esq., Assistant Regional Director (to kasek@sec.gov)
Attn: Cecilia Connor, Esq. (to connorce@sec.gov)
Attn: Christopher R. Kelly, Esq. (to kellycr@sec.gov)
Attn: Jennifer C. Barry, Esq. (to barryj@sec.gov)

Dated: May 18, 2020, Washington, DC



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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 18, 2020

Admin. Proc. File No. 3-19787

In the Matter of Nano Magic, Inc. Petitioner.	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF INFORMATION BEFORE THE COMMISSION AT TIME OF TRADING SUSPENSION ISSUED PURSUANT TO SECTION 12(k)(1)(A) OF THE SECURITIES EXCHANGE ACT OF 1934

Dated: May 18, 2020
Washington, DC

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES AND REGULATIONS

CASES

OTHER MATERIALS

This Motion presents one conceptual issue and one substantive issue for the Commission. The conceptual issue is whether the Commission considers a bona fide and meritorious challenge to a trading suspension to be a piñata process – put blind-folders on the Petitioner and force the Petitioner to swing in the dark. The substantive issue is whether the Commission means what it says when ordering the Division of Enforcement to "file **all** the information that was before the Commission at the time of the Trading Suspension Order's Issuance" ("Information Order"). Put differently, and addressing a question apparently never before the Commission previously for consideration, as this is a proceeding that does not involve litigation discovery, the issue is whether a Petitioner is entitled to a redacted copy of the Division of Enforcement's Action Memorandum to enable the Petitioner to address for the Commission all the information that was before the Commission – not cherry-picked facts and subjective characterizations of facts – at the time the Commission ordered the trading suspension.

This issue is before the Commission entirely because of the decision by the Philadelphia Regional Office of the Division of Enforcement ("PRO") to file what is, on its face, "Information Before the Commission at the Time of the Trading Suspension" and accompanying "Declaration" of the assigned attorney (collectively "Information Declaration") from the Philadelphia Regional Office's Division of Enforcement ("PRO") that is questionable in its completeness, accuracy and veracity, despite the Information Declaration being a sworn statement. The Commission's analysis here should be very simple. When the Commission decided erroneously to order the trading suspension, the Commission had before it an Action Memorandum containing facts and analysis. The Commission simply needs to place the full unredacted Action Memorandum next to the

Information Statement to render its decision here. Nano Magic is not seeking, as set forth in footnote 5 of the Commission's Order, the Division of Enforcement's privileged analysis or sensitive information about the staff's investigation methods. Nor is Nano Magic seeking information the disclosure of which would otherwise violate applicable federal law or regulations. Instead, Nano Magic only is requesting the facts before the Commission, as the Commission ordered. Facts presented are not privileged. If the PRO now takes the position that facts are privileged, then the Division of Enforcement would be challenged to receive in the future factual narratives or presentations of the results of internal investigations. This Memorandum of Points and Authorities addresses expressly why the Commission should order the PRO to provide Nano Magic a copy of the Action Memorandum redacted to provide only the facts that actually were before the Commission at the time the Commission considered and ordered the trading suspension.

Nano Magic's accompanying Motion to Compel, and this Memorandum of Points and Authorities filed pursuant to and consistent with 17 C.F.R. § 201.550, Rule 550 of the Commission's Rules of Practice, and pursuant to Rule 154(a) of the Rules of Practice (17 C.F.R. § 201.154(a)) respectfully requests that the Commission order the PRO to produce a redacted copy of its Action Memorandum that was the PRO's request for the Commission to enter the instant trading suspension and to make the production as an exhibit or to accompany the Division of Enforcement's substantive response to its anticipated forthcoming submission.

