

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

NANO MAGIC INC.

Administrative Proceeding
File No. 3-19787

DIVISION OF ENFORCEMENT'S OPPOSITION BRIEF
IN THE MATTER OF NANO MAGIC INC.

Respectfully submitted,
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Dated: May 21, 2020

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The Division of Enforcement (“Division”) hereby submits this brief in opposition to Petitioner’s Sworn Petition to Terminate Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934 (“Exchange Act”) *In the Matter of Nano Magic Inc.*, A.P. File No. 3-19787, and Declaration of Cecilia B. Connor, dated May 21, 2020 (the “May 21 Connor Decl.”).

INTRODUCTION

The Securities and Exchange Commission (“Commission”) appropriately suspended trading in the securities of Nano Magic Inc. (“NMGX” or “the company”) on April 30, 2020 because the facts clearly show that misleading information was circulating in the marketplace concerning the role that the company and its products could play in the fight against the virus that causes COVID-19. That misinformation corresponded with a spike in both the price and volume of NMGX stock, which coincided with a private offering of NMGX securities at a below market price to a company owned and controlled by NMGX’s CEO and his father. Significantly, in challenging the Commission’s trading suspension, NMGX does not dispute that the information circulating in the marketplace was misleading. Rather, the company simply relies on its assertions that it was not the source of the misleading information, despite the fact that it issued a misleading press release on April 7, 2020, stating that the company was “eager to join” the COVID-19 fight. Through its Sworn Petition to Terminate Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Exchange Act (“NMGX Petition”), NMGX not only seeks to rewrite the legal standards governing when trading suspensions are appropriate, but also asks the Commission to ignore what appears to be a coordinated campaign to manipulate the price of NMGX stock and, potentially, the resulting harm suffered by NMGX investors buying company stock at inflated prices. NMGX’s arguments to overturn the trading suspension lack merit, and should be denied.

PROCEDURAL HISTORY

On April 30, 2020, pursuant to Section 12(k) of the Exchange Act [15 U.S.C. § 781(k)], the Commission issued an Order of Suspension of Trading in the Securities of NMGX, a Michigan-based issuer with common stock trading on the OTC Link ATS (“OTC Link”), operated by OTC Markets Group, Inc. (“OTC Markets”), under the ticker symbol NMGX. The trading suspension ran from May 1, 2020 to May 14, 2020. The Commission suspended trading due to questions 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 NMGX on April 7, 2020 regarding the Company’s involvement in the fight against COVID-19.”

On May 6, 2020, NMGX filed with the Office of the Secretary (“OS”) the NMGX Petition and four exhibits to the NMGX Petition (“Petition Ex.”). The following day, NMGX filed a Motion for Expedited Consideration of Sworn Petition to Terminate Trading Suspension Pursuant to Section 12(k)(1)(A) of the Exchange Act. On May 8, 2020, pursuant to Commission Rule of Practice 550(b), the OS issued an Order Requesting Additional Written Submissions (5/8/20 Order, A.P. File No. 3-19787) (“May 8, 2020 Order”). Later that same day, NMGX filed 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 Exchange Act, requesting that the Commission further expedite the schedule for written submissions. On May 14, 2020, in accordance with the Commission’s May 8, 2020 Order, the Division filed with the OS: (i) the Information Before the Commission at the Time of the Trading Suspension, and (ii) the Declaration of Cecilia B. Connor dated May 14, 2020 (the “May 14 Connor Decl.”).¹

¹ On May 18, 2020, NMGX filed a Motion to Compel Production of Information Before the Commission at Time of Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Exchange Act. On May 19, 2020, the Division filed an Opposition Brief to Nano Magic Inc.’s Motion to Compel Production of Information Before the

STATEMENT OF FACTS

I. Issuer Background

NMGX is a Delaware corporation incorporated in 2014 with its principal executive offices located in Bloomfield Hills, Michigan. (May 14 Connor Decl. ¶4). The company's common stock is quoted on OTC Link under the ticker symbol NMGX. (May 14 Connor Decl. ¶8). NMGX's latest financial statements were included in the company's Form 10-K for the fiscal year ended December 31, 2019, filed with the Commission on May 13, 2020 ("NMGX 2019 10-K") reporting: cash of \$216,801, total assets of \$1,320,087, liabilities of \$1,766,943, revenue of \$2,436,010, and a net loss of \$964,987. (NMGX FY 2019 Form 10-K, filed May 13, 2020).

According to the OTC Markets Group Inc.'s website, NMGX purports to be "a global leader in developing, commercializing and marketing enhanced-performance products enabled by nanotechnology." (May 14 Connor Decl. ¶6). On March 2, 2020, NMGX's Board of Directors adopted an amendment to its certificate of incorporation, changing its name from PEN, Inc. to Nano Magic Inc. (May 14 Connor Decl. ¶5). On April 7, 2020, the company announced the name change and a change in ticker symbol to NMGX, as well as a rebrand and new product line. (*Id.*).

