UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19787-EAJ

In the Matter of

NANO MAGIC INC.

DIVISION OF ENFORCEMENT'S ANSWER TO PETITIONER'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND OTHER EXPENSES PURSUANT TO 17 C.F.R. § 201.31, *ET SEQ.*

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Pursuant to Rule of Practice 201.52, the Division of Enforcement hereby respectfully answers and objects to Petitioner Nano Magic Inc.'s ("Petitioner") Application for an Award of Attorneys' Fees and Other Expenses Pursuant to 17 C.F.R. § 201.31, *et seq.* ("Application").[1]

I. INTRODUCTION

This Equal Access to Justice Act ("EAJA") proceeding arises from a single, 10-day trading suspension of Petitioner's "NMGX" securities[2] ordered by the Commission on April 30, 2020—at the outset of the global COVID-19 pandemic and during a time of intense uncertainty in the financial markets and beyond—under Section 12(k)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78l(k)(1). During the two-month period that preceded the trading suspension, Petitioner's stock price and trading volume dramatically increased alongside misleading information in the marketplace suggesting Petitioner had a patent for a disinfectant that killed "coronavirus" and was launching products to combat the pandemic. Instead of refuting this misinformation, Petitioner announced in a press release that it was "eager to join the Covid-19 fight." Those circumstances fully justified the Division's actions in seeking the trading suspension and the Commission's decision to grant it.

Petitioner's efforts to attack the integrity of the Division staff through repeated and baseless misconduct allegations distract from the fatal procedural and substantive flaws in the Application. Unlike many traditional fee-shifting statutes, EAJA petitions like this one must be closely scrutinized because the statute's objective is to address only unjustified litigation initiated by the government. Nothing of the sort happened here.

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[1] By Order dated January 28, 2025, the Administrative Law Judge extended the Division's time to file this Answer up through and including February 21, 2025.

[2] Petitioner's common stock trades under the symbol "NMGX" and is classified as a penny stock under Commission regulations.

The Application should be denied for three reasons—the first two of which are threshold procedural issues Petitioner cannot overcome. *First*, the trading suspension and the proceedings underlying this fee petition are not an "adversary adjudication" because they were not an "adjudication *required* by statute to be determined *on the record after opportunity for an agency hearing*." 5 U.S.C. §§ 504(a)(1), 554(a) (emphasis added); Rule of Practice 201.33. A trading suspension under Exchange Act Section 12(k)(1) is entered *ex parte* and does not provide an aggrieved party the right to challenge the suspension in an adjudication that requires an on-the-record hearing. This procedural deficiency alone dooms Petitioner's application.

Second, even if Petitioner establishes an "adversary adjudication," it is not a "prevailing party." Despite Petitioner's extensive discussion of years of litigation, various proceedings including a mandamus petition and, ultimately, the Commission's October 2024 order vacating the trading suspension *nunc pro tunc*, Petitioner was awarded no actual relief. The suspension had long expired at the time of the termination order and it neither required specific action nor altered the legal relationship between the parties. The termination order's silence on its reasoning further undermines Petitioner's claimed "prevailing party" status.

And *third*, turning to the merits, the Division's position in seeking and later defending the trading suspension was "substantially justified" based on the misinformation in the marketplace and its clear impact on Petitioner's stock price. It is irrelevant whether Petitioner itself made or authorized the misstatements, or intentionally (or inadvertently) contributed to them. Even accepting Petitioner's version of events, its purported clean hands do not change the fact the Division had more than a reasonable basis in both law and fact to seek the suspension. Neither do Petitioner's misconduct allegations which, as demonstrated below, are meritless and contradicted by the record. At bottom, it is undisputed there was significant misleading information in the marketplace suggesting Petitioner

had a patent for a product that killed coronavirus and the company was poised to reap the benefits of this technology in combatting the global pandemic. The Division's actions in seeking a trading suspension were meant to—and did—protect investors from unwittingly making investment decisions based on this misinformation.

Petitioner is not entitled to an EAJA fee award, and the Administrative Law Judge therefore should deny the Application in its entirety.[3]

II. FACTUAL AND PROCEDURAL HISTORY

The Division sets forth the factual background for the trading suspension and an overview of the proceedings in the underlying matter.

A. Marketplace Claims About Petitioner's Coronavirus Disinfectant Patent

Between at least February 24, 2020 and April 14, 2020, at the outset of the global COVID-19 pandemic, there were approximately 60 promotional messages posted from accounts on Twitter and InvestorsHub.com—many by the same users—discussing NMGX in connection with coronavirus and claiming, among other things, that Petitioner held a patent for a product that kills human coronavirus. (Information Before the Commission at the Time of the Trading Suspension, and accompanying declaration, May 15, 2020 ("Information Statement"), at ¶ 10.)[4] The posts implied the product was capable of killing the virus that causes COVID-19. (*Id.*) Examples of these posts include:

- February 24, 2020: InvestorsHub user luke424 posted, among several other similar posts in the following days, "PENC [the prior trading

[3] For the reasons below, if the Administrative Law Judge finds Petitioner is entitled to relief, the Division respectfully requests an order of further proceedings under Rule of Practice 201.55 with respect to the specific fees and expenses sought by Petitioner in the Application. The Application is facially deficient in numerous ways and does not support the claimed fees.

[4] References to the Information Statement, other filings, and the Commission's orders in the underlying matter are to the title and date as reflected on the docket.

symbol for NMGX] has a patent that kills Coronavirus 99.99% of the time";

- 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;

- 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;

- March 1, 2020: Twitter user @JoeDTrader posted, "What?! $PENC already have [sic] the solution to kill the Corona Virus since 2015?! All governments should get a hold of this company ASAP! #CoronaVirusUpdate";

- March 2, 2020: Twitter user Dream85705614 posted, "$PENC 780k float #coronavirus play. People are starting to find it";

- 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; and

- 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, there were over 450 posts during the time period on the InvestorsHub message board, with additional posts on Twitter, promoting NMGX generally and discussing whether to purchase NMGX stock. (*Id.* at ¶ 11.) This message board activity represented a significant increase from previous periods. (*Id.*) Indeed, during the entire year of 2019, the InvestorsHub message board contained only nine posts discussing PENC (now known as NMGX). (*Id.*)

B. Petitioner's April 7, 2020 Statement

On April 7, 2020, Petitioner issued a press release titled "Nano Magic Inc., Formerly PEN Inc., Announces New Name, New Trading Symbol, Rebrand, and New Product Line Coming Soon" ("April 7 Press Release"). (*Id.* at ¶ 15.) According to the press release, "[t]he 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.*) The release further stated: "In fact, [Tom] Berman [Petitioner's CEO] was excited to share that they are eager to join the Covid-19 fight." (*Id.*)

No specific information was provided in the April 7 Press Release, however, as to how Petitioner actually planned to "join the Covid-19 fight." (*Id.* at ¶ 16.)

C. Increase in Trading Price and Volume of NMGX

At the same time of the promotional activity in the marketplace, there was a significant increase in NMGX's stock price and trading volume. Indeed, in the three months prior to February 24, 2020, NMGX's closing share price fluctuated between $0.55 and $0.83 with an average share price of $0.66 and an average daily trading volume of 1,626 shares. (*Id.* at ¶ 22.) On 63% of the trading days during this period, trading volume was less than 500 shares. (*Id.*)

During just the first two weeks of the promotional activity, however, NMGX's share price more than doubled, from a closing price of $0.67 per share to $1.45. (*Id.*) The closing price spiked during this period on March 2, 2020—the day after the post referenced above from Twitter user @JoeDTrader asserting that Petitioner already has had "the solution to kill the Corona Virus since 2015" —to $2.10 per share, a 256% increase from the closing price on the day before the promotional activity started. (*Id.*) During this period, NMGX's average trading volume also increased 770% from

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the previous three months to 12,522 shares, and its average closing price increased 218% from the previous three months to $1.44. (*Id.*)

The closing price of NMGX continued to fluctuate between $0.95 and $2.24 from March 9, 2020 until the issuance of the April 7 Press Release, with an average 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 before the start of the promotional activity. (*Id.* at ¶ 23.) Following issuance of the April 7 Press Release, the closing 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 promotional activity began. (*Id.*)

D. FINRA Inquiry and Division Interview

On April 14, 2020, following issuance of April 7 Press Release, FINRA's Office of Fraud Detection and Market Intelligence ("FINRA") telephoned Petitioner and sent written questions in which FINRA inquired about, among other things, (i) whether Petitioner was aware of any promotion of NMGX; (ii) whether Petitioner at the time had any products or patents "specifically designed or obtained pursuant to COVID-19 relief efforts"; (iii) whether one of Petitioner's patents [10440958: Disinfectant Material Comprising a Copper Halide Salt and Surfactant) ("NMGX Patent")] could be described as a "Corona Virus patent"; and (iv) any operations or business activities that Petitioner "specifically implemented pursuant to COVID-19." (Petition to Terminate Trading Suspension, May 6, 2020 ("550 Petition"), at 20 & Ex. C.)