I. PROCEDURAL HISTORY

On, Thursday, April 30, 2020, the Commission entered the instant trading suspension "for the period from 9:30 a.m. EDT on May 1, 2020, through 11:59 p.m. on

May 14, 2020." *Nano Magic Inc.*, Exchange Act Release No. 88789, 2020 WL 2097884 (April 30, 2020). On May 6, 2020 at 3:13 P.M. EDT, Nano Magic filed, under signature of the company's Chief Executive Officer who is a member of the Bar of the State of Michigan, a Sworn Petition to Terminate Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934. On May 7, 2020, at 12:08 P.M. EDT, Nano Magic filed a Motion for Expedited Consideration of its Sworn Petition to Terminate Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934. On May 8, 2020, at 11:06 A.M. EDT, the Commission issued its Order Requesting Additional Written Submission. *In the Matter of Nano Magic Inc.*, Exchange Act Release No. 88841, 2020 WL 2310946 (May 8, 2020) ("Submissions Order"). Following receipt of the Submissions Order, Nano Magic sent an e-mail "meet and confer request" to the PRO requesting to compress the schedule of submissions set forth in the Submissions Order. The PRO did not respond, and Nano Magic, through counsel, filed with the Commission, on the same day as the Submissions Order, a Motion to Expedite Schedule for Submissions in Consideration of Sworn Petition to Terminate Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934.[1]

On Thursday, May 14, 2020, the PRO filed its Information Declaration. On Friday, May 15, 2020, undersigned counsel sent to the PRO a "meet and confer" e-mail requesting production of a redacted copy of the Action Memorandum. Exhibit A. In the e-mail, counsel referred to the language of the Submissions Order, that "[b]y May 14, 2020, the Division of Enforcement shall file **all** the information that was before the

[1] The Commission did not rule on the Motion thereby leaving in place the schedule for submissions as set forth in the Submissions Order.

Commission at the time of the Trading Suspension Order's issuance," and took exception with the Information Declaration that represented to the Commission that its accompanying declaration is "setting forth **the substantive facts before the Commission** at the time it issued the order suspending trading in Nano Magic Inc. securities on April 30, 2020." (emphasis added). *Id.* Counsel expressed that the Commission did not invite the Staff to exercise its subjective judgment as to "substantive facts" as a substitute for the Commission's Order to "file all the information" that was before the Commission. *Id.* The PRO responded that it has "complied with its obligations under the Order, and [counsel's] request for additional information is misconceived." *Id.* The PRO also expressed that "action memoranda are privileged." *Id.* The PRO rejected the request for the redacted Action Memorandum, necessitating this Motion to Compel.

II. ANALYSIS AND ARGUMENT

Nano Magic does not dispute that Action Memoranda contain privileged content, and Nano Magic is <u>not</u> seeking disclosure of the Staff's privileged analysis, sensitive information about the staff's investigation methods, or information the disclosure of which would otherwise violate applicable federal law or regulations. Nano Magic simply wants and has a right to the one document containing the facts – unfiltered – as were before the Commission for the Commission's consideration exactly as the Commission stated in its Submission Order, "**all** the information that was before the Commission at the time of the Trading Suspension Order's issuance." The reason is straight-forward, in that "Rule of Practice 550(b) provides that the Commission may resolve petitions to terminate a trading suspension 'on the facts presented in the petition and *any other relevant facts known to the Commission.*'" *Bravo Enters. Ltd.*, Exchange Act Release

No. 75775, 2015 WL 5047982, at 20 (Aug. 7, 2015), citing Rule of Practice 550(b), 17 C.F.R. § 201.550(b). Notwithstanding Nano Magic's confidence that the facts presented in the Petition are more than sufficient to enable the Commission to terminate the trading suspension and fashion appropriate relief, the Commission's Submissions Order affords Nano Magic the opportunity to challenge the facts known to the Commission at the time the Commission issued the trading suspension. That only is possible if Nano Magic knows what facts were before the Commission, not the PRO's subjective and slanted presentation of the facts as set forth in the Information Declaration.

A. The Information Declaration is Defective on its Face as a Purported Statement of All Information that was Before the Commission.