II. As the COVID-19 Pandemic Accelerated, Suspicious Promotional Activity Appeared Implying NMGX Had a Patent for a Product that Kills the Coronavirus that Causes COVID-19

Between at least February 24, 2020 and April 14, 2020, as the COVID-19 pandemic rapidly accelerated, accounts on Twitter.com ("Twitter") and InvestorsHub.com ("InvestorsHub") posted approximately 60 promotional messages, many authored by the same

Commission at Time of Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Exchange Act ("Division Opposition Brief") and, that same day, NMGX filed a Reply to the Division Opposition Brief.

users, discussing NMGX in connection with coronavirus and claiming, among other things, that NMGX holds a patent for a product that kills human coronavirus. (May 14 Connor Decl. ¶10).

The posts implied that the company's product was capable of killing the virus that causes COVID-19. Both the price and volume of NMGX stock jumped sharply during the period of these posts. (*Id.*) Examples of these posts include:

- On February 24, 2020, InvestorsHub user luke424 posted, among several other similar posts in the following days, "PENC [the prior ticker symbol for NMGX] has a patent that kills Coronavirus 99.99% of the time."
- On February 28, 2020, InvestorsHub user BJ_Cooper posted, "I truly believe that the Corona Virus patent is just the tip of the iceberg. It'll be interesting to see what else is in the works." InvestorsHub user BJ_Cooper posted at least nine promotional posts regarding NMGX between February and April 2020.
- On February 29, 2020, Twitter user @t4kingoff posted, "\$PENC On 10/15/19 patent approved for disinfectant that kills #coronavirus 99.9% of time and many other nasty things." This user was the author of numerous posts promoting NMGX on both Twitter and InvestorsHub between February and April 2020.
- On March 1, 2020, Twitter user @JoeDTrader posted, "What?! \$PENC already have the solution to kill the Corona Virus since 2015?! All governments should get a hold of this company ASAP! #CoronaVirusUpdate."
- On March 2, 2020, Twitter user Dream85705614 posted, "\$PENC 780k float #coronavirus play. People are starting to find it."
- On March 8, 2020, Twitter user @holdingprofits posted, "\$PENC don't sleep on this #CoronavirusOutbreak stock. PENC has . . . patent to kill virus in 10 minutes on public transportation systems." User @holdingprofits was the author of at least six promotional posts regarding NMGX during February and March 2020.

On March 29, 2020, Twitter user Auggie20010 posted, "CORONAVIRUS UPDATE: US SCIENTISTS FROM \$PENC ALREADY found the NANOMATERIAL that kills the VIRUS in 10 MINUTES on a surface for up to 5 DAYS. PATENTED 10/2019." Auggie2010 was the author of six additional posts on InvestorsHub in March 2020, promoting NMGX as a lucrative investment. (*Id.*)

In total, between February 14 and April 24, 2020, there were over 450 posts on the InvestorsHub message board with additional posts on Twitter—a significant increase from previous periods—promoting NMGX generally and discussing whether to purchase NMGX stock. (May 14 Connor Decl. ¶11). By contrast, only nine posts discussing NMGX appeared on these sites during all of 2019. (*Id.*)

III. The Price and Volume of NMGX Stock Sharply Increased During the Period of the Posts

Coincident with the suspicious promotional activity described above, there was a significant increase in NMGX's stock price and trading volume. In the three months prior to February 24, 2020, NMGX's closing share price fluctuated between \$0.55 and \$0.83 with an average closing share price of \$0.66 and an average daily trading volume of 1,626 shares. (May 14 Connor Decl. ¶22). On 63% of the trading days during this time period, trading volume in NMGX securities was less than 500 shares. (*Id.*)

During just the first two weeks of the promotional activity, NMGX's share price more than doubled, from a closing price of \$0.67 per share on February 24 to a closing price of \$1.45 per share on March 6, 2020. NMGX's closing share price spiked during this period on March 2, 2020, the day after the Tweet by @JoeDTrader stating that PEN Inc. has had "the solution to kill the Corona Virus [sic] since 2015," to a closing share price of \$2.10, a 256% increase from its closing share price on the day before the commencement of the promotional activity. During this time period, NMGX's average trading volume also increased 770% from the previous three months to an average daily volume of 12,522 shares, and its average closing share price increased 218% from the previous three months to an average closing share price of \$1.44. (*Id.*)

IV. NMGX Raised Capital While Suspicious Promotional Activity was Ongoing

On March 24 and 26, 2020, NMGX raised \$540,000 and \$25,000, respectively, in a private capital raise. (May 14 Connor Decl. ¶25). This offering occurred in the midst of the suspicious message board posts on InvestorsHub and Twitter and after NMGX's stock price had increased exponentially. (May 14 Connor Decl. ¶¶22-24). Specifically, on March 24 and 26, 2020, the dates of the capital raise, the closing share price of NMGX common stock was \$1.60 and \$1.77, respectively, an increase of 238% and 264%, respectively from NMGX's closing

share price of \$0.67 on February 24, 2020, the day that the promotional activity began (May 21 Connor Decl. ¶3).

