Initial Decision Release No. 1416
Administrative Proceeding
File No. 3-19787

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of **Nano Magic Inc.**	**Initial Decision on Equal Access to Justice Act Application** July 23, 2025

Appearances: Jacob S. Frenkel and Brooks T. Westergard, Dickinson Wright PLLC, for Applicant Nano Magic Inc.

Gregory R. Bockin and Patrick R. Costello, for the Division of Enforcement, Securities and Exchange Commission

Before: Dean C. Metry, Chief Administrative Law Judge

Introduction

More than four years after Nano Magic Inc. petitioned the Securities and Exchange Commission to terminate a 10-day trading suspension of its securities, the Commission granted Nano Magic's petition and vacated the trading suspension order nunc pro tunc as of the date it was issued, thus retroactively expunging the suspension altogether. Nano Magic filed this timely application under the Equal Access to Justice Act (EAJA) for attorney fees and costs arising from its successful defense.

Nano Magic's desire to recoup legal expenses following a long and drawn-out proceeding is understandable, and its briefing raises points of considerable merit. Nevertheless, the company is not eligible for recovery under EAJA because a proceeding to terminate a trading suspension is not an adversary adjudication under section 554 of the Administrative Procedure Act (APA). I must therefore deny Nano Magic's application.

Procedural History

During the early months of the COVID-19 pandemic, the Commission issued 10-day trading suspensions in the securities of more than 20 issuers for which there were issues regarding the accuracy and adequacy of information in the marketplace concerning their efforts to combat the coronavirus.

Nano Magic—which specializes in nanotechnology-powered cleaning products—had its trading suspended from May 1, 2020, until May 14, 2020, on these grounds. The Commission's April 30, 2020, trading suspension order, which was approved by three out of four sitting commissioners, cited concerns about information in the marketplace claiming that the company had a patent for a disinfectant to kill the coronavirus and a recent statement by Nano Magic about its involvement in the fight against COVID-19. *Nano Magic Inc.*, Securities Exchange Act of 1934 Release No. 88789, 2020 WL 2097884 (Apr. 30, 2020); Final Commission Votes for Agency Proceedings, Calendar Year 2020, https://www.sec.gov/about/commission-votes/annual/commission-votes-ap-2020.xml. In the weeks prior to the trading suspension, Nano Magic's average closing share price had increased by 218%—from less than one dollar to over two dollars—and its trading volume had increased by 770%. Information Before the Commission at the Time of the Trading Suspension, Decl. of Cecilia B. Connor, ¶ 22 (May 14, 2020).

On May 6, 2020, before the suspension expired, Nano Magic filed a petition under Rule 550 of Commission's Rules of Practice to terminate the trading suspension. Nano Magic disavowed knowledge of the inaccurate claims about the use of the company's products against the coronavirus that were circulating on the internet, which were not made or approved by the company.[1] Petition to Terminate Trading Suspension, at 16–17 (May 6, 2020). It also argued that its statement about being eager to join the fight against COVID-19 was accurate. *Id.* at 17–19. In response, the Division of Enforcement argued that the trading suspension was justified for several reasons; most importantly, that misinformation in the market, even if not made or approved by the company, can still mislead the public. Div. Opp'n Br., at 14 (May 21, 2020).

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[1] Also on May 6, Nano Magic issued a press release asserting that it never communicated that it had a patent for a disinfectant that kills the coronavirus, and that it believed the misinformation was posted on internet message boards by third parties. Nano Magic Inc., Current Report (Form 8-K) (May 6, 2020), Ex. 99.1, "Nano Magic Inc. Responds to Securities Trading Suspension," https://www.sec.gov/Archives/edgar/data/891417/000149315220007819/ex99-1.htm.

Over the next couple of days, Nano Magic moved the Commission to expedite its consideration of the petition so it could be resolved before the trading suspension expired on May 14, but the Commission did not do so. *See* Motion for Expedited Consideration of Petition to Terminate (May 7, 2020); Motion to Expedite Scheduling of Submissions Concerning Petition to Terminate (May 8, 2020). On May 18, Nano Magic further moved the Commission to compel the Division to disclose its action memorandum seeking the trading suspension, which it suspected would include additional information beyond the "substantive facts" already disclosed by the Division on May 14. Motion to Compel Production of Information Before the Commission, at 2 (May 18, 2020). Briefing on Nano Magic's petition to terminate the trading suspension concluded on May 28.