This PRO, by its Information Declaration, alone gave rise to the need for this Motion. This trading suspension is about the PRO playing fast and loose with the facts, which in Commission enforcement parlance is negligence. That has occurred here through the PRO's application to the Commission via an Action Memorandum to impose the trading suspension, and now it is up to the Commission whether to countenance this continued gamesmanship to conceal a grossly defective presentation about Nano Magic that never should have resulted in a trading suspension in the first place. The time to demonstrate how the Information Declaration has more holes than a piece of Swiss cheese is Nano Magic's reply brief to the PRO' substantive response to the Petition, if Nano Magic determine that there even is a need to supplement its already comprehensive petition. Here, Nano Magic intends to highlight for the Commission some glaring

examples of the defects in the Information Declaration and Nano Magic's need for the redacted Action Memorandum.[2]

Paragraph 17 of the Information Declaration reads "On April 14, 2020, FINRA's Office of Fraud Detection and Market Intelligence sent written questions to the company in which FINRA inquired about the promotion of NGMX." If the Information Declaration is accurate, even applying the PRO's self-authorized standard of providing only the "substantive facts," then that means the PRO did not inform the Commission that (1) Nano Magic responded to FINRA, and (2) the PRO did not advise the Commission as to Nano Magic's answers. According to the Information Declaration, the PRO only put before the Commission the fact of a FINRA letter and written questions but not the fact that there was a reply or the exculpatory content of the reply. Instead, the PRO's "substantive facts" based Information Declaration leaves the reader with an incorrect impression that Nano Magic did not even respond to the FINRA letter.

Further, the Information Declaration characterizes the FINRA letter as an inquiry "about the promotion of NGMX." That's not what the letter says. Rather, the second line of the letter reads FINRA is "conducting a routine review of the trading activity surrounding NanoMagic (sic)." Only two of 14 questions (questions 7 and 8) inquire about whether Tom Berman, the CEO, is "aware of any promotion" and whether he "or anyone from the company funded any promotion." The answer to both questions was

[2] Nano Magic intends the enumerated examples simply as examples. Nano Magic has countless other arguments that it reserves and is well-positioned to make about the Information Declaration.

no.[3] Nano Magic appended to its Petition Exhibits C and D, the FINRA letter and Nano Magic's response.

Nano Magic invites the Commissioners to put the three documents next to each other for comparison – the Action Memorandum, the Information Declaration and the Petition with Exhibits. Presuming a fair and objective review of the Action Memorandum and the Information Declaration side by side, with the Commission now having both the FINRA letter and response with the actual letter, there are only two possible factual conclusions. One is the PRO failed miserably in its presentation of the facts in the Action Memorandum. The other is that PRO, in the Information Declaration, omits material facts, not just content from "all information" before the Commission.

Next, the language of paragraph 16 is entirely misleading, as narrated, and presents incongruous content. Nowhere and never has Nano Magic or Mr. Berman claimed that the company had "COVID-19 related products or business activities." So, if Nano Magic does not claim to have "COVID-19 related products or business activities," then there would be no reason for the company to make such claims subsequent to the press release or on its website. The press release accurately states, consistent with its patents, that Nano Magic holds "a roster of patents and trademarks for cleaning products and surface protectants powered by nanotechnology." Reference to the substantive nature and efficacy of the patents, which the company references throughout its filings with the Commission and are readily available on the United States Patent and Trademark Office's website, are material facts that should have been before the

[3] In paragraph 18, the Information Declaration reflects that both Mr. Berman and its General Counsel, Jeanne Rickert, "stated that they were not aware of any promotional activity involving NMGX in the past two months, including any claims related to COVID-19."

Commission. If such facts were not in the Action Memorandum, then Nano Magic is entitled to know and be able to argue such points in its reply brief.

Setting the stage for the last example is a most entertaining television advertisement (admittedly one of counsel's favorites) for Aflac insurance company in which the always entertaining Aflac duck waddles into a barber shop and shakes its head in dismay at statements by Yogi Berra.[4] "Eh" with a headshake, in the sound and demeanor of the Aflac duck, is the correct reaction to paragraph 14, which states that "[a]s of [the date on which the Commission ordered the trading suspension], NMGX had not disavowed the promotional activity concerning its patent." How can a company or its principals disavow knowledge of something about which it has no knowledge? Better yet, on April 17th in the FINRA interview and on April 24th in the interview with the PRO, the CEO stated emphatically that he was not aware of any promotional activity.[5] Moreover, the PRO did not even appear to consider the possibility that the content of the internet message boards may have reflected some quality research drawn from the company's accurate public filings and a message board poster's reasonable aspiration that the company's tested and successful cleaning products and surface protectants may possibly be helpful to address surface transmission of a coronavirus strain. Further, had the PRO requested any documents from Nano Magic – or even just documents relating to

[4] Aflac – Berra at the Barber (2002, USA), https://www.youtube.com/watch?v=VS83HdpzxDU (last visited May 17, 2020).