Division staff recently learned, through the NMGX 2019 10-K, that the sole investor in this private placement was PEN Comeback 2, an entity owned and controlled by NMGX's CEO, Tom Berman, and his father, Ronald Berman. Ronald Berman is also a Director of NMGX. PEN Comeback 2 purchased shares in the private raise at a per share price of \$0.65 and in-the-money warrants at an exercise price of \$1.50, a significant discount to the market price of NMGX stock on March 24 and 26, 2020. (NMGX FY 2019 Form 10-K at pg. 44, note 18).

V. NMGX Issued Misleading Press Release Regarding COVID-19

On April 7, 2020, NMGX issued a press release titled "Nano Magic Inc., Formerly PEN Inc., Announces New Name, New Trading Symbol, Rebrand, and New Product Line Coming Soon." (May 14 Connor Decl. ¶15; Petition Ex. B). According to the press release, "The Company is preparing for the launch of their new Nano Magic-branded product line that will include lens care, electronic device screen cleaning and protection, sport and safety anti-fog solutions, auto windshield cleaning and protection, as well as household surface cleaning and protectant solutions." (*Id.*) Furthermore the press release states: "In fact, Berman [CEO of NMGX] was excited to share that they are eager to join the Covid-19 fight." (*Id.*)

Prior to this press release, the company last issued a press release on October 28, 2018. (May 14 Connor Decl. ¶15). The press release provided no specific information as to how NMGX planned to "join the Covid-19 fight," and, as of April 30, 2020, the date of the Order of Suspension of Trading in the Securities of NMGX ("Order of Suspension"), the company had made no subsequent claims regarding any COVID-19 related products or business activities. (May 14 Connor Decl. ¶16).

Following the issuance of NGMX’s April 7, 2020 press release, on April 14, 2020, FINRA’s Office of Fraud Detection and Market Intelligence (“FINRA”) sent written questions to the company in which FINRA inquired, among other things, about the promotion of NGMX and whether NMGX currently had any products or patents “specifically designed or obtained pursuant to COVID-19 relief efforts.” (May 14 Connor Decl. ¶17; Petition Ex. D., pg. 2). NMGX responded that it was not aware of any promotion, and wrote that the company has “a formula suited to COVID-19 relief and we have accelerated its development in light of the pandemic.” (May 14 Connor Decl. ¶17; Petition Ex. D., pgs. 2-3).

VI. NMGX’s Share Price and Trading Volume Continued to Increase Following the Company’s Press Release

The closing share price of NMGX continued to fluctuate between \$0.95 and \$2.24 from March 9 until the issuance of the April 7, 2020 press release, with an average closing share price of \$1.43 and an average daily trading volume of 4,677, an increase of 287% from the average daily trading volume in the three months preceding the start of the promotional activity. (May 14 Connor Decl. ¶23). Following the issuance of the April 7, 2020 press release, the closing share price of NMGX steadily increased each day from \$1.20 to \$2.40 as of April 24, 2020, a 292% increase from the closing price on the day before the commencement of the promotional activity. (*Id.*) NMGX’s trading volume fluctuated, but, as of April 24, 2020, remained significantly higher than the stock’s average daily trading volume prior to the commencement of the promotional activity, with an average daily trading volume that was 239% higher than the average daily trading volume in the three months prior to February 24, 2020. (*Id.*)

VII. SEC Interview Confirmed that NMGX Had No Specific Plan to Join the Fight Against COVID-19

On April 24, 2020, Division staff conducted a telephonic interview with NMGX’s CEO, Tom Berman, and its General Counsel, Jeanne Rickert, both of whom stated that they were not

aware of any promotional activity involving NMGX in the past two months, including any claims related to COVID-19. (May 14 Connor Decl. ¶18). While Berman referenced a patent assigned to NMGX's predecessor company, PEN, Inc., in 2019 for "[d]isinfectant material comprising a copper halide salt and surfactant" ("NMGX Patent"), he acknowledged that this disinfectant was never tested with respect to SARS-CoV-2, the virus that causes COVID-19. (May 14 Connor Decl. ¶¶12, 19). Berman stated that NMGX is attempting to re-register the product with the additional ingredient of povidone-iodine ("PVP-I"). (May 14 Connor Decl. ¶19). However, he acknowledged that additional testing was needed to determine whether the product can be used against SARS-CoV-2, although he appeared unfamiliar with the Environmental Protection Agency's ("EPA") testing processes and did not know what testing would be required to establish the approved uses for the re-registered product. (*Id.*) Berman stated that he did not believe that PVP-I was currently approved to treat the human coronavirus. (*Id.*) In fact, PVP-I is not currently an ingredient approved by the EPA for use against human coronavirus, let alone SARS-CoV-2. (*Id.*)