Nothing happened for over a year. Then, on August 18, 2021, the Commission issued an order noting that Nano Magic's "petition and motions present significant merits and procedural issues," and invited Nano Magic to brief whether there was any continuing prejudice from the now expired trading suspension and whether the Commission had authority to grant relief. *Nano Magic*, Exchange Act Release No. 92703, 2021 WL 3666995 (Aug. 18, 2021). Nano Magic filed a supplemental brief explaining that because of the trading suspension, it had lost its piggyback exemption allowing its stock to be quoted on the over-the-counter markets. Even though the suspension had expired, it would be difficult to find a broker willing to file the necessary form so its securities could be quoted again. Nano Magic argued that its stock could not trade in anything but the "grey" market, where it was subject to a "caveat emptor" designation and there were no market makers or publicly available stock quotes. Nano Magic Supp'l Filing Addressing Prejudice, at 2–4 & Ex. B (Expert Opinion of Frank Childress) (Sept. 1, 2021). This fact, according to Nano Magic, "essentially placed [the company] in an unending form of trading and regulatory purgatory." *Id.* at 3 & Ex. B. The Division responded by arguing that Nano Magic failed to demonstrate prejudice because it had not provided any concrete information about the steps it had taken to resume trading, and that Nano Magic was not entitled to an expedited decision. Div. Response to Nano Magic Supp'l Filing, at 2–3 (Sept. 15, 2021).

On February 14, 2022, after several more months of inaction by the Commission, Nano Magic filed a petition for writ of mandamus with the U.S. Court of Appeals for the District of Columbia Circuit. Nano Magic sought to compel the Commission to rule on its petition to terminate the trading suspension and its motion to compel additional information from the Division. Petition for Writ of Mandamus, at 1, *Nano Magic Holdings Inc.*, No. 22-1021 (D.C. Cir. Feb. 14, 2022). The Commission's Office of Litigation and Administrative Practice (OLAP) countered that Nano Magic had not shown it

was entitled to "the extraordinary remedy of mandamus" and that the Commission was "working diligently and reasonably to decide Nano Magic's petition, while also performing" many other "adjudicatory, law enforcement, and regulatory responsibilities." SEC's Opp'n, at 2–3, *Nano Magic*, No. 22-1021 (D.C. Cir. May 2, 2022).

The D.C. Circuit denied the mandamus petition on June 29, 2022, because Nano Magic had not shown that the Commission's delay was "so egregious or unreasonable" as to warrant mandamus. Order, *Nano Magic*, No. 22-1021 (D.C. Cir. June 29, 2022) (per curiam). The court credited OLAP's assertion that the Commission "has made significant progress towards a decision on the petition to terminate and expects to issue a decision in the coming months," but it also noted that the "denial is without prejudice to refiling in the event of significant additional delay." *Id.*

The court dismissed as moot the portion of Nano Magic's mandamus petition concerning the motion to compel, because the Commission ruled on it on April 28, 2022. The Commission denied Nano Magic's motion and declined to provide a redacted version of the action memorandum on which it based the trading suspension. *Nano Magic*, Exchange Act Release No. 94818, 2022 WL 1288188, at *2 (Apr. 28, 2022). At the same time, the Commission listed additional facts that were before it when it suspended trading, including that Nano Magic director Ronald Berman sold shares of the company for a profit during the period of suspicious promotional activity. *Id.* On May 16, 2022, Nano Magic filed a brief advising the Commission that the Division had provided the Commission with inaccurate information: Ronald Berman had not traded shares of Nano Magic—it was his brother Robert Berman, who was not a director of the company. Supp'l Br. in Further Support of Motion to Compel, at 2 (May 16, 2022). Nano Magic asked the Commission to reconsider its denial of the motion to compel and suggested that the Division intentionally or with gross negligence provided false information to the Commission—a point which the Division contested in its response. *Id.* at 8; Div. Motion to Seek Leave to Respond to Nano Magic's Supp'l Br., at 3 (Jun. 2, 2022); *see* Opp'n to and Motion to Strike Div. Motion to Seek Leave to Respond to Nano Magic's Supp'l Br., at 2–3 (Jun. 3, 2022). The Division also argued that the trading suspension was justified by the misinformation in the market, and Berman's trading had no bearing on the matter. Rather, it was something the Division had planned to investigate separately. Div. Motion to Seek Leave, at 2–5.