[5] On May 6, 2020, Nano Magic, then aware of the Commission's concerns about "information in the marketplace," issued a press release (attached as Exhibit A to the Petition) stating, in part, "neither the Company, nor its officers, nor its directors were the source of 'information in the marketplace claiming that the Company has a patent for a disinfectant that kills 'coronavirus' referenced in the [trading suspension] Order….The Company believes that the 'information' to which the SEC refers is information that may have been posted by third parties on internet message boards. The Company cautions investors to rely only on information released by the Company in its current and periodic reports filed with the SEC…. The Company has a strict policy of not communicating on internet message boards and a policy of not

the testing and performance of Nano Magic's cleaning products and surface protectants, then the PRO easily could have concluded that the hopes expressed on the internet message board may have been well-grounded. Factual statements that the PRO made to the Commission in its Action Memorandum about both the internet message board content (unknown to the company) and the company's tested and successful cleaning products and surface protectants is important information before the Commission that the company should be able to address. The facts, if any, before the Commission about internet message board content (unknown to the company) and the company's tested and successful cleaning products and surface protectants only is available in the Action Memorandum.

B. This is a Case of First Impression because the Precedent Governing Litigation Discovery Does Not Apply to a Trading Suspension which the Commission Acknowledges is Not an Enforcement Action.

The PRO's inevitable protestations against producing a redacted for facts only Action Memorandum from its canned language of pleadings in Commission Administrative Proceedings and civil litigation will fall on an examination of each case cited. The reason is that every case (at least that counsel could find) reflects a discovery demand in a litigated enforcement proceeding. A trading suspension is neither an enforcement action nor an enforcement proceeding. The Commission makes very clear that "[a] trading suspension is not an enforcement action and is not a finding of wrongdoing."[6]

---

communicating with persons seeking to obtain information from the Company outside of the Company's public filings and official statements."

[6] U.S. SEC. & EXCH. COMM'N, Information Regarding Trading Suspensions and COVID-19, https://www.sec.gov/files/information-regarding-trading-suspensions-covid-19_1.pdf.

In advance of the Commission considering a recommendation for an enforcement action that would give rise to federal court or administrative litigation, documents related to the decision to bring such an action (or not to bring an action) in a specific forum or to pursue an action at all understandably would have been prepared in anticipation of litigation. *See SEC v. Somers*, No. 3:11-cv-00165-H, 2013 WL 4045295, at *2 (W.D. Ky. Aug. 8, 2013) (holding that an SEC action memorandum and associated documents "are created in anticipation of litigation, and at the very least, the attorney work product privilege protects them"); *accord SEC v. Merkin*, No. 11-23585-CIV, 2012 WL 2568158, at *1 (S.D. Fla. June 29, 2012); *SEC v. Nacchio*, No. 05-cv-00480-MSK-CBS, 2007 WL 219966, at *7 (D. Colo. Jan. 25, 2007) (documents including action memorandum privileged); *SEC v. Cavanagh*, No. 98 Civ. 1818(DLC), 1998 WL 132842, at *2 (S.D.N.Y. Mar. 23, 1998) (documents privileged where prepared by attorneys determining whether to recommend enforcement action).

That analysis does not apply here, because the sole issue is what factual information was before the Commission that caused the Commission to conclude at that precise point in time whether a trading suspension was warranted. Federal district courts have found that privilege does not cover factual material, even material contained in handwritten notes by Division of Enforcement staff, unless it is "inextricably intertwined with deliberative notes." *E.g., Williams & Connolly LLP v. U.S. S.E.C.*, 729 F. Supp. 2d 202, 213 (D.D.C. 2010). To the extent that documents contain "merely factual material," they do not fall within the deliberative process privilege. *Id.* at 213 (citing *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (*per curiam*) ("The deliberative process privilege does not … protect material that is purely factual, unless the material is so

inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.")).