Berman also stated that he used the phrase "eager to join the Covid-19 fight" in the April 7, 2020 press release because NMGX is "trying to sell cleaning products to ultimately provide cleaner surfaces to hopefully rid dirt and grime and nastiness from people's lives." (May 14 Connor Decl. ¶20). Berman stated that NMGX "would love to be able to develop a product to join the COVID-19 fight," but acknowledged that, at the present, NMGX had no specific plan to do so, other than its attempts to re-register the NMGX Patent with an additional ingredient that is not approved by the EPA to fight the human coronavirus. (*Id.*) Finally, Berman stated that, while he was generally aware that the price of NMGX stock had increased over the past two months, he was "not focused on the stock price" and did not know the reason for the increase in price. (May 14 Connor Decl. ¶27).

Following this interview, Division staff spoke with the product manager at the EPA’s Office of Pesticide (“EPA Product Manager”) who Berman had previously communicated with regarding re-registration of NMGX’s disinfectant product with the additional ingredient of PVP-I. (May 14 Connor Decl. ¶21). The EPA Product Manager confirmed that PVP-I is not currently registered with the EPA, and thus any review of a product containing this ingredient would be a de novo review, not a re-registration. (*Id.*) According to the EPA Product Manager, such a review is a lengthy, complex, and costly process involving many studies to demonstrate, among other things, the toxicity of the new active ingredient, and takes an average of approximately two years. (*Id.*)

ARGUMENT

I. The Commission Properly Imposed a 10-Day Trading Suspension in the Securities of NMGX

As a preliminary matter, even though the trading suspension terminated on its own terms on May 14, 2020, it is still proper for the Commission to hear NMGX’s petition to remove the trading suspension pursuant to Commission Rule 550(b), as NMGX filed its request for Commission review within the 10-day suspension. *Bravo Enter. Ltd.*, Exch. Act Rel. No. 75775, 2015 WL 5047983 (Aug. 27, 2015), at *6 (Aug. 27, 2015) (Commission Opinion).

A. Section 12(k) of the Exchange Act Provides Authority for the Commission to Impose a 10-Day Suspension of Trading in an Issuer’s Securities

Section 12(k)(1)(A) of the Exchange Act authorizes the Commission to issue an order summarily suspending trading in any security (other than an exempted security) for a period not exceeding ten business days if “in its opinion the public interest and the protection of investors so require.”² The law authorizes the Commission to act “without any notice, opportunity to be

² A trading suspension order prohibits brokers, dealers, and members of a national securities exchange from using any instrumentality of interstate commerce “to effect any transaction in, or induce the purchase or sale of,” a security subject to a suspension order while the suspension is in effect. Section 12(k)(4). After a trading suspension

heard, or findings based upon a record.” *SEC v. Sloan*, 436 U.S. 103, 112 (1978). A decision to suspend trading is “rooted in [the Commission’s] opinion based on [its] expertise, experience, and knowledge, that a trading suspension [is] in the public interest and would protect investors.” *Bravo Enter. Ltd.*, Exch. Act Release No. 34-75775 (2015) WL 5047983 at *3. There is no express statutory requirement “to allege or find that an issuer has violated a specific provision of the federal securities laws before suspending trading” *Id.* at *3. The Commission has concluded that the test of Section 12(k)(1) “demonstrates that Congress conferred upon the Commission broad discretion to temporarily suspend trading in a security.” *Id.* at *2.

In determining whether to suspend trading, “the primary issues normally to be considered . . . are whether or not there is sufficient public information about which to base an informed investment decision or whether the market for the security appears to reflect manipulative or deceptive activities.” *Id.* at *4 (quoting Rules of Practice, Exch. Act Rel. No. 35833, 60 Fed. Reg. 32738, 32787 (June 23, 1995) (adopting release) (Comment to Rule 550 discussing the Commission’s process for petitions to terminate a suspension of trading)).