The case languished for two more years. On April 17, 2024, the Commission requested additional briefing after discovering that Nano Magic had regained piggyback eligibility and was again being quoted on the over-the-counter markets. *Nano Magic*, Exchange Act Release No. Release No. 99980, 2024 WL 1672043, at *1 (Apr. 17, 2024). The Commission asked the parties to

address whether Nano Magic's Rule 550 petition was now moot. *Id.* Nano Magic argued the petition was not moot, and moreover, that the Commission's four-year delay had denied it due process. Nano Magic Opening Brief Addressing Non-Mootness, at 11–18 (May 8, 2024). It also filed declarations by CEO Tom Berman and director Ronald Berman explaining that not only did it take the company nearly three years to find a market maker willing to submit the required form to allow Nano Magic's stock to trade again, but that the stigma of the trading suspension continued to make it difficult for the company to raise capital and do business. *Id.*, Exs. A & B. The Division argued that Nano Magic no longer suffered from any injury capable of redress by a decision on its petition, but the Commission should nevertheless exercise its discretion and decide the case in the Division's favor by denying the petition. Div. Response to Supp'l Br. as to Mootness, at 1 (May 29, 2024).

On October 10, 2024, the Commission remarkably granted Nano Magic's petition and vacated the trading suspension order nunc pro tunc as of the date it was issued on April 30, 2020. *Nano Magic*, Exchange Act Release No. 101298, 2024 WL 4475691 (Oct. 10, 2024). The Commission did not include reasons for its ruling, noting only that although Nano Magic had resumed trading, the parties agreed that the Commission should still decide the matter. *Id.*

Nano Magic timely filed the instant EAJA application on January 8, 2025.[2] Briefing concluded on March 24, and at my direction, Nano Magic submitted a declaration by Tom Berman on May 2, which demonstrated the

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[2] Nano Magic's application is timely because an EAJA application may be filed up to 90 days after the Commission's final decision in the matter. 17 C.F.R. § 201.44(a), (b) (paralleling 5 U.S.C. § 504(a)(2) and allowing an EAJA application to be filed up to 30 days after "a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding … becomes final and unappealable, both within the Commission and to the courts"); *see also* 15 U.S.C. § 78y(a)(1) (providing 60 days for "a person aggrieved by a final order of the Commission" to file an appeal in federal court); *Adams v. SEC*, 287 F.3d 183, 191 (D.C. Cir. 2002) (holding "that § 504(a)(2) of EAJA is to be interpreted as creating a bright-line rule" that "[w]hen a potential appeal exists under the relevant statute, the time for appeal must lapse, or the appeal be completed, before the 30-day deadline begins to run"). Nano Magic filed its application on the last day. The Division does not dispute that the application was timely filed. Answer, at 16 n.9 (Feb. 21, 2025).

company's financial eligibility under EAJA.[3] I heard oral argument on Nano Magic's application on May 14.

Discussion

EAJA is a fee-shifting statute. "The governing principle of the Act is that the 'United States should pay those expenses which are incurred when the government presses unreasonable positions during litigation.'" *Matthews v. United States*, 713 F.2d 677, 683–84 (11th Cir. 1983) (quoting *Goldhaber v. Foley*, 698 F.2d 193, 197 (3d Cir. 1983)). EAJA is a partial waiver of sovereign immunity and must be strictly construed. *Ardestani v. INS*, 502 U.S. 129, 137 (1991).

As relevant to administrative proceedings, EAJA provides that:

> An agency that conducts an *adversary adjudication* shall award, to a *prevailing party* other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1) (emphasis added).