The Commission ordered the PRO to "file **all** the information that was before the Commission at the time of the Trading Suspension's Order's issuance." The PRO had two choices. One was to file with the Commission **all** the information that was before the Commission in an "Information Declaration." The other was for the PRO to concede its egregious error, including by waiving filing and deferring to the Commission to rule on the Petition. Instead, the PRO doubled down, not only filing the Information Declaration but also submitting a gravely defective submission. Upon doing so, the PRO opened itself up to the need for production of a redacted for facts only Action Memorandum. In a somewhat analogous case, given the unique nature of this matter, a United States District Court in the District of Columbia has found an agency's deliberate disclosure of a report prepared by its attorney served to waive work product protection for the subject matter discussed therein, and thus opponents could question the attorney regarding the information concerning the same subject matter as the report. *US Airline Pilots Ass'n v. Pension Ben. Guar. Corp*., 274 F.R.D. 28, 30-31 (D.D.C. 2011). The agency cannot then rely on privilege to bar access to additional materials that otherwise could provide an important context for proper understanding of the report. *Id.* at 32.

One other analogy is appropriate for the Commission's consideration. The Division of Enforcement, when a company has conducted an internal investigation and engages in self-reporting through its counsel, invariably expects that the company will make known all facts developed during the internal investigation. The Commission states in the Division of Enforcement's Enforcement Manual that a company's failure to

waive privilege protections will not negatively impact its claim for cooperation credit. U.S. SEC. & EXCH. COMM'N, Enforcement Manual, Section 4.3: Waiver of Privilege, at 76 (Nov. 28, 2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf (hereinafter "SEC Enforcement Manual"). This policy mirrors Department of Justice policy. The SEC Enforcement Manual notes, however, that "if a party seeks cooperation credit for timely disclosure of relevant facts, [then] the party must disclose all such facts within the party's knowledge." *Id*. This includes factual information learned through attorney interviews, which might be reflected in the attorneys' notes and/or memoranda generated as a result of those interviews. *Id*. Thus, if the factual evidence is obtainable only through memoranda generated by counsel, then the company may need to and does consider furnishing those materials or otherwise reporting the content of those materials to the SEC in order to receive credit. It is only such facts, by analogy arising from the internal investigative work of the PRO, in this non-litigation context, that Nano Magic is requesting to be able to respond properly and effectively to any further submissions that the PRO may make.

To the extent that the PRO decides to misconceive its factual narrative in the Action Memorandum somehow as work product, then the D.C. Circuit has recognized that even "the principles underlying the work-product doctrine should not encompass all attorney memoranda of interviews." *Duran v. Andrew*, No. 09-730, 2010 WL 1418344, *4 (D.D.C. Apr. 5, 2010) (citing *In re HealthSouth Corp. Securities Litig.*, 250 F.R.D. 8, 11 (2008); *In re Sealed Case*, 124 F.3d 230, 236 (D.C. Cir. 1997), *rev'd on other grounds*, 524 U.S. 399 (1998)). In applying *In re Sealed Case*, fact work product and opinion work product in witness interviews are distinguished. *Id.* at *4. "Purely factual

material embedded in attorney notes may not deserve the super-protection afforded to a lawyer's mental impressions," so the D.C. Circuit has rejected the notion that a lawyer's interview notes are always opinion work product. *Duran*, No. 09-730, 2010 WL 1418344, *4 (citing *Director, Office of Thrift Supervision v. Vinson & Elkins*, 124 F.3d 1304, 1307-08 (D.C. Cir. 1997)); *see also F.T.C. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 778 F.3d 142, 152 (D.C. Cir. 2015) (many of the documents at issue found to contain only factual information requested or selected by counsel, which does not reveal any insight into counsel's legal impressions or their views of the case). In *Duran v. Andrew*, the court found that a report containing witness interview statements that are factual recitations of witness interviews is distinguishable from attorney notes of such witness interviews. *Id*. at *4.