B. The Commission’s Standard in Determining Whether to Issue a Trading Suspension

“The Commission has broad discretion to determine when, in its opinion, the public interest and investor protection requires a trading suspension.” *Id.* at *1. The question of whether the Commission is of the “opinion” that a trading suspension is warranted is a subjective one—and there is a “significant ‘distinction between a subjective standard (whether the agency thinks that a condition has been met) and an objective one (whether the condition has in fact

expires, Exchange Act Rule 15c2-11 governs the ability of brokers to initiate and resume securities quotations for securities not listed on a national securities exchange. *See* 17 C.F.R. § 240.15c2-11. “Once there has been a lapse in two-way quotations for more than four business days for any reason, including a trading suspension, a broker-dealer cannot re-initiate quotations without complying with the informational and other requirements of Rule 15c2-11 and filing a Form 211 with FINRA, or otherwise demonstrating that it qualifies for an exception or exemption under Rule 15c2-11(f) or (h).” *Bravo Enter. Ltd.*, 2015 WL 5047983 at *12, n. 72.

been met),’ with the former giving the agency more discretion to act.” *Id.* at * 2, citing *Drake v. FAA*, 291 F.3d 59, 72 (D.C. Cir. 2002). Likewise, while the phrase “in the public interest” is not statutorily defined, it is an “inherently ‘broad standard[] for administrative action.” *Id.* at *2, citing *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). Finally, the phrase “investor protection” implies an “expansive mandate.” *Id.* at *2.

The Commission is not required to allege or find that an issuer has violated the federal securities laws in order to issue a 10-day trading suspension. *Id.* at *3-4. Rather, temporary trading suspensions are “a powerful tool for ‘alerting investors and the investing public’ about ‘questions the Commission has raised regarding the issuer or its securities.’” *Id.* at *4 (citation omitted).

C. The Facts Surrounding the Misleading Information in the Marketplace, Including the Spike in the Price and Volume of NMGX Stock, Support the Issuance of a 10-Day Trading Suspension in the Securities of NMGX

Between at least February 24, 2020 and April 14, 2020, as the COVID-19 pandemic intensified throughout the world, NMGX was the subject of manipulative promotional activity that included approximately 60 posts to message boards promoting NMGX and stating, among other things, that NMGX has a patent for a product that kills “coronavirus.” These claims were highly misleading in light of the global pandemic and strongly implied that the company’s product could be used in the fight against COVID-19. However, as Berman acknowledged to Division staff, none of the company’s products contains any ingredient approved by the EPA for use against SARS-CoV-2, the virus that causes COVID-19. During the promotional activity, NMGX’s stock price and trading volume increased significantly. *Bravo Enter. Ltd.*, 2015 WL 5047983 at *5 (the Commission has exercised its trading suspension authority in a variety of circumstances, including “when there were questions about trading in the stock, including indicia of potential market manipulation or unusual market activity.”)

The claims in the message board posts were exacerbated by the April 7, 2020 press release issued by the company, in which Berman misleadingly stated that he was “excited to share that [NMGX is] eager to join the Covid-19 fight.” The press release provided no information regarding the company’s efforts to address COVID-19, and, in a subsequent interview with the Division staff, Berman admitted that NMGX had no specific plan to join the COVID-19 fight. *Med Pro Venture Capital, Inc.*, Exch. Act. Rel. No. 74218, 2015 WL 500137 (Feb. 6, 2015) (trading suspension based on “questions that have been raised about the accuracy of publicly available information about the company’s operations, including questions about the accuracy of statements in a company press release”); *Prospect Ventures Inc.*, Exch. Act. Rel. 72338, 2014 WL 253736 (June 6, 2014) (trading suspension based on “questions regarding the accuracy of assertions by [issuer] to investors in public filings”).

Significantly, in the NMGX Petition, NMGX appears to concede the fact that there was a coordinated promotional campaign to manipulate the price of the company’s stock. NMGX makes no attempt to defend the accuracy of the many message board posts that contained misleading information regarding the company, nor does it try to explain how the substantial rise in NMGX’s stock price was anything other than manipulation. Indeed, the fact that the company sold more than 830,000 shares of NMGX common stock at approximately 40% of the then-trading stock price and warrants to purchase more than 830,000 additional shares of NMGX common stock at \$1.50, also below the then-trading stock price, through a private offering to an entity controlled by CEO Berman and his father, Ronald Berman, a NMGX Director, demonstrates the inflated nature of NMGX’s stock price at that time.

1. *NMGX's arguments that it was not the source of the message board posts, that it is a "real company with quality management," and that the suspension has had an adverse impact on the company are irrelevant.*

The company argues in the NMGX Petition that the trading suspension should be terminated because: (i) the company was not the source of the message board posts; (ii) NMGX is a "real company with quality management;" and (iii) the suspension has had an adverse impact on the company. (NMGX Petition, pgs. 2-7, 16-17, 27-30).