Thus, to be eligible for EAJA relief, Nano Magic must demonstrate that: (1) a proceeding to terminate a trading suspension is an adversary adjudication within the meaning of EAJA; and (2) it was a prevailing party. These threshold issues must be determined before I consider whether the Division has shown that the agency's position was substantially justified. *See 2-Bar Ranch Ltd. P'ship v. U.S. Forest Serv.*, 996 F.3d 984, 993 (9th Cir. 2021) (concluding that a district court's remand for an agency to consider the substantial justification

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[3] *See* 17 C.F.R. § 201.42 (requiring an EAJA applicant to submit an exhibit detailing its net worth and that of any affiliates as of when the proceeding was initiated). To be eligible for recovery under EAJA, Nano Magic and its affiliates must have had not more than 500 employees and a combined net worth of not more than seven million dollars when the proceeding was initiated. 17 C.F.R. § 201.34(a), (b)(5), (c), (f). Berman's May 2, 2025, declaration—coupled with the declaration he filed along with the EAJA application in January—establish that Nano Magic had 12 employees at the end of 2019, 21 employees at the end of 2020, and that the net worth of Nano Magic and its affiliates has consistently been far less than seven million dollars. The Division has not contested Nano Magic's financial eligibility.

issue, without the court first reviewing the agency's adversary adjudication determination, was "inappropriate" because if the underlying proceeding is not an adversary adjudication, fees are unavailable and proceedings will end). Because a proceeding to terminate a trading suspension is not an adversary adjudication, Nano Magic's application must be denied.

I am inclined to think that Nano Magic is a prevailing party, and I am not convinced that the Division is correct in any part of its argument on this point; but unfortunately, it has no bearing on the outcome of the case. Thus, although I address the matter as is required by the Rules of Practice, I do not definitively resolve the issue. 17 C.F.R. § 201.56 ("The [EAJA] decision shall include written findings and conclusions on the applicant's … status as a prevailing party ….''). I do not reach the issue of substantial justification. *See id.* (providing that substantial justification must be addressed only "if at issue").

Adversary Adjudication

EAJA defines an adversary adjudication as "an adjudication *under section 554* of this title in which the position of the United States is represented by counsel or otherwise." 5 U.S.C. § 504(b)(1)(C)(i) (emphasis added). In turn, section 554 of the APA "applies … in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," subject to certain exceptions not relevant here. 5 U.S.C. § 554(a). The Supreme Court has held that EAJA is "unambiguous" and applies only to proceedings "'subject to' or 'governed by' § 554," not even to proceedings that are functionally equivalent to a section 554 adjudication but governed by a different statute. *Ardestani*, 502 U.S. at 134–35. What a section 554 proceeding entails was explained in a D.C. Circuit opinion authored by then-Judge Ginsburg:

> If an adjudication is governed by section 554, it must feature [the APA's] procedural components: an impartial and unbiased presiding officer, *id.* § 556(b); notice and an opportunity to participate in the hearing, *id.* § 554(c); the right of the parties to appear with counsel, *id.* § [555(b)]; the right to present oral and written evidence (including rebuttal evidence) and to conduct such cross-examination as is required for a full and true disclosure of the facts, *id.* § 556(d); the right to submit proposed findings, conclusions and exceptions, *id.* § 557(c); the compilation of an exclusive record upon which the agency must base its decision, *id.* § 556(e); and limitations on ex parte communications and on the combination of prosecutorial and adjudicative functions, *id.* § 554(d).

St. Louis Fuel & Supply Co. v. FERC, 890 F.2d 446, 448 (D.C. Cir. 1989).

A proceeding to terminate a trading suspension is not an on-the-record adjudication governed by section 554 of the APA. Section 12(k)(1)(A) of the Securities Exchange Act of 1934 authorizes the Commission to enter a 10-day trading suspension "without any notice, opportunity to be heard, or findings based upon a record." *SEC v. Sloan*, 436 U.S. 103, 112 (1978); *see* 15 U.S.C. § 78*l*(k)(1)(A) (providing the Commission the power "summarily to suspend trading in any security … for a period not exceeding 10 business days" if "in its opinion the public interest and the protection of investors so require"). The statute does not expressly provide any recourse for the suspended entity—indeed, a suspension expires on its own terms—but Rule of Practice 550 allows "[a]ny person adversely affected by a [Section 12(k)(1)(A)] suspension" to "file a sworn petition with the Secretary, requesting that the suspension be terminated." 17 C.F.R. § 201.550(a). Under Rule 550, "[t]he Commission, in its discretion, *may* schedule a hearing on the matter, request additional written submissions, or decide the matter on the facts presented in the petition and any other relevant facts known to the Commission." 17 C.F.R. § 201.550(b) (emphasis added). Thus, a Rule 550 proceeding to terminate a trading suspension is an informal adjudication; the Commission has complete discretion whether to even hold a hearing. *Bravo Enters., Ltd.*, Exchange Act Release No. 75775, 2015 WL 5047983, at *6 n.51 (Aug. 27, 2015).