Petitioner responded by letter three days later in which it stated (i) it was not aware of any promotion; (ii) it had a "formula suited to COVID-19 relief and we have accelerated its development in light of the pandemic"; (iii) the NMGX Patent was issued on October 15, 2019, as part of "research and development work focused on clean and sanitized surfaces," and that experimental testing for

the patent was performed against Human Coronavirus 229E;[5] and (iv) it added povidone-iodine ("PVP-I") to a product formula it developed in 2015, had conversations with the EPA about re-registering PVP-I, and had been working with a laboratory to complete testing to re-register and sell the product as a sanitizer. (*Id.* at Ex. D.)

On April 24, 2020, the Division conducted a telephonic interview with Petitioner's CEO, Tom Berman, and its General Counsel, Jeanne Rickert, both of whom stated they were not aware of any promotional activity involving NMGX in the preceding two months, including any claims related to COVID-19. (Information Statement declaration, at ¶ 18.) Berman was aware, however, that NMGX's stock price had increased during that time, but noted he was "not focused on the stock price," and did not know the reason for the increase. (*Id.* at ¶ 27.)

While Berman referenced the NMGX Patent, he acknowledged during the interview the disinfectant never had been tested with respect to SARS-CoV-2, the virus that causes COVID-19. (*Id.* at ¶ 19.)[6] He also referenced Petitioner's attempt to re-register PVP-I, but acknowledged additional testing was needed to determine whether it could be used against SARS-CoV-2. (*Id.*) During the interview, he appeared to Division staff to be unfamiliar with the EPA's testing processes and did not know what testing would be required to establish approved uses for the re-registered product. (*Id.*) Berman also stated he did not believe PVP-I was approved at the time to treat human coronavirus. (*Id.*) In fact, at the time of the interview, PVP-I was not an ingredient approved by the EPA for any use, let alone against human coronavirus or SARS-CoV-2. (*Id.*)

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[5] Human Coronavirus 229E is a common type of coronavirus that causes mild to moderate illnesses such as the common cold, but at the time, the Centers for Disease Control and Prevention stated that 229E "*should not be confused* with coronavirus disease 2019." (Information Statement declaration, at ¶ 13, emphasis in original.)

[6] In fact, neither the copper halide salt nor the surfactant in the NMGX Patent were ingredients approved by the EPA for use against SARS-CoV-2, and the patent contained no claims regarding COVID-19. (Information Statement declaration, at ¶ 12.)

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Berman further stated he used the phrase "eager to join the Covid-19 fight" in the April 7 Press Release because Petitioner was "trying to sell cleaning products to ultimately provide cleaner surfaces to hopefully rid dirt and grime and nastiness from people's lives." (*Id.* at ¶ 20.) He noted that Petitioner "would love to be able to develop a product to join the COVID-19 fight," but acknowledged that, at the time, the company had no specific plan to do so, other than the attempt to re-register PVP-I. (*Id.*)

Following the interview, Division staff spoke with the product manager at the EPA's Office of Pesticide with whom Berman had previously communicated regarding re-registration of PVP-I. (*Id.* at ¶ 21.) The product manager confirmed PVP-I was not registered with the EPA, and thus any review of a product containing PVP-I actually would be a de novo review, not a re-registration. (*Id.*) According to the product manager, that review would entail a lengthy, complex, and costly process involving many studies to demonstrate, among other things, the toxicity of the new active ingredient, and would take an average of approximately two years. (*Id.*)

E. The Trading Suspension

On the Division's recommendation, the Commission entered a temporary order of suspension of trading of Petitioner's NMGX penny stock on April 30, 2020. *See Nano Magic, Inc.*, Rel. No. 88789, 2020 WL 2097884 (Apr. 30, 2020) ("Trading Suspension"). The suspension commenced on May 1, 2020 and ended on May 14, 2020. (*Id.* at 2.) The Commission was "of the opinion that the public interest and the protection of investors" required that trading be suspended in NMGX "because of questions regarding the accuracy and adequacy of information in the marketplace since at least February 24, 2020." (*Id.* at 1.) Those questions related to "publicly available information" concerning NMGX including:

> (a) information in the marketplace claiming that [Petitioner] has a patent for a disinfectant that kills "coronavirus"; and (b) a statement

> made by NMGX on April 7, 2020 regarding [Petitioner's] involvement in the fight against COVID-19.

(*Id.*) By its own terms, the basis for the Trading Suspension is limited to "publicly available information" about Petitioner and its products. No mention is made of Petitioner's ownership or its affiliates, or of any trading in NMGX by Petitioner or its affiliates.

F. Petitioner's Subsequent Actions

Petitioner had opportunities to correct the confusion created by the promotional activity, following both its correspondence with FINRA regarding the issue and the interview with Division staff, but Petitioner did not issue a clarifying statement after either of those interactions. (Order Denying Motion to Compel, Apr. 28, 2022 ("Motion to Compel Order"), at 2.) In fact, as of April 30, 2020, when the Commission entered the Trading Suspension: (i) Petitioner had not disavowed the promotional activity concerning its patent; (ii) it made no subsequent claims regarding any COVID-19 related products or business activities; and (iii) there was no mention of either COVID-19 or the Human Coronavirus 229E disinfectant on its website. (Information Statement declaration, at ¶¶ 14, 16.)

Eventually, however, on May 6, 2020—*after* the Trading Suspension already was in effect—Petitioner issued a press release ("May 6 Press Release") titled "Nano Magic Inc. Responds to Securities Trading Suspension." (550 Petition, at Ex. A.) The release quoted the Trading Suspension's reference to "information in the marketplace claiming that [Petitioner] has a patent for a disinfectant that kills 'coronavirus,'" but stated that neither Petitioner nor its management was the source of that information. (*Id.* at 1.) The release went on to "caution[] investors" only to rely on information released by Petitioner, and further referenced the Commission's 2013 investor alert warning of the risks of information posted on internet message boards in which it is "nearly impossible for investors to tell the difference between fact and fiction." (*Id.*) Although the May 6

Press Release confirmed that testing on Petitioner's patents had occurred prior to 2015, and that there was "no reference to the specific strain of coronavirus that is the subject of current popular and widespread interest," Petitioner did not affirmatively state in the press release the company did not have a patent for a disinfectant that killed COVID-19. (*Id.*)

G. The Underlying Proceedings

An issuer adversely affected by an order under Exchange Act Section 12(k)(1) may petition the Commission, under Rule of Practice 201.550, to terminate a temporary trading suspension and set forth the reasons why the issuer believes the suspension was not necessary. Petitioner here did so on May 6, 2020 by filing the 550 Petition—the same day it issued the May 6 Press Release.

As reflected on the docket, the underlying proceedings spanned the better part of four years and involved numerous filings by Petitioner—some of which were authorized by the Commission but many of which were not (as explained further below). The Division opposed the 550 Petition and defended the Trading Suspension. (Division's Opposition Brief in the Matter of Nano Magic Inc., May 21, 2020 ("Division Opposition Brief")). Petitioner then filed its closing submission in support of the 550 Petition. (Petitioner's Closing Submission in Support of Termination of Trading Suspension with Exhibits A-C, May 27, 2020 ("Closing Submission")).