First, NMGX's claim that it is unaware of the source of the misleading message board posts is irrelevant. "Regardless of the culpable party, potentially manipulative or deceptive trading implicates the public interest and [the Commission's] objective to maintain fair and orderly markets in which investors can make informed investment decisions." *Immunotech Laboratories, Inc.*, Exch. Act Release No. 34-75790, 2015 WL 5081237 at *7 (rejecting issuer's argument that since it was unaware of identity of touters of its stock, a trading suspension was inappropriate). *See Efuel EFN Corp.*, Exch. Act Rel. No. 86307, 2019 WL 2903941, at *5 (July 5, 2019) (The Commission "may suspend trading even 'based on the conduct of unrelated third parties when that conduct threatens a fair and orderly marketplace.' Put another way, any alleged uncertainty in the identity of the party directly responsible for spreading materially false information does not detract from the Commission's interest in maintaining fair and orderly markets in which investors can make informed investment decisions.") (citation omitted); *see also Bravo Enter. Ltd.*, Exch. Act Rel. No 75775, 2015 WL 5047983, at *3 & n.17 (noting that the Commission has suspended trading where "speculative rumors were swirling in the marketplace"); *Microbiological Sciences, Inc.*, Exchange Act Release No. 8544, 1969 WL 96473, (Mar. 4, 1969) (trading suspension where "unfounded and false rumors" circulated in the marketplace "[c]ontrary to past efforts of management").

NMGX’s argument that it is a “legitimate company” with “quality management” also has no bearing on the subject inquiry—whether or not there was sufficient public information about which to base an informed investment decision, or whether the market for NMGX appeared to reflect manipulative or deceptive activities. *Bravo Enter. Ltd.*, 2015 WL 5047983 at *4.³

Finally, NMGX’s claim that the suspension has adversely affected the company is not a “sufficient countervailing consideration.” *Bravo Enter. Ltd.*, 2015 WL 5047983 at *13.

“Although a trading suspension potentially could be to the detriment of *current* shareholders prevented from selling their holdings while the suspension is in effect, [the Commission] also must consider the interests of *prospective* or *potential* investors who might be harmed because they purchase shares in reliance on potentially inaccurate or inadequate information about the issuer.” *Id.* (The “extent of any harm that may result to existing shareholders cannot be the determining factor in our analysis,” and therefore “[i]n evaluating what is necessary or appropriate to protect investors, regard must be had not only for existing stockholders of the issuer, but also for potential investors.”).

2. *NMGX’s explanation for its statement regarding COVID-19 in the April 7, 2020 press release is insufficient and misleading.*

The company’s explanation for Berman’s statement that it was “eager to join the Covid-19 fight” is both inadequate and misleading. In the NMGX Petition, the company argues that the statement is “true” because it “has been working diligently since February 2020 to determine the correct specifications for the PVP-I formula” and because it “has been working on an extremely aggressive and accelerated timeline for its PVP-I products (NMGX Petition, pg. 18). NMGX

³ Interestingly, the company omits mention in the NMGX Petition that its former Chief Financial Officer (“CFO”), Adam Wasserman, who served as Chief Accounting Officer and then CFO of NMGX from September 2014 until May 2016, was barred in 2018 by a U.S. District Court in Florida from serving as an officer or director of a public company for five years, after being charged by the Commission with improperly commingling corporate and personal funds as part of a practice to transfer funds to the U.S. while avoiding foreign currency controls. *SEC v. Wasserman*, No. 18-cv-23729 (S.D. Fla. filed Sept. 12, 2018).

goes on to explain that “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.” (NMGX Petition, pg. 19).

This explanation in and of itself implies that the company has a plan to obtain approval of the “PVP-I product” for use against SARS-CoV-2, the virus that causes COVID-19. However, in the April 24, 2020 interview with the Division staff, Berman stated that he does not believe that PVP-I is currently approved to treat the human coronavirus and, in fact, PVP-I is not currently an ingredient approved by the EPA for any use, let alone use against human coronavirus or SARS-CoV-2. (May 14 Connor Decl. ¶19). PVP-I is not currently registered with the EPA, and thus any review of a product containing this ingredient would be a de novo review, rather than a re-registration. According to the EPA, such a review is a lengthy, complex, and costly process involving many studies to demonstrate, among other things, the toxicity of the new active ingredient, and takes an average of approximately two years. (May 14 Connor Decl. ¶21).

In the NMGX 2019 10-K, the company states: “Our commercial products do not require any government approvals. The modified version of our hygienic product that we are working to launch in 2020 is expected to require some regulatory approval from the EPA depending, in part, on what claims are made regarding its efficacy.” NMGX makes no mention of an attempt by the company to obtain approval from the EPA to market the product as a disinfectant for use against SARS-CoV-2. And the fact that NMGX plans to “launch” the product in 2020 suggests that the

company will not be seeking approval from the EPA to market the product as a disinfectant for use against SARS-CoV-2, as, according to the EPA, the addition of the PVP-I ingredient would require a de novo review, which takes an average of approximately two years.