Neither the statute nor the rule requires that the proceeding be governed by section 554 of the APA. There is no requirement for notice and opportunity for a hearing, and no requirement for the proceeding to be conducted "on the record" with the right to present witness testimony and documentary evidence or to conduct cross-examination.[4] By contrast, in other administrative proceedings under the federal securities laws, such as Exchange Act Section 12(j) proceedings to suspend or revoke the registration of a security, the statute specifies that the matter must be "on the record after notice and opportunity for hearing," which triggers the APA's procedural requirements. 15 U.S.C. § 78*l*(j); *see Aageson Grain & Cattle v. U.S. Dep't of Agric.*, 500 F.3d 1038, 1044

[4] The Commission has separate rules for adjudications "not required to be determined on the record after notice and opportunity for hearing." 17 C.F.R. § 201.191(a). Those rules do not require the APA's procedures. In fact, they require little more than that the Commission issue a written decision and provide prompt notice of any adverse action or final disposition. 17 C.F.R. § 201.191(b).

(9th Cir. 2007) ("[T]he APA generally applies where an administrative hearing is required by statute or the Constitution.").[5]

Nano Magic argues that it is sufficient for EAJA purposes that Rule 550 allows the Commission to conduct a formal on-the-record adjudication, even though it does not require one. Reply, at 5 (Mar. 24, 2025). But that is not the correct standard for determining whether a proceeding is governed by section 554 of the APA. "What counts is whether the statute indicates that Congress intended to *require* full agency adherence to all section 554 procedural components." *St. Louis Fuel & Supply Co.*, 890 F.2d at 448–49. Here, no statute requires adherence to the APA's procedures in a proceeding to terminate a Section 12(k)(1)(A) trading suspension. Moreover, Rule 550 does not require the Commission to adhere to those procedures—to the contrary, it allows the Commission complete discretion to decide a petition to terminate a trading suspension in the manner it deems appropriate, with or without a hearing.

Nano Magic further argues that Rule 550's process for challenging a suspension is an "adjudication" under the APA because it results in a Commission order, and it is "adversarial" because the position of the government was represented by counsel. Reply, at 6–8. Yet Nano Magic ignores the fact that EAJA's definition of "adversary adjudication" also prescribes that the adjudication be conducted under section 554 of the APA, and the Rule 550 proceeding was not required to be conducted under that section.

Finally, Nano Magic argues that every adversarial proceeding where there is a due process right to be heard qualifies as an adversary adjudication under section 554, regardless of what language the statute or rule employs. Reply, at 9. Due process may require adherence to the APA's formal procedures in

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[5] When the Commission published its regulations implementing EAJA in 1982, it explained that "the Act permits awards" of fees in "on-the-record agency adjudications subject to 5 U.S.C. 554" and included an appendix listing the Commission administrative proceedings to which EAJA would apply, which included Exchange Act Section 12(j) suspension or revocation proceedings, but did not include Rule 550 proceedings on petitions to lift trading suspensions. Equal Access to Justice Rules, 47 Fed. Reg. 609, 609–10, 613 (Jan. 6, 1982). However, the Commission eliminated this appendix in its 1989 revisions to the regulations, and instead provided that "[t]he fact that the Commission has not identified a type of proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application." Equal Access to Justice Act Rules, 54 Fed. Reg. 53,050, 53,051 (Dec. 27, 1989) (codified at 17 C.F.R. § 201.33(b)).