Nano Magic perceives that the PRO misled the Commission once already, the result of which was a serious adverse impact on the company. Nano Magic now implores the Commission to prevent that from occurring a second time, applying the Division of Enforcement's own criteria for sharing facts developed in internal investigations. Nano Magic is <u>not</u> requesting opinions, legal analysis, theories or investigative methodology. The Commission has ordered the PRO to provide the facts before the Commission. Nano Magic is asking specifically and only for the facts that the PRO put before the Commission when the Commission made its decision to suspend trading. Failing to order such production of one redacted document fundamentally guts the concept of the Commission's Information Order – the written order to file **all** information that was before the Commission – and deprives Nano Magic of an informed ability to determine

whether it would (or would not) be in the company's interest to respond and the content of such response.

III. CONCLUSION

The Commission has a fundamental right to expect that its Staff, in this case the PRO, will be accurate and forthright with the Commission. So that Nano Magic can make a determination whether it is in Nano Magic's interest – despite the considerable time, reputational harm and cost already incurred – to supplement its comprehensive sworn Petition by the company's CEO, himself an officer of the court, the company deserves to know precisely what facts were before the Commission. The PRO does not want Nano Magic to know the answer, because the PRO has every reason to expect to be called out for manipulating the facts and omitting material facts. That is why the PRO through its Information Declaration necessitated this motion, and the Commission should order production of a redacted Action Memorandum to accompany the PRO's substantive response to the Petition due on May 21st.

This is a motion to compel production of one document – one document that will make clear what constituted "all the information that was before the Commission." Accordingly, Nano Magic respectfully requests that the Commission order the PRO to produce as an Exhibit to its substantive response to the Petition due on May 21, 2020, its Action Memorandum, seeking the trading suspension, redacted such that only the facts presented to the Commission are provided to Nano Magic.

Dated: May 18, 2020
Washington, DC

[signature block on next page]

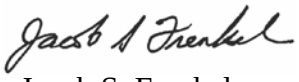
Jacob S. Frenkel
Dickinson Wright PLLC
International Square Building
1825 I St., N.W., Suite 900
Washington, DC 20006
Phone: (202) 466-5953
E-mail: jfrenkel@dickinsonwright.com
Counsel to Nano Magic Inc.

Certificate of Service

On May 18, 2020, this Memorandum of Points and Authorities in Support of Motion to Compel Production of Information Before the Commission at Time of Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934 was delivered to the following parties and other persons entitled to notice in the manner set forth to the right of each served party:

Division of Enforcement (via e-mail)
Philadelphia Regional Office
Securities and Exchange Commission
Attn: Kingdon Kase, Esq., Assistant Regional Director (to kasek@sec.gov)
Attn: Cecilia Connor, Esq. (to connorce@sec.gov)
Attn: Christopher R. Kelly, Esq. (to kellycr@sec.gov)
Attn: Jennifer C. Barry, Esq. (to barryj@sec.gov)

Dated: May 18, 2020, Washington, DC



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

Jacob S. Frenkel

From: Jacob S. Frenkel
Sent: Friday, May 15, 2020 5:17 PM
To: 'Kelly, Christopher R.'
Cc: Barry, Jennifer; Kase, Kingdon; Connor, Cecilia
Subject: RE: EXTERNAL: RE: Nano Magic E-mail Meet and Confer re "Information Before the Commission"

Chris,
Thank you for your reply.
To ensure that I was clear, the request for the redacted Action Memorandum was to redact everything other than the facts before the Commission. I am aware of the Commission's position on Action Memoranda as privileged, and that is the reason for the request for the Memorandum in redacted form.
Thank you again for your reply.
Regards,
Jacob

From: Kelly, Christopher R. <KellyCr@SEC.GOV>
Sent: Friday, May 15, 2020 5:11 PM
To: Jacob S. Frenkel <JFrenkel@dickinson-wright.com>
Cc: Barry, Jennifer <barryj@SEC.GOV>; Kase, Kingdon <KaseK@SEC.gov>; Connor, Cecilia <connorce@SEC.GOV>
Subject: EXTERNAL: RE: Nano Magic E-mail Meet and Confer re "Information Before the Commission"