Additionally, although an experimental test of the disinfectant covered by the NMGX Patent conducted in approximately 2015 apparently resulted in a 99.99% reduction in the Human Coronavirus 229E, this type of coronavirus is distinctly different from SARS-CoV-2, the virus that causes COVID-19. (May 14 Connor Decl. ¶13). Human Coronavirus 229E is a common type of coronavirus that causes mild to moderate illnesses such as the common cold, and the Centers for Disease Control and Prevention recently stated that it “*should not be confused* with coronavirus disease 2019”⁴ (emphasis in original). (*Id.*)

The company further claims in the NMGX Petition that “Human Corona Virus 229E also is an accepted surrogate to test for efficacy against COVID-19.” (NMGX Petition, pg. 13, fn. 9, pgs. 14-15). On May 12, 2020, the Division staff spoke with the EPA Product Manager regarding this statement. The EPA Product Manager informed the Division staff that Human Coronavirus 229E is not an accepted “surrogate” to test for efficacy against SARS-CoV-2 because that term implies a “straight one-for-one swap,” meaning that a product proven in tests to be effective against Human Coronavirus 229E would also be deemed proven to be effective against SARS-CoV-2. (May 21, 2020 Connor Decl. ¶4). The EPA Product Manager additionally stated that the EPA does not allow for label claims or marketing materials that suggest that products effectively tested against strains of human coronavirus other than SARS-CoV-2, including Human Coronavirus 229E, have been approved by the EPA for use against SARS-CoV-2. (*Id.*)

⁴ Centers for Disease Control and Prevention – Common Human Coronaviruses, <https://www.cdc.gov/coronavirus/general-information.html>.

Finally, the company's argument that it "relied on experienced in-house counsel for her review of the [April 7, 2020] press release prior to the company's issuance of the release," (NMGX Petition, pg. 26), is irrelevant to the question of whether there was sufficient public information regarding NMGX about which to base an informed investment decision, or whether the market for NMGX appeared to reflect manipulative or deceptive activities. *See Bravo Enter. Ltd.*, 2015 WL 5047983 at *4.

3. *NMGX mischaracterizes the interview with the Division staff and provided a misleading response to FINRA's written questions.*

NMGX argues that the FINRA referral and Division investigation do not support the ordering of a trading suspension. (NMGX Petition, pgs. 20-22). However, in support of this argument, the company mischaracterizes the April 24, 2020 interview with the Division staff. NMGX contends that the staff "never directed one substantive question to Ms. Rickert," that there "were no questions related to status of product development, applicability of the patents, relevant product testing or actual customer base and interest," and that the staff did not inquire about the details of the message board posts. (*Id.*) In fact, the Division staff posed a number of substantive questions to Rickert, including whether she was aware of the promotional activity. (May 14 Connor Decl. ¶18). Moreover, part of Rickert's role as General Counsel is to affirmatively provide information, and Rickert could have answered any question posed by the Division staff to Berman. Division staff also inquired in great detail regarding the NMGX Patent, NMGX's attempt to re-register its disinfectant product with the additional PVP-I ingredient, and the EPA testing that the company would need to undergo in order to re-register the PVP-I product. (May 14 Connor Decl. ¶19). The staff did not inquire as to the "names or monikers" of the message board promoters because both Berman and Rickert definitively stated that they were not aware of any promotional activity involving NMGX in the past two months, including any claims related to COVID-19. (May 14 Connor Decl. ¶18).

Additionally, NMGX conspicuously omits mention of the discussion of the company's March 2020 capital raise during the April 24, 2020 interview. During the interview, Berman maintained that his main goal was to help NMGX get out of debt. Division staff followed up with numerous questions about Berman's plans to get NMGX out of debt. (May 14 Connor Decl. ¶24). In response, Berman stated that he was working on negotiating payment plans and increasing sales for the company in order to ultimately make the company more profitable. When asked whether NMGX had taken any other steps to reduce its debt, he appeared evasive and offered no further answer. (*Id.*) Only after the Division staff specifically asked whether NMGX had recently made any efforts to obtain financing from investors to help extricate the company from debt, did Berman reveal that NMGX had conducted two private capital raises, the second of which concluded in March 2020, while the promotional activity was ongoing, and raised \$540,000 and \$25,000 on March 24 and 26, 2020, respectively. (May 14 Connor Decl. ¶¶24-25). Berman, however, failed to disclose a significant fact to the Division staff about the March 2020 private placement—that the sole investor was PEN Comeback 2, an entity owned and controlled by Berman, and his father, Ronald Berman, who is also a Director of NMGX. Nor did Berman disclose the fact that, through this private offering, Berman and his father purchased NMGX stock at approximately 40% of NMGX's then-publicly traded stock price and, in addition, purchased in-the-money warrants at \$1.50, which was also below the then-publicly traded stock price.