certain administrative proceedings even if the statute is not explicit. *See, e.g.*, *Collord v. U.S. Dep't of Interior*, 154 F.3d 933, 935–37 (9th Cir. 1998) (recognizing that as to certain mining claims under the General Mining Law of 1872, a formal APA hearing under section 554 was required as a matter of due process, and therefore the proceeding was an adversary adjudication for EAJA purposes). However, due process is flexible and does not always require APA procedures or that an evidentiary hearing be held. *See Mathews v. Eldridge,* 424 U.S. 319, 334–35, 348–49 (1976); *Buckingham v. Sec'y of U.S. Dep't of Agric.*, 603 F.3d 1073, 1082 (9th Cir. 2010); *Cavin v. United States*, No. 90-5097, 1991 WL 244931, at *1 (Fed. Cir. Nov. 25, 1991) (because "due process does not require, in all instances, a formal administrative adjudication," the EAJA applicants "would still have to show that the opportunity … to submit documentary evidence and pleadings supporting their application for a patent was inadequate, and that a section 554 formal administrative adjudication was necessary to protect their alleged property rights"); *2-Bar Ranch*, 996 F.3d at 994–95 (similar). In this context, the Commission has found that Rule 550's limited post-deprivation procedures satisfy due process, and I am bound by the Commission's decision. *Decision Diagnostics Corp.*, Exchange Act Release No. 99439, 2024 WL 360862, at *3 n.22 (Jan. 29, 2024) (citing *Xumanii Int'l Holdings Corp. v. SEC*, 670 F. App'x 508 (9th Cir. 2016)). Even if, as Nano Magic suggests, the Commission violated its due process rights by failing to rule on its petition for more than four years, that does not mean that Rule 550 itself violates due process and that the APA's procedures should have instead applied.

Because the underlying proceeding is not an adversary adjudication, Nano Magic's EAJA application must be denied. Nevertheless, as noted above, I will address Nano Magic's prevailing party status without deciding the issue.

Prevailing Party

The Division contends that Nano Magic is not a prevailing party for EAJA purposes because by the time the Commission granted its petition to terminate, Nano Magic gained nothing from the decision. The trading suspension expired on its own after 10 days, and by 2023, Nano Magic was again being quoted on the over-the-counter markets. Answer, at 21–23.

The Division may be correct if Nano Magic is considered a plaintiff. "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties …." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989); *see also Lackey v. Stinnie*, 604 U.S. ---- , 145 S. Ct. 659, 671 (2025) (holding that a preliminary injunction alone does not render a plaintiff a prevailing party, and that a plaintiff prevails when a tribunal "conclusively resolves his claim by granting enduring relief on the

merits that alters the legal relationship between the parties"); *Perez-Arellano v. Smith*, 279 F.3d 791, 794 (9th Cir. 2002) (holding that the Supreme Court's definition of prevailing party, although provided in the civil rights context, also applies to EAJA). So, for example, an award of nominal damages is enough to make a plaintiff a prevailing party, but a declaratory judgment that results in no change in the defendant's behavior toward the plaintiff is insufficient. *Compare Farrar v. Hobby*, 506 U.S. 103, 112 (1992), *with Rhodes v. Stewart*, 488 U.S. 1, 4 (1988). The Commission's decision terminating the trading suspension granted Nano Magic no retrospective or prospective relief, and it did not resolve the merits of any claim. Although the trading suspension was expunged nunc pro tunc, Nano Magic received no tangible relief from its victory. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) ("[A] 'prevailing party' is one who has been awarded some relief by the court ….").

The Division maintains that Nano Magic, having petitioned to terminate the trading suspension, is a plaintiff. Oral Arg. Tr. 78, 88. Unlike in circumstances where the Commission institutes administrative proceedings to bar a person from the securities industry or revoke a company's registration, it is arguable that the Commission did not subject Nano Magic to an ongoing proceeding in which it had to defend itself. *See Nano Magic*, 2021 WL 3666995, at *1 n.4 (explaining that ordinarily, "[a] trading suspension is not a finding of wrongdoing"). It issued a 10-day suspension which terminated on its own accord, although it left long-lasting consequences in its wake. There were no further proceedings until Nano Magic filed a petition to terminate the suspension. The Division's argument might make sense if Nano Magic is regarded like a plaintiff who sues for relief following alleged misconduct by a state actor. *See Fox v. Vice*, 563 U.S. 826, 833 (2011) (holding in the civil rights context that a plaintiff can recover fees "from the defendant—the party whose misconduct created the need for legal action").