In August 2021, long after the Trading Suspension had expired, Petitioner was asked by the Commission what additional prejudice it sustained during the pendency of the 550 Petition. (Order Requesting Additional Written Submissions, Aug. 18, 2021, at 2.) Petitioner responded it was prejudiced because of its "loss of the 'piggy-back' exemption and Caveat Emptor labeling." (Supplemental Filing of Petitioner Nano Magic Inc. Addressing Prejudice and Timeliness of Commission Consideration of Sworn Petition to Termination Trading Suspension Issued Pursuant to Section 12, Sept. 1, 2021 ("Supplemental Filing"), at 2.) Then, following restoration of its piggy-

back exemption, when asked for additional briefing concerning whether this matter had become moot, the parties' submissions collectively made clear there really was no longer any continuing legally cognizable injury capable of redress in this proceeding. (*See* Petitioner's Opening Brief Addressing Non-Mootness of Rule 550 Petition to Terminate Trading Suspension, May 8, 2024 ("Opening Brief"), at 7-13; Division of Enforcement's Response to Applicant Nano Magic's Supp Briefing to Termination the Trading Suspension, May 29, 2024 ("Division Response"), at 2-5).[7]

On October 10, 2024, the Commission granted the 550 Petition and denied all outstanding motions in the underlying matter as moot. (Order Granting Petition to Terminate Trading Suspension, Oct. 10, 2024 ("Termination Order")). The Commission stated: "We grant Nano Magic's Rule 550 petition and vacate the trading suspension order *nunc pro tunc* April 30, 2020." (*Id.* at 2.) The Commission highlighted that "[i]n granting relief, we note that the trading suspension has expired and that Nano Magic has regained piggyback eligibility." (*Id.* at 1-2.) By doing so, the Commission acknowledged there was no continuing legally cognizable injury capable of redress in the proceeding, but nevertheless "f[ound] it appropriate to exercise our discretion to entertain the petition" "given the parties' agreement that the Commission should decide the matter." (*Id*.)

But the Commission did not include any substantive discussion in the Termination Order concerning its resolution of the 550 Petition—making it impossible to ascertain whether the resolution was based on the actual merits, or whether the Commission considered any particular fact to be material in its decision. The Commission did not address the evidence of record demonstrating that: (i) the marketplace claims suggesting Petitioner had a patent for a disinfectant that killed COVID-19 were, in fact, inaccurate; (ii) the April 7 Press Release—whether intentionally or not—

[7] The Division argued that although Petitioner did "not have a continuing cognizable injury capable of redress" it was "in the public interest pursuant to the substantial discretion afforded to the Commission in controlling its case docket for it to reach the merits . . . ." (Division Response, at 1.)

augmented the effect of the misinformation by stating the company was "eager to join the Covid-19 fight"; and (iii) the trading price and volume of NMGX increased significantly during the period of misinformation in the marketplace. (*Id.*) Additionally, because the Trading Suspension already had expired, and Petitioner already had regained its piggyback exemption, the Commission had no further legal relief to grant at the time the Termination Order was issued.

III. ARGUMENT

The Administrative Law Judge should deny the Application in its entirety. Petitioner cannot demonstrate its eligibility for an EAJA award because the underlying matter is not an "on the record" adversary adjudication under 5 U.S.C. § 554 required by Rule of Practice 201.33, and Petitioner is not a "prevailing" party under Rule of Practice 201.35(a). Even if Petitioner were eligible, the Application still fails because the Division's position in seeking and defending the Trading Suspension was substantially justified.

A. Petitioner's Claims of Misconduct are Spurious and Unsupported by Evidence

Before turning to its procedural and substantive arguments under the EAJA, the Division first addresses the spurious assertions of misconduct against the staff of the Philadelphia Regional Office ("PLRO") on which the Application is predominantly—and nearly singularly—based and that are as meritless as they are irrelevant. Not only are these allegations based on pure speculation and contrary to the actual record, but they also have been addressed and rejected by the Commission in the underlying matter. Even Petitioner must concede these allegations do not relate to the misinformation in the marketplace concerning the company that substantially justified the Trading Suspension. And they can in no way overcome the procedural shortcomings of the Application.

These peripheral matters stem from Petitioner's motion to compel the action memorandum in the underlying matter—a motion that was denied by the Commission in a reasoned opinion almost

three years ago. (*See* Motion to Compel Order.) The motion concerned Petitioner's objection to the Division's identification of "substantive facts" in the Information Statement as opposed to "all the information" that was before the Commission, as requested by the Commission's prior order (*see* Order Requesting Additional Written Submissions, May 8, 2020 ("Written Submissions Order")). In denying the motion to compel, however, the Commission put this issue to rest by comparing the action memorandum with the Information Statement; disclosing four additional facts; and finding that "collectively, this [additional] information, paired with the information included in the Information Statement and Declaration, fully and fairly set forth all of the factual information that was before us when we suspended trading in [NMGX]." (Motion to Compel Order, at 2.)

One of the additional facts disclosed by the Commission—which Petitioner emphasizes repeatedly throughout the Application—was that during the time NMGX was being promoted, two trading accounts held by Ronald Berman, the father of Tom Berman (Petitioner's CEO), sold 1,310 NMGX shares and recognized trading profits of $3,367. (*Id.* at 2.) Petitioner notes, however, those accounts were held not by Ronald Berman, but instead by *Robert* Berman, Ronald's now-deceased brother. (Application ("App."), at 14-15.)

As acknowledged more than two and half years ago, the Division's staff inadvertently attributed certain trading in the stock of NMGX to Ronald Berman instead of his brother Robert Berman based on information that it was provided during the investigation that turned out to be inaccurate. PLRO was forthright with the Commission—and Petitioner—when it explained the discrepancy:

> With respect to the March 2020 trading discussed in NMGX's Supplemental Briefing, the Division had attributed this trading to Ronald Berman, a Director of NMGX and the father of NMGX's CEO, based on information provided to it at the time that was later revealed to be incorrect. Regardless, however, of who placed these trades, this issue is not relevant to the misinformation in the market at

> the time of the suspension. Rather, it was included in the action memorandum only to communicate to the Commission that the Division intended to further investigate a separate issue, namely the circumstances surrounding the timely trading, which we now know was conducted not by Ronald Berman, but by his brother, Robert Berman.

(Division Motion to Seek Leave to Respond to Applicant Supplemental Briefing in Further Support of Applicant Motion to Compel and Response in Opposition to Applicant Supplemental Briefing with Certificate of Service, June 2, 2022 ("PLRO Motion for Leave"), at 4-5). As such, the discrepancy was merely the result of incorrect information provided to the staff and was included only to alert the Commission of the staff's intention to investigate a separate issue and *not* as a basis for the Trading Suspension. Accordingly, it simply is not the case, as Petitioner now claims in the Application, that PLRO "lied to and misled" the Commission to obtain the suspension. (App., at 1.)[8]

What is more, Petitioner amplifies its attempt to distract from the sole issues at stake in this EAJA proceeding by misrepresenting what the Commission said in the Motion to Compel Order. The Motion to Compel Order does not state *anywhere* that the Commission "relied" on any particular fact in imposing the Trading Suspension, or that it considered any particular fact to be "material" in its decision. Rather, the Order simply recites the information "that was before" the Commission when

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[8] This discrepancy prompted Petitioner's needless filing of supplemental briefing in further support of its previously denied motion to compel, in which it asked the Commission to reconsider the request for the action memorandum. (*See* Supplemental Briefing in Further Support of Motion to Compel Production of Information before the Commission at Time of Trading Suspension Issued with Exhibits A and B, May 16, 2022 ("Supplemental Briefing")). PLRO then sought leave to respond. (*See* PLRO Motion for Leave.)

Petitioner also took issue in the Supplemental Briefing with the three additional facts disclosed by the Commission in the Motion to Compel Order, but its arguments were unavailing. Indeed, in light of its statements in the May 6 Press Release, Petitioner was hard-pressed to claim there was no "confusion" in the marketplace (Supplemental Briefing, at 5); whether or not the Division asked Tom Berman if Petitioner was relying on the Regulation D exemption for its private offerings does not change the fact that no Form D was filed (*id.* at 6; Information Statement, at ¶ 25); and Ronald Berman's ownership of 10.2% of NMGX's common stock was not "innuendo" to support the Trading Suspension (Supplemental Briefing, at 6) because, as the Division explained, the stock ownership was part of the staff's intention to investigate a separate issue.

Notably, the Commission did not grant Petitioner's request for reconsideration.

the suspension was entered. (*See* Motion to Compel Order, at 2.) In addition, as noted above, the Termination Order does not provide any reasoning as to why the Commission vacated the Trading Suspension. For Petitioner to assume the original suspension or the ultimate termination were based on the discrepancy, or on any argument in particular that it made in its filings in the underlying matter, is nothing but conjecture. Indeed, in light of PLRO's forthright explanation, the mere suggestion the staff—with no apparent reason for ill will against Petitioner—set out purposely to conflate *Ronald* and *Robert* Berman's names and thereby attribute trading profits of just over $3,000 to the wrong relative of Petitioner's CEO as the means to mislead the Commission into granting an unwarranted 10-day trading suspension, and that it *worked*, defies logic.