In discussing the written questions that NMGX received from FINRA on April 14, 2020 in the NMGX Petition, the company also fails to mention that its April 17, 2020 response to FINRA contains additional misleading information. (NMGX Petition, pg. 20). Specifically, in response to FINRA's question of whether "NMGX currently ha[s] any products or patents that were specifically designed or obtained pursuant to COVID-19 relief efforts," the company

responded that it has “a formula suited to COVID-19 relief and we have accelerated its development in light of the pandemic.” (Petition Ex. D, pgs. 2-3). As described above, this statement is misleading at best. Berman himself acknowledged in the April 24, 2020 interview with the Division staff that he does not believe that PVP-I is currently approved to treat the human coronavirus and, in fact, PVP-I is not currently an ingredient approved by the EPA for any use, let alone use against human coronavirus or SARS-CoV-2. (May 14 Connor Decl. ¶19).

FINRA also inquired in its April 14, 2020 written questions as to whether the company was “aware of any promotion,” (Petition Ex. D, pg. 2), thus putting the company on notice of a potential issue with regard to the promotion of NMGX. Therefore, by April 30, 2020, the date of the Order of Suspension, NMGX had twice been given notice of potential promotional activity, following both the correspondence with FINRA and the April 24 interview. Thus, as of April 30, 2020, the date of the trading suspension, the company had two opportunities to look into the matter and correct the confusion in the marketplace created by the promotional activity, but it failed to issue any clarifying statement.

Additionally, in the NMGX Petition, the company states that “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.” (NMGX Petition, pg. 16). It is especially concerning that NMGX did not disavow the promotions after receiving direct inquiries from potential investors on the subject of NMGX products’ effectiveness with regard to COVID-19. Instead, NMGX exacerbated the misinformation by issuing a misleading press release regarding COVID-19.

CONCLUSION

For the reasons stated above, the Division requests that the Commission deny NMGX's petition to terminate the trading suspension issued on April 30, 2020.

By its attorneys:

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

NANO MAGIC INC.

Administrative Proceeding
File No. 3-19787

DECLARATION OF CECILIA B. CONNOR

I, CECILIA B. CONNOR, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am Counsel with the United States Securities and Exchange Commission (“Commission”) and have been employed by the Commission as an attorney in the Division of Enforcement since 2016.

2. I submit this Declaration in conjunction with the Division of Enforcement’s brief in opposition to Petitioner’s Sworn Petition to Terminate Trading Suspension Issued Pursuant to Section 12(k)(1)(A) of the Securities Exchange Act of 1934 *In the Matter of Nano Magic Inc.*

3. On March 24 and 26, 2020, the dates of the most recent capital raise by Nano Magic Inc. (“NMGX”), the closing share price of NMGX common stock was \$1.60 and \$1.77, respectively, an increase of 238% and 264%, respectively, from NMGX’s closing share price of \$0.67 on February 24, 2020, the day that the suspicious promotion of NMGX began.

4. On May 12, 2020, Kingdon Kase, Assistant Regional Director, and I (the “Division staff”) spoke with the product manager at the Environmental Protection Agency’s (“EPA”) Office of Pesticide (“EPA Product Manager”) who had previously communicated with NMGX’s CEO, Tom Berman, regarding re-registration of a NMGX disinfectant product. The EPA Product Manager informed the Division staff that Human Coronavirus

229E is not an accepted “surrogate” to test for efficacy against SARS-CoV-2, the virus that causes COVID-19, because that term implies a “straight one-for-one swap,” meaning that a product proven in tests to be effective against Human Coronavirus 229E would also be deemed proven to be effective against SARS-CoV-2. The EPA Product Manager additionally stated that the EPA does not allow for label claims or marketing materials that suggest that products effectively tested against strains of human coronavirus other than SARS-CoV-2 have been approved by the EPA for use against SARS-CoV-2.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 21st day of May, 2020 in Haddonfield, New Jersey.

Cecilia B. Connor

CECILIA B. CONNOR

STATEMENT OF FILING BY EMAIL

I hereby certify that, on this 21st day of May, 2020, with respect to In the Matter of Nano Magic Inc., Administrative Proceeding File No. 3-19787, I caused a true and correct copy of the foregoing Division of Enforcement's Opposition Brief and Declaration of Cecilia B. Connor to be filed via email with the Office of the Secretary of the U.S. Securities and Exchange Commission pursuant to the SEC's March 8, 2020, Order in In re Pending Administrative Proceedings. The filing was sent to the email address: APFilings@sec.gov.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of May, 2020, with respect to In the Matter of Nano Magic Inc., Administrative Proceeding File No. 3-19787, I caused a true and correct copy of the foregoing Division of Enforcement's Opposition Brief and Declaration of Cecilia B. Connor (together with the accompanying Statement of Filing by Email) to be served upon the following by email:

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