Jacob,

In accordance with the Commission's May 8, 2020, Order Requesting Additional Written Submissions, the Division of Enforcement (the "Division") set forth all factual information related to the trading suspension that was before the Commission at the time of the Trading Suspension Order's issuance through the Declaration of Cecilia B. Connor, dated May 14, 2020. Contrary to your suggestion, the Division did not use its subjective judgment as to which of these facts to include in its submission. Accordingly, the Division has complied with its obligations under the Order, and your request for additional information is misconceived. Moreover, as you likely are aware, action memoranda are privileged.

Regards,
Chris

Christopher R. Kelly
Senior Trial Counsel
United States Securities and Exchange Commission
Philadelphia Regional Office
One Penn Center
1617 JFK Blvd., Ste. 520
Philadelphia, PA 19103
Tel: (215) 597-3741
Fax: (215) 597-2740
e-mail: KellyCR@sec.gov

From: Jacob S. Frenkel <JFrenkel@dickinson-wright.com>
Sent: Friday, May 15, 2020 1:43 PM
To: Kase, Kingdon <KaseK@SEC.gov>; Connor, Cecilia <connorce@SEC.GOV>

Exhibit A

Cc: Kelly, Christopher R. <KellyCr@SEC.GOV>; Barry, Jennifer <barryj@SEC.GOV>
Subject: Nano Magic E-mail Meet and Confer re "Information Before the Commission"

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Good afternoon, King and Cecilia,

We have reviewed the statement filed with the Commission titled "Information Before the Commission at the Time of the Trading Suspension." The Commission's Order expressly required that "the Division of Enforcement shall file **all** the information that was before the Commission at the time of the Trading Suspension Order's issuance." Instead, the Staff has filed "the Declaration of Cecilia B. Connor, dated May 14, 2020, **setting forth the substantive facts** before the Commission at the time it issued the order suspending trading." The Commission did not direct the Staff to use its subjective judgment as to what facts to include. The Order called for "all the information." Accordingly, please provide today a redacted copy of the Action Memorandum so that Nano Magic can view "all the information" before the Commission, redacted to provide only the facts before the Commission.

To enable Nano Magic to respond fully and fairly, this is a request, in the form of an e-mail meet and confer, for a redacted copy of the Staff's Action Memorandum recommending that the Commission enter the Trading Suspension of the securities of Nano Magic. I stress "redacted," because, consistent with footnote 5 of the Commission's Order, we are not seeking disclosure of the Staff's privileged analysis or sensitive information about the staff's investigation methods. Nor are we seeking information the disclosure of which would otherwise violate applicable federal law or regulations. If the Staff does not respond to this request (as in the non-response to the previous meet-and-confer e-mail requesting to compress the submissions schedule as ordered by the Commission), then counsel will interpret the absence of a response as the Staff declining to provide a redacted copy of the Action Memorandum.

Thank you.

Jacob

Jacob S. Frenkel

Member

Chair, Government Investigations and Securities Enforcement Practice

International Square
1825 Eye St. N.W.
Suite 900
Washington, D.C. 20006
Profile V-Card

Phone 202-466-5953
Mobile 240-417-8496
Fax 844-670-6009
Email JFrenkel@dickinsonwright.com

DICKINSON WRIGHT PLLC
ARIZONA CALIFORNIA FLORIDA KENTUCKY MICHIGAN NEVADA OHIO TENNESSEE TEXAS WASHINGTON D.C. TORONTO

Admitted to practice in Maryland and Louisiana. Not admitted to practice in the District of Columbia.

Exhibit A

The information contained in this e-mail, including any attachments, is confidential, intended only for the named recipient(s), and may be legally privileged. If you are not the intended recipient, please delete the e-mail and any attachments, destroy any printouts that you may have made and notify us immediately by return e-mail.

Neither this transmission nor any attachment shall be deemed for any purpose to be a "signature" or "signed" under any electronic transmission acts, unless otherwise specifically stated herein. Thank you.

Exhibit A