What is certain, however, is the Commission's own stated reasons, in the Trading Suspension itself, as to why the suspension was necessary—that is, because of the *publicly available information* concerning (i) claims in the marketplace that Petitioner had a patent for a disinfectant that killed "coronavirus"; and (ii) a statement by Petitioner regarding the company's involvement in the fight against COVID-19. (Trading Suspension, at 1.) Petitioner even concedes these stated reasons were the "sole justification for the suspension." (App., at 11.) The Commission says nothing in the Trading Suspension about Petitioner's ownership, Petitioner's affiliates, or any trading in NMGX by Petitioner or its affiliates. It is thus not possible to read between the lines, as Petitioner invites through the Application, when no lines are even there. There simply is no evidence in the record the discrepancy played any role in the Commission's consideration of the trading suspension.

Having opted for tangents and distractions, Petitioner instead could have complied with its obligation under Rule of Practice 201.41 and explain in the Application why it believes the Division's position with respect to the Trading Suspension "was not substantially justified." But as set forth in Section D below, the Division had a reasonable basis to seek and defend the suspension. It is thus not

hard to fathom why Petitioner would choose to crowd the Application with meritless claims and avoid the actual facts supporting the suspension. The Administrative Law Judge therefore should reject Petitioner's attempt to distract from the only matters properly at issue in this proceeding through its reliance on these irresponsible, inappropriate, and baseless accusations of professional misconduct.

B. The Equal Access to Justice Act

"The governing principle of the [EAJA] is that the 'United States should pay those expenses which are incurred when the government presses unreasonable positions during litigation.'" *Matthews v. U.S.*, 713 F.2d 677, 683-84 (11th Cir. 1983) (quoting *Goldhaber v. Foley,* 698 F.2d 193, 197 (3d Cir. 1983)). Congress, by enacting EAJA, created a substantial exception to the general rule set forth in *Alyeska Pipeline Serv., Co. v. Wilderness Soc'y,* 421 U.S. 240, 257 (1975), which held that parties to a lawsuit generally must bear their own legal fees and expenses.

Fee claims arising from administrative proceedings, such as this matter, are governed by the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*. ("APA"). Under Section 504 of the APA, 5 U.S.C. § 504, the Commission has adopted regulations for EAJA applications arising in Commission administrative proceedings. *See* Rules of Practice 201.31-201.60. Because the EAJA is a partial waiver of sovereign immunity, however, it must be strictly construed. *Ardestani v. I.N.S.*, 502 U.S. 129, 137 (1991); *Donald F. Lathen, Jr., et al.*, Initial Decision, Rel. No. 1259, 2018 WL 4143861, at *3 (Aug. 30, 2018). An applicant must file a timely petition and meet certain eligibility requirements. Rules of Practice 201.34, 201.44.[9] In addition, pursuant to Rules 201.33 and 201.35, the underlying matter from which the application arises must qualify as an "adversary

[9] The Division does not dispute the Application is timely under Rule 201.44 or that Petitioner's net worth and employee numbers appear to be within the limits imposed on corporate applicants under Rule 201.34. The Division points out, however, that Petitioner has not complied with the following additional requirements: (i) reporting the aggregate net worth of the company's covered affiliates under Rule 201.34(f); and (ii) providing the net worth exhibit under Rule 201.42(a). (*See* 550 Petition, at 5 (noting Petitioner's directors own or control approximately 85% of NMGX's outstanding common stock)).

adjudication" under 5 U.S.C. § 554, and the applicant must be a "prevailing party" under 5 U.S.C. § 504(a)(1). If the applicant satisfies the threshold requirements and the underlying matter is properly qualified, it may receive "an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the Office or Division over which the applicant has prevailed was substantially justified." Rule of Practice 201.35. Reasonable fees are capped at a maximum rate of $75.00 per hour pursuant to Rule 201.36, and costs and other expenses are subject to additional limitations.

Importantly, the EAJA "is not intended to be an automatic fee-shifting device in cases where an applicant prevailed." *Michael Flanagan, et al.,* Initial Decision, Rel. No. 241, 2003 WL 22767598, at *4 (Nov. 24, 2003) ("*Flanagan I*"). Rather, EAJA's aim is to redress unjustified litigation initiated by the government. *See SEC v. Price Waterhouse,* 41 F.3d 805, 809 (2d Cir. 1994) (Leval, J., dissenting in part from denial of EAJA award: "The provisions of the EAJA . . . are designed to compensate victims of *unjustified* litigation by the Government . . . [and] to furnish relief from such governmental litigation abuse.") (emphasis in original); *Jones v. Hodel,* 685 F. Supp. 4, 7 (D.D.C. 1988) ("Congress enacted EAJA to 'reduce the enormous financial burden' that litigants would face in challenging abusive governmental tactics.").

As explained in detail below, this proceeding falls well outside the type of conduct the EAJA was intended to address. That the Commission ultimately vacated the Trading Suspension does not change the outcome here, and the underlying matter is a far cry from the type of unjustified governmental conduct the EAJA was meant to remedy.

C. Petitioner is Not Eligible for an EAJA Award

Petitioner contends it meets the threshold requirements for an award of fees and expenses under the EAJA. (App., at 9.) The Division submits, however, that Petitioner is unable to demonstrate

its eligibility for an EAJA award because neither the Trading Suspension nor the proceedings surrounding the 550 Petition is an "adversary adjudication" required by Rule of Practice 201.33, and Petitioner is not a "prevailing" party under Rule of Practice 201.35.

1. The Underlying Matter is Not An Adversary Adjudication

Petitioner is not eligible for an EAJA award because neither the Trading Suspension under Exchange Act Section 12(k)(1) that prompted the filing of the Application, nor the proceedings in the underlying matter surrounding the 550 Petition, is an "on the record" adversary adjudication under 5 U.S.C. § 554 as required by Rule of Practice 201.33.

To qualify for a fee award under the EAJA, the applicant must have been a party to an "adversary adjudication." Rule of Practice 201.34. "Adversary adjudication" is defined in 5 U.S.C. § 554 as "an adjudication *required* by statute to be determined *on the record after opportunity for an agency hearing*." *Id.* § 554(a) (emphasis added). Courts apply Section 554 exactly as it is written, requiring that the proceeding at issue be "subject to" or "governed by" the requirements in Section 554 to qualify as an "adversary adjudication."[10] *Ardestani*, 502 U.S. at 135-36; *Friends of Earth v. Reilly*, 966 F.2d 690, 692-96 (D.C. Cir. 1992); *see also Clarence Z. Wurts*, Initial Decision, Rel. No. 194, 2001 WL 1343997, at *4 n.8 (Oct. 31, 2001). Section 554(c) requires the proceeding be subject to the evidentiary procedures identified in 5 U.S.C. §§ 556 and 557, which include the taking of evidence, the presentation of a party's case or defense "by oral or documentary evidence," the right to conduct cross-examination, and a final decision with "findings and conclusions . . . on all the material issues of fact, law, or discretion presented in the record." *Id.* §§ 556(b), 556(d), 557(c).

To determine if a proceeding falls under Section 554, courts look to the statutory scheme at issue to see if Congress intended for the proceeding to be subject to section 554. *2-Bar Ranch Ltd.*

[10] None of the exceptions for this requirement identified in Section 554(a)(1)-(6) applies in this case.

P'ship v. U.S. Forest Serv., 996 F.3d 984, 994 (9th Cir. 2021); *GasPlus, L.L.C. v. U.S. Dep't of Interior*, 593 F. Supp. 2d 80, 90 (D.C. Cir. 2009). Courts also consider whether the party aggrieved by the proceeding had a due process right to an administrative hearing, in which case the agency would be required to observe Section 554's formal adjudication procedures. *See 2-Bar Ranch*, 996 F.3d at 994.

Neither the Trading Suspension nor the underlying proceedings pursuant to Rule of Practice 201.550 is an "adversary adjudication" under this test. The Exchange Act, under which the Commission has authority to implement a temporary trading suspension under Section 12(k)(1), does not provide an aggrieved party the right to challenge the suspension in an adjudication that requires an on-the-record hearing. *See* 15 U.S.C. § 78l(k) (describing process for summarily suspending trading in any security); *see also Bravo Enters. Ltd., et al.*, Rel. No. 75775, 2015 WL 5047983, at *2, 6 (Aug. 27, 2015) (noting 12(k)(1) suspensions are entered *ex parte* without any notice, opportunity to be heard, or findings based upon a record).[11] By contrast, a longer trading suspension under *Section 12(j)* of the Exchange Act *does* require Commission findings "on the record after notice and opportunity for a hearing" for the aggrieved party. *See* 15 U.S.C. § 78l(j). Notably, the Commission's adopting release for the Rules of Practice identifies a *Section 12(j)* suspension as an "adversary adjudication" under 5 U.S.C. § 554, but does *not* also identify a *12(k)(1)* suspension as such. *See* Adopting Release, *Rules of Practice*, 60 Fed. Reg. 32738, 32821 (June 23, 1995). Moreover, although Rule 201.550 provides a petitioner the right to challenge a suspension, it does

[11] An order effectuating a temporary trading suspension is only subject to review "as provided in section 78y(a)," *id.* § 78l(k)(5), which provides for review of Commission orders in federal court, *see id.* § 78y(a).

not *require* the Commission to make findings or hold an on-the-record hearing. Nor does it *require* the evidentiary procedures identified in 5 U.S.C. §§ 556 and 557.[12]

The lack of these procedures is fatal to Petitioner's argument that the underlying matter was an "adversary adjudication." *See 2-Bar Ranch*, 996 F.3d at 994-95 (administrative proceeding to challenge U.S. Forest Service's suspension of grazing permit was not adversary adjudication where relevant statutes "do not expressly require adjudications to be decided on the record after opportunity for agency hearing" and where due process did not require such procedures); *LePage's 2000, Inc. v. Postal Reg. Comm'n*, 674 F.3d 862, 868 (D.C. Cir. 2012) (Postal Regulatory Commission order to discontinue licensor's "nonpostal service" was not adversary adjudication where relevant statute required agency to make determinations, but did not require a hearing); *Family Television, Inc. v. SEC*, 608 F. Supp. 882, 884 (D.D.C. 1985) (SEC investigatory proceeding that did not result in a hearing on the record in front of an administrative law judge was not an adversary adjudication). Even if there were any ambiguities in the statutory language about whether the trial-like procedures identified in 5 U.S.C. §§ 554, 556, and 557 must occur in a Rule 201.550 proceeding—and there are not—these ambiguities must be strictly construed in favor of the government because, as noted above, EAJA operates as a partial waiver of sovereign immunity. *See Ardestani*, 502 U.S. at 137.

Any argument that due process required Petitioner to have an administrative hearing similarly would fail. As noted in previous Commission decisions, the procedure under Rule 201.550 allowing aggrieved parties to challenge a temporary trading suspension "satisfies the requirements

[12] The broader regulatory scheme under which the Commission promulgated Rule 550 also does not require an on-the-record hearing to challenge a temporary trading suspension. *See*, *e.g.*, 15 U.S.C. § 78d-1(b) (providing only a right to "review by the Commission" for a party adversely affected by a trading suspension under section 78l(k)); 15 U.S.C. § 78v (not requiring on-the record adjudications in connection with Commission "hearings"); Adopting Release, *Rules of Practice*, 60 Fed. Reg. at 32787 (not specifying an on-the-record proceeding for a petition under Rule 201.550).

of the Due Process Clause." *See Decision Diagnostics Corp.*, Rel. 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)); *Apotheca Biosciences Inc.*, Rel. No. 90779, 2020 WL 7632296, at *2 n.19 (Dec. 22, 2020) (also citing *Xumanii*). Accordingly, because Petitioner was not entitled to any additional procedural protections in challenging the Trading Suspension, such as an on-the-record hearing, the underlying matter cannot qualify as an "adversary adjudication."

2. Petitioner is Not a Prevailing Party

Even if there was an "adversary adjudication," the EAJA limits recovery to a "prevailing party," and the Commission's EAJA regulations provide that a "prevailing applicant may receive an award for fees and expenses" only under certain circumstances. *See* Rule of Practice 201.35(a); 5 U.S.C. § 504(a)(l). Petitioner, however, did not "prevail" here.

As Petitioner predicted, and consistent with its concerns at the outset of the proceedings below, this matter effectively became moot before the Commission ruled on the 550 Petition: "[Petitioner] submits that 'appropriate relief' in this narrow yet fully detailed factual narrative is termination of the suspension. That being the case, . . . it is not possible to turn back the clock, where *true relief and bona fide appropriate relief is terminating the trading suspension while it remains in effect*.") (Motion to Expedite Schedule for Submissions in Consideration of Sworn Petition to Terminate Trading Suspension Issued, May 8, 2020 ("Second Motion to Expedite"), at 2) (emphasis added).

Under applicable law, the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship between the parties" and that "change must be marked by 'judicial imprimatur.'" *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 422 (2016) (first quoting *Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989), then quoting *Buckhannon*

Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 605 (2001)). In other words, "[t]o be a prevailing party, 'a plaintiff must have been awarded some relief by the court.'" *Holman v. Vilsack*, 117 F.4th 906, 911 (6th Cir. 2024) (citing *Tenn. State Conf. of NAACP v. Hargett*, 53 F. 4th 406, 410 (6th Cir. 2022) (quoting *Buckhannon*, 532 U.S. at 603)) (quotation marks omitted). Litigation resulting in "a nonjudicial alteration of actual circumstances" or "the sought-after destination without . . . any judicial relief," however, does not confer prevailing party status. *Buckhannon*, 532 U.S. at 606; *see also Poland v. Chertoff*, 494 F.3d 1174, 1187 (9th Cir. 2007) (denying prevailing party status to a plaintiff who had not yet obtained "any relief on the merits of his claims," despite holding the plaintiff had established one of his claims).

Here, Petitioner is not a "prevailing party" under the EAJA because it cannot use the Termination Order "to take any specific action," *Holman*, 117 F.4th at 912, nor does the Termination Order cause a "material alteration of the legal relationship between the parties," *CRST*, 578 U.S. at 421-22. The Trading Suspension expired long before issuance of the Termination Order, and thus the Commission's decision to "vacate the trading suspension order *nunc pro tunc* April 30, 2020," provided no actual relief to Petitioner. (Termination Order, at 2.) Furthermore, prior to issuance of the Termination Order, Petitioner already had undertaken efforts to regain its piggyback eligibility. Therefore, the Commission did not—and could not—order that relief either. Indeed, the Termination Order noted "the trading suspension has expired and [] Nano Magic has regained piggyback eligibility," and suggested the only reason it would "entertain [the 550 Petition]" was "the parties' agreement that the Commission should decide this matter." (*Id.* at 1-2.) As a result, although the trading suspension did terminate (automatically after ten days), and Petitioner had regained its piggyback eligibility (of its own accord), Petitioner is not eligible for an award of fees and expenses

because "there is no judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605.

Accordingly, Petitioner cannot demonstrate it is a "prevailing party" and the Application therefore should be denied.

D. The Division's Position With Respect to the Trading Suspension was Substantially Justified

Assuming the underlying matter qualifies as an "on the record" adversary adjudication under Rule of Practice 201.33, and assuming further Petitioner is properly considered a "prevailing" party under Rule of Practice 201.35, the Application still should be denied because the Division's position with respect to the Trading Suspension was substantially justified.

Petitioner has conceded the operative inquiry in this EAJA proceeding with respect to the Division is the Trading Suspension:

> In other words, Nano Magic's potential claim for an award of fees and expenses under the EAJA stems entirely from the Commission's trading suspension in the first instance, and its continued refusal to decide the [550] Petition on the merits. *That* is what continues to harm Nano Magic, and *that* will be the basis for Nano Magic's EAJA fee application if the [550] Petition is granted.

(Applicant Nano Magic's Reply Brief Addressing Petition to Terminate Trading Suspension, June 5, 2024 ("Reply Addressing Non-Mootness"), at 9 (emphasis in original)). Rule of Practice 201.35(a) specifically provides that it is "the position of the Office or Division" to which the substantial justification analysis applies.[13]

[13] Petitioner also references what it terms *the Commission's* "continued refusal to decide the [550] Petition on the merits." Indeed, Petitioner's apparent dissatisfaction with the length of time it took the Commission ultimately to rule both on the 550 Petition and other filings in the underlying matter seems to pervade the Application in large part. To the extent this dissatisfaction serves as a basis for the fee petition, however, the Division notes it does not control the Commission's docket or the speed at which the Commission issues its rulings, and therefore cannot be faulted, or otherwise held to account, for any claimed delay. Indeed, the Division did not take a position on Petitioner's motion to expedite the proceedings.

As demonstrated below, and in compliance with Rule 201.35(a), the Division submits it was substantially justified in seeking the suspension in the first instance on the basis of the misinformation in the marketplace. In addition, given the evidence of record continued to demonstrate the misinformation corresponded with the significant increases in NMGX's trading price and volume, the Division was further substantially justified in defending the suspension in the underlying matter.

1. Standards Applicable to Substantial Justification

Petitioner correctly observes, in citing *Pierce v. Underwood*, 487 U.S. 552 (1988), that a position is "substantially justified" if it has a "reasonable basis both in law and fact" or if it is "justified in substance or in the main." (App., at 10.) Petitioner also notes the government's position can be justified in substance—even if ultimately incorrect—as long as a "reasonable person could think it correct." (*Id.*, citing *Pierce*, 487 U.S. at 566 n.2.) But Petitioner overlooks the specific standards adopted by the Commission when it considers EAJA applications—particularly those applicable to an underlying matter decided adversely to the Division. In other words, simply because the Commission disagreed with the Division on the merits does not mean the Division's position was not substantially justified. *Richard J. Adams*, Rel. No. 48146, 2003 WL 21539570, at *5 (July 9, 2003) ("Making the outcome of the underlying case dispositive would 'virtually eliminate the 'substantially justified' standard from the statute.'") (citation omitted); *Clarke T. Blizzard*, Rel. No. 2409, 2005 WL 1802401, at *3 (July 29, 2005) ("[C]onclusions we reached in the proceeding on the merits are not dispositive of the outcome of the matter before us now.").

Rather, an EAJA proceeding begins with an "independent evaluation." *Adams*, 2003 WL 21539570, at *5. The focus is not on the strength of the applicant's evidence or defenses in the underlying matter, but on "*the case presented by the Division*." *Robert L. McCook*, Rel. No. 47572, 2003 WL 1542104, at *3 (Mar. 26, 2003) (emphasis added); *see also Rita C. Villa*, Rel. No. 42502,

2000 WL 300264, at *6 (Mar. 8, 2000) ("[T]he determination of whether there was substantial justification to initiate a proceeding must be made largely on the basis of the evidence submitted by the Division.").

The Division's case is considered "substantially justified" if it satisfies a reasonable person—that is, if it has a reasonable basis in law and in fact—and holds true even if the trier of fact in the underlying matter found the Division's evidence insufficient to prove the violations alleged. *Adams*, 2003 WL 21539570, at *5. In other words, the standard is met if "one permissible view of the evidence leads to the conclusion that the government has shown a reasonable basis in fact and law for its position." *Villa*, 2000 WL 300264, at *4 n.9 (quoting *Jackson v. Bowen*, 807 F.2d 127, 130 (8th Cir. 1986)). This is because "substantial justification" is considered a different and less stringent standard than the preponderance of the evidence standard used to determine liability for a substantive securities violation. *Blizzard*, 2005 WL 1802401, at *3; *Michael Flanagan, et al.*, Rel. No. 2258, 2004 WL 1538526, at *6 (July 7, 2004) ("*Flanagan II*") ("Our finding that the Division did not meet the preponderance[] standard necessary to sustain its case is distinct from the requirement under the EAJA that the agency's position be substantially justified.")

With respect to the Division's case in an underlying matter, the independent evaluation in a Commission EAJA proceeding "favors treating a case as an inclusive whole, rather than as atomized line-items." *Flanagan II*, 2004 WL 1538526, at *4 (citing *Comm'r INS v. Jean*, 496 U.S. 154, 161-62 (1990)); *see also* Rule of Practice 201.55(a); 5 U.S.C. § 504(a)(1) ("Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, *as a whole*, which is made in the adversary adjudication for which fees and other expenses are sought.") (emphasis added); *Lathen*, 2018 WL 4143861, at *3 (citing Section 504).

2. The Division's Case as a Whole Had a Reasonable Basis in Law

(a) Section 12(k)(1) Standards

Exchange Act Section 12(k)(1) provides that "[i]f in its opinion the public interest and the protection of investors so require, the Commission is authorized by order . . . summarily to suspend trading in any security" for up to 10 business days. 15 U.S.C. § 78l(k)(1). By enacting Section 12(k)(1), Congress gave the Commission broad discretion to take "decisive steps" to suspend trading in a security on a temporary basis. *Bravo*, 2015 WL 5047983, at *4. This will at times require the Commission to act before there has been an opportunity to fully develop information about a situation or even where an investigation is ongoing. *Id.*; *Apotheca*, 2020 WL 7632296, at *9.

Suspensions are based on the Commission's "opinion," which is a subjective standard about what action is necessary under the circumstances to protect investors and the public interest. *Bravo*, 2015 WL 5047983, at *2; *Immunotech Labs., Inc.*, Rel. No. 75790, 2015 WL 5081237, at *1 (Aug. 28, 2015). The term "public interest" is not defined by statute but instead amounts to an inherently broad consideration in which the Commission calls upon its own "expertise, experience, and knowledge to make a discretionary judgment in the face of potential uncertainty." *Bravo*, 2015 WL 5047983, at *2. That has led the Commission to suspend trading in a number of instances, including situations involving fraud or manipulation by persons unconnected with the issuer or "when speculative rumors were swirling in the marketplace." *Id.* at *3. The Commission's authority in this space has given it the flexibility "to address novel or atypical scenarios that might arise in which such a measure was needed to protect investors or the public interest." *Id.* at *4.

As a general matter, the Commission's decision to enter a temporary suspension is based on whether there is sufficient public information on which an investor may make an informed

investment decision or whether the market for the security appears to reflect manipulative or deceptive conduct:

> We also have suspended trading when there were questions about the accuracy of publicly available information about the company, whether in press releases, public filings, or other statements. And we have suspended trading when there were questions about trading in the stock, including indicia of potential market manipulation or unusual market activity.

Id. at *4-5. This holds true whether the information in the press releases, public filings, or statements was disseminated by the issuer itself or by third parties. *Efuel EFN Corp.*, Rel. No. 86307, 2019 WL 2903941, at *2 (July 5, 2019); *Apotheca*, 2020 WL 7632296, at *2.

The Commission's public information concerns are particularly acute with microcap securities and penny stocks, which frequently lack transparency, trade in low volumes, are closely held, and are highly volatile. *Bravo*, 2015 WL 5047983, at *5. They often are subject to pump-and-dumps and other fraudulent schemes through aggressive promotion:

> Such stocks may be touted by promoters who look to the news headlines for ideas about attractive investment ideas to promote—for example, marijuana-related businesses, virtual currencies such as Bitcoin, and natural disasters such as Hurricane Sandy. Press releases and promoters may promise high returns based on the promise of huge profits from the latest innovation, technology, product, or fad.

Id. The Commission thus has been particularly vigilant in exercising its trading suspension authority in the microcap and penny stock space—even in instances when questions have arisen concerning the accuracy of information about an issuer or its stock, including potentially misleading statements in press releases and reports. *Id.*

Temporary suspensions under Section 12(k)(1) are limited to one, 10-day period based on "any single set of circumstances." *Id.* at *2. The Commission enters suspensions *ex parte* without any notice, opportunity to be heard, or findings based upon a record. *Id.* at *2, 6. Such a mechanism

is "critical to protecting investors and the public interest" and enables the Commission to "act quickly when necessary to stop ongoing manipulation or to draw attention to potentially inaccurate information about an issuer circulating in the market." *Id.* at *6*; Efuel*, 2019 WL 2903941, at *2 (noting the temporary suspension is an "important tool" for alerting the public about the Commission's concerns about an issuer). Moreover, the Commission is not required to allege or find that an issuer actually committed a violation of the federal securities laws before a temporary suspension can be entered. *Bravo*, 2015 WL 5047983, at *3; *Myriad Interactive Media, Inc.*, Rel. No. 75791, 2015 WL 5081238, at *5 n.22 (Aug. 28, 2015) (deeming irrelevant respondent's argument that there was no evidence it "sought to mislead confuse the market" because a temporary suspension does not require a finding of scienter).

Nor does the Commission need to find that an issuer or its affiliates were the ones responsible for the proscribed conduct: "[A]ny 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." *Efuel*, 2019 WL 2903941, at *5; *see also Immunotech*, 2015 WL 5081237, at *7 (rejecting respondent's contention that it was necessary for the Commission to find that respondent was responsible for the touting activity in the market).

(b) The Trading Suspension in this Case

For its part, Petitioner already has acknowledged the Commission's public interest and investor protection concerns in the context of a trading suspension and the pressing need to act expeditiously under Exchange Act Section 12(k)(1): "This [550] petition does not challenge the authority of the Commission to exercise its discretion, mindful that the Commission's investor protection function 'will at times require that we act *before* there has been an opportunity to fully

develop information about a situation." (550 Petition, at 2, citing *Bravo*, 2015 WL 5047983, at *4 (emphasis in original)). Petitioner also remarked: "Nano Magic has no doubt that, based on the information before the Commission last week, the Commission exercised its subjective judgment as authorized by statute and did what it then believed was justified to protect investors or the public interest." (Motion for Expedited Consideration of Petition to Terminate Trading Suspension, May 7, 2020 ("First Motion to Expedite"), at 3).

(c) Rule of Practice 201.550

Persons adversely affected by a temporary suspension are not without recourse. Indeed, Rule of Practice 201.550 affords an issuer the opportunity to file a sworn petition with the Commission setting forth the reasons why the suspension should be terminated. *Bravo*, 2015 WL 5047983, at *6. Petitioner here availed itself of that opportunity by filing the 550 Petition. Indeed, Petitioner summed up the purpose behind Rule 201.550 in its conclusion: "Assuming, arguendo, that the information before the Commission at the time of the trading suspension order's issuance provided grounds, in the Commission's subjective opinion, that the public interest and the protection of investors required a trading suspension, then information presented here to the Commission and during the pendency of the trading suspension provide compelling grounds to terminate the suspension." (550 Petition, at 30.)

Importantly, as Petitioner's own summary of the Rule 201.550 process reveals, simply because there may be grounds to terminate a suspension does not mean the suspension was not justified initially. Indeed, the issuance of a suspension will itself sometimes "pr[y] loose" more or different information of value to investors, and the fact that such information is *now* available in the marketplace has no bearing on whether the suspension was warranted before. *See Bravo*, 2015 WL 5047983, at *13 n.75 (quotation marks omitted). And the Division emphasizes, as stated above, that

the inquiry in this EAJA proceeding is focused not on Petitioner's arguments against the suspension, but on the *Division's* case and whether it was substantially justified under the principles of Exchange Act Section 12(k)(1).

3. The Division's Case as a Whole Had a Reasonable Basis in Fact

The record in the underlying matter, as detailed in Section II above, shows clearly why the Division had a reasonable basis for its positions in the underlying matter.

(a) Marketplace Claims About Petitioner's Coronavirus Disinfectant Patent

Against the backdrop of the COVID-19 pandemic, and the imminent risk investors likely would face with inaccurate information in the marketplace from those seeking to capitalize on a worldwide emergency—circumstances which, unfortunately, often pervade the penny stock space, *see Bravo*, 2015 WL 5047983, at *5—the Division investigated the market for trading in NMGX. And with suspicious claims like Petitioner "already [has] the solution to kill the Corona Virus," "patent approved for disinfectant that kills #coronavirus 99.9% of time," and "don't sleep on this #CoronavirusOutbreak stock," coupled with a 256% increase in NMGX's closing share price and a 770% spike in trading volume, the need for prompt Commission action became apparent.

Petitioner contends in the Application that "[t]he Commission never provided any evidence that Nano Magic had anything to do with any of the posts, and Nano Magic vigorously denied that it either made, condoned, or even was familiar with the posts. In fact, Tom Berman, the company's CEO, did not even know that the posts existed." (App., at 12.) But as Petitioner itself acknowledged in the May 6 Press Release, information posted on message boards like InvestorsHub or Twitter carries the risk that it may be "nearly impossible for investors to tell the difference between fact and fiction." (May 6 Press Release, at 1.) And as the Division argued throughout the underlying matter (*see* Division Opposition Brief, at 12, 14-15), whether Petitioner itself had anything to do with the

misleading posts is irrelevant because what matters to the Commission in the 12(k)(1) suspension context is not the source of the misinformation, but the *effect* it has on the marketplace, regardless of who put the misinformation out there. *See Efuel*, 2019 WL 2903941, at *5 ("[A]ny 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."); *Myriad*, 2015 WL 5081238, at *8 n.31 ("[W]e may suspend trading based on the conduct of unrelated third parties when that conduct threatens a fair and orderly marketplace.'"); *Apotheca*, 2020 WL 7632296, at *9 (same).

For its part, Petitioner never has disputed that NMGX was the subject of marketplace promotion—nor could it, frankly, because the over 450 messages the Division staff uncovered on InvestorsHub and Twitter clearly show otherwise. *See Immunotech*, 2015 WL 5081237, at *7 (rejecting respondent's contention that it was necessary for the Commission to find that respondent was responsible for the touting activity in the market).[14] And evidence in the record supports the Division's case that the information in the marketplace was, in fact, misleading and inaccurate, because Petitioner did not actually have a patent that killed COVID-19 "99.99%" of the time. The NMGX Patent had been tested years earlier on a different strain of human coronavirus, but *not* on COVID-19. Petitioner's CEO himself acknowledged as much during the Division's interview. He also conceded the company's attempt to re-register PVP-I would require additional testing before its effectiveness against the virus could be determined. Needless to say, of course, these nuances appeared nowhere in the marketplace message board posts. Hence the need for the Commission to

[14] Instead, Petitioner spent considerable time in the 550 Petition setting forth various facts relating to NMGX in an apparent attempt to make clear it was "never a shell company" but "a real company with quality management, not a recycling of 'bad guys' under a new roof." (550 Petition, at 3.) The Trading Suspension, however, was not based on the position that Petitioner was a fraudulent "shell" company, and neither the Division nor the Division's staff ever stated that it was. (*See generally* Trading Suspension; Information Statement; Division Opposition Brief; Termination Order.)

take "decisive steps" against "speculative rumors [] swirling in the marketplace" in the face of a "novel or atypical scenario[]" all with the goal of protecting investors and preserving the public interest. *Bravo*, 2015 WL 5047983, at *3-4.

Instead, Petitioner attempts to explain away the buzz in the marketplace, and the corresponding spike in trading in NMGX, as "not surprising" because of what it contends was "Nano Magic's new leadership, cash infusion, overhaul of operations, actually filing SEC disclosures to become current, and rebranding campaign." (App., at 11.) But the purpose of this EAJA proceeding is not to resolve competing interpretations of the evidence. Rather, the focus is *solely* on "the case presented by the Division" and whether the Division was substantially justified in seeking and defending the Trading Suspension based on the evidence of record and applicable law. *McCook*, 2003 WL 1542104, at *3; *Villa*, 2000 WL 300264, at *6. Here, "one permissible view of the evidence," *Villa*, 2000 WL 300264, at *4 n.9, was that the misleading and inaccurate information in the marketplace about a penny stock issuer with a disinfectant product claiming to be "99.99%" effective against a deadly global virus contributed to the 256% increase in the issuer's share price and the 770% spike in the trading volume. *See Apotheca*, 2020 WL 7632296, at *9 ("[A]nomalous trading patterns such as those present here indicate the possible presence of manipulative trading and support the imposition of a trading suspension.").

What is more, Petitioner says nothing in the Application about its apparent agreement with the Division's "permissible view of the evidence" through the company's issuance of the May 6 Press Release.[15] Nor does Petitioner address its failure to take any corrective action to dispel the "speculative rumors [] swirling in the marketplace" following either the FINRA interview on April

[15] Although issued after the Trading Suspension was entered, the May 6 Press Release may still be considered here because it is part of the "administrative record, as a whole," having been attached as an exhibit to the 550 Petition. *See* Rule of Practice 201.55(a).

14, 2020 or the Division's interview on April 24, 2020. (Motion to Compel Order, at 2.) It was not until May 6, 2020—after the Trading Suspension already was in effect, and curiously on the same day the 550 Petition was filed—that it *finally* took some action to address the inaccurate and misleading posts concerning the patent, and confirm that testing on the company's disinfectant products was not applicable to "the specific strain of coronavirus" that is the subject of "popular" and "widespread" interest. (May 6 Press Release, at 1.) Given Mr. Berman's concessions to the Division during the April 24, 2020 interview about what Petitioner's products were—and were not—capable of, however, Petitioner arguably could, and should, have gone further in the May 6 Press Release by affirmatively stating the marketplace claims were misleading. Petitioner also could, and should, have made that same acknowledgment in the 550 Petition. But Petitioner stopped short of doing that in either instance, and even defended the misleading posts in the underlying matter.[16]

The Commission has held that a disclosure acknowledging misinformation made *after* entry of a trading suspension bolsters the determination that prior public statements justifying the suspension were misleading. *Bravo*, 2015 WL 5047983, at *9. Furthermore, although the May 6 Press Release did not go so far as to affirmatively dispute the marketplace claims, it nevertheless confirmed the propriety of the suspension because by "promoting the public dissemination of accurate information, the trading suspension advanced the public interest and the protection of investors." *Apotheca*, 2020 WL 7632296, at *8; *Immunotech*, 2015 WL 5081237, at *7. At bottom, the fact the 550 Petition ultimately was granted does not change the calculus in this EAJA proceeding as far as the marketplace claims are concerned. The question here is not whether Petitioner was liable

[16] The Division is at a loss to understand Petitioner's continued claim that misleading information "enjoy[s] First Amendment protections." (App., at 12.) This is the same argument made in support of the 550 Petition where Petitioner claimed the First Amendment shields "informed speculation" on internet message boards. (Closing Submission, at 15.) The irony in this, of course, is that the "speculation" Petitioner speaks of was anything but "informed," as the facts here make clear, and was further support for the necessity of a trading suspension in light of the misinformation in the marketplace.

for anything or whether it acted with scienter. *McCook*, 2003 WL 1542104, at *4 (an EAJA proceeding is not for the purpose of "assessing liability" of the respondent for the violations charged); *Myriad*, 2015 WL 5081238, at *5 n.22 (suspension does not require a finding of scienter).

Rather, the analysis is limited to whether the Division had a reasonable basis for the temporary suspension of trading in NMGX as a result of the misleading information in the marketplace. *See McCook*, 2003 WL 1542104, at *4 (the purpose of the EAJA is to "evaluat[e] the strength of the Division's case."). As noted above, "substantial justification" for EAJA purposes is a "different and less stringent standard" than the preponderance standard used for the Division to prove its case in an underlying matter. *Blizzard*, 2005 WL 1802401, at *3; *Flanagan II*, 2004 WL 1538526, at *6. This holds true even if the Division's case in an underlying matter was dismissed. *Blizzard*, 2005 WL 1802401, at *5 (upholding law judge's initial decision denying EAJA application on grounds that while the Commission dismissed the charges in the underlying matter, the evidence presented by the Division was "reasonably subject to a different interpretation that meets the lower threshold of substantial justification" for EAJA purposes).

And the different EAJA standard also applies in the circumstances where the Commission gave weight to the applicant's credibility in the underlying matter. For example, in *Villa*, 2000 WL 300264, at *6, the Commission based dismissal of the underlying matter largely on the respondent's credibility, finding the Division's circumstantial evidence was insufficient to show the respondent had caused the company's reporting violations. Nevertheless, "weighing the same evidence under the EAJA standard," the Commission determined the Division's position was substantially justified and rejected the EAJA application. *Id.*; *see also Kirk Montgomery*, Rel. No. 34-45161, 2001 WL 1618266, at *3 (Dec. 18, 2001) ("To the extent the law judge made a credibility finding in favor of [respondent], it does not preclude a finding of substantial justification on the part of the Division. A

determination of substantial justification may be premised on evidence, including testimony, that was rejected by the initial trier of fact.").

As noted above, the Commission did not provide any reasoning in the Termination Order as to why it decided to vacate the Trading Suspension. Even assuming, however, the Commission found Petitioner to be credible or otherwise assigned weight to any of its particular arguments in the course of the 550 Petition, the Division submits the independent evaluation required in this EAJA proceeding shows the Division's case as a whole with respect to the misleading marketplace claims had a reasonable basis in fact, and shows further why the Commission was justified in taking "decisive steps" to suspend trading in NMGX. *Bravo*, 2015 WL 5047983, at *4.

(b) Petitioner's April 7, 2020 Statement

Against the backdrop of the misleading marketplace claims about Petitioner's patent, and the significant spike in NMGX's share price and volume, Petitioner issued the April 7 Press Release disclosing that it was preparing for the launch of its newly branded product line, including "household surface cleaning and protectant solutions," and quoting Tom Berman, its CEO, who stated that Petitioner was "eager to join the Covid-19 fight." (April 7 Press Release, at 1.) What followed, unsurprisingly, was yet another spike in NMGX trading, with a 292% increase in the share price over the subsequent two weeks. Even assuming Petitioner was unaware of the marketplace claims, the announcement on April 7 from a penny stock issuer about its newly branded product line and eagerness to join the COVID-19 fight—without any specific information as to how it planned to do that—may well have fed into the misinformation in the public, which then correlated with a significant increase in trading in NMGX. So the Division investigated this announcement further.

Tellingly, the investigation revealed, among other things, that (i) Berman was aware of the increase in NMGX's stock price but could not explain its cause; (ii) the NMGX Patent never had

been tested with respect to SARS-CoV-2, the virus that causes COVID-19; (iii) PVP-I was not an ingredient approved by the EPA for any use, let alone against COVID-19; (iv) PVP-I required additional testing to assess its utility for COVID-19, and that testing would take approximately two years; (v) while Berman stated that Petitioner "would love to be able to develop a product to join the COVID-19 fight," he acknowledged the company had no specific plan to do that, other than attempting to register PVP-I; and (vi) as of April 30, 2020, when the Trading Suspension was entered, Petitioner had not made any subsequent claims regarding any COVID-19 related products or business activities, and there was no mention of COVID-19 or the Human Coronavirus 229E disinfectant on Petitioner's website. Understandably so, this evidence then prompted the "questions" the Commission references in the Trading Suspension not only about the accuracy of information in the public about a penny stock, but also the *adequacy* of that information. *See Bravo*, 2015 WL 5047983, at *11; *Immunotech*, 2015 WL 5081237, at *6.

Petitioner claims here the April 7 Press Release was "accurate" and "not misleading." (App., at 12.) This follows the arguments made in the 550 Petition (i) emphasizing, in an apparent attempt to downplay the issue, that "COVID-19" is only mentioned in the body of the press release but not in the "headline"; (ii) noting that neither Petitioner nor Mr. Berman "intended to or did mislead or mispresent anything"; and (iii) stressing that the "only reason" for even mentioning COVID-19 in the release was that many people familiar with Petitioner's products and patents "had been asking" whether PVP-I was "being worked on and if it was going to come to market." (550 Petition, at 19.) These arguments, however, are largely beside the point.

Whether in a headline or in a direct quote, it is undeniable COVID-19 was front and center of everyone's mind in April 2020. Given the uncertainty surrounding the virus at the time, and whether existing products would have any effect on it, Petitioner made an announcement that it was

unveiling "household surface cleaning and protectant solutions" and quoted Mr. Berman as expressing an eagerness "to join the Covid-19 fight." Headline or not, the Division's investigation and recommendation that trading in NMGX be suspended was justified, particularly in light of Berman's own admissions during the staff's interview about what Petitioner's products were—and were not—capable of.

Furthermore, although Petitioner argued "[t]here was *no* statement, as set forth in the trading suspension, that the company had any 'involvement in the fight against COVID-19'" (550 Petition, at 18) (emphasis in original), neither the Division nor the Commission in the Trading Suspension ever claimed the company made a statement in which Berman is quoted as talking about "the Company's involvement in the fight against COVID-19." Rather, the suspension is in reference to Berman's statement, in the April 7 Press Release, that the company was "eager to join the Covid-19 fight'"—which Berman admitted to Division staff that he made. (Information Statement declaration, at ¶ 20.)

The Commission is not required to allege or find that an issuer committed a violation of the federal securities laws before a trading suspension can be entered. *Bravo*, 2015 WL 5047983, at *3; *Myriad*, 2015 WL 5081238, at *5 n.22. The Commission also does not need "to conclude that any particular statement violated the antifraud provisions or that manipulative trading was in fact occurring" in order to issue a trading suspension. *Bravo*, 2015 WL 5047983, at *11; *Immunotech*, 2015 WL 5081237, at *6. And despite Petitioner's claim that it never intended to misrepresent anything in the April 7 Press Release, a "professed lack of intent to mislead, even if credited, does not change our analysis concerning whether a trading suspension was necessary for the protection of investors." *Apotheca*, 2020 WL 7632296, at *7.

Petitioner's contrition aside, the fact remains that while the April 7 Press Release announced the launch of the company's newly branded household surface cleaning product line alongside its

"eager[ness] to join the Covid-19 fight," the press release did not provide any specific information about how the company planned to join the fight, and Berman himself conceded to the Division there were no plans in place. The risk, therefore, that Petitioner's