However, the Division's argument is unconvincing. During the 10-day suspension period, Nano Magic's only recourse from the trading suspension and the collateral consequences that could last for years was to file a Rule 550 petition. When the Commission entered the trading suspension, it placed Nano Magic in a position where it had to defend itself against an ongoing legal disability—its inability to trade. That Nano Magic filed the petition to commence the Rule 550 proceeding does not change the fact that it was on the defensive.

If Nano Magic is a defendant, a different standard to determine whether it prevailed applies. *See Lackey*, 145 S. Ct. at 669 n.* ("A different body of caselaw addresses when a *defendant* is a 'prevailing party' for the purposes of other fee-shifting statutes."). The Supreme Court held:

> Plaintiffs and defendants come to court with different objectives. A plaintiff seeks a material alteration in the legal relationship between the parties. A defendant seeks to prevent this alteration to the extent it is in the plaintiff's favor. … The defendant has … fulfilled its primary objective whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision.

CRST Van Expedited, Inc. v. EEOC, 578 U.S. 419, 431 (2016). Unlike a plaintiff, a defendant prevails merely by rebuffing the plaintiff's challenge. When the Commission retroactively terminated the suspension, it wiped out the trading suspension. Nano Magic thus rebuffed the Division, which had sought the trading suspension against Nano Magic in the first place and persisted in opposing Nano Magic's attempt to have the trading suspension terminated.

Other considerations further suggest that Nano Magic should be considered a prevailing party. The Court in *CRST* explained that a nonmerits dismissal of an unreasonable claim can still be grounds for fee recovery by a defendant because "significant attorney time and expenditure may have gone into contesting the claim," and "Congress could not have intended to bar defendants from obtaining attorney's fees in these cases on the basis that, although the litigation was resolved in their favor, they were nonetheless not prevailing parties." *Id.* at 434. This logic applies here. Nano Magic spent significant time and money defending itself against the trading suspension, eventually obtaining its retroactive termination. To say that it is not a prevailing party despite incurring substantial financial costs to vindicate its position seems contrary to the purpose of EAJA.

Finally, although Nano Magic received no tangible relief from the Commission's decision, that's only because it took so long for the Commission to issue it. If the Commission had terminated the trading suspension during the 10 days when it was in effect, Nano Magic would unquestionably be a prevailing party. Similarly, had the Commission retroactively terminated the suspension before 2023, Nano Magic—having never been suspended—would presumably have regained its piggyback exemption automatically, which is also a tangible form of relief. It seems unfair for Nano Magic to lose its prevailing party status simply because the Commission took more than four years to issue its decision. Indeed, this case raises serious questions about the process by which the Commission can summarily suspend the trading of an issuer's securities yet not provide a forum for the issuer to obtain meaningful relief for four years.

In sum, I am inclined to think that Nano Magic is a prevailing party under EAJA. Yet I do not decide the issue as it makes no difference to the outcome of the case.

Order

Because the underlying proceeding is not an adversary adjudication under section 554 of the Administrative Procedure Act, Nano Magic's application for fees and expenses is DENIED.

This initial decision shall become effective in accordance with and subject to the provisions of Section 201.57 of the Commission's regulations pertaining to the Equal Access to Justice Act, 17 C.F.R. § 201.57. Nano Magic or Division counsel may file with the Commission a petition for review of this initial decision within 21 days after service of the decision. 17 C.F.R. §§ 201.57, .410(b). A motion to correct a manifest error of fact may be filed within 10 days of the initial decision. *See* 17 C.F.R. §§ 201.111(h), .410(b). If a motion to correct a manifest error of fact is filed, then a party shall have 21 days to file a petition for review from the date of the order resolving such motion. *See* 17 C.F.R. § 201.410(b).

If neither Nano Magic nor Division counsel seek review and the Commission does not take review on its own initiative, this initial decision "shall become a final decision of the Commission" on August 22, 2025. 17 C.F.R. §§ 201.57, .160(a).

/s/ Dean C. Metry
Chief Administrative Law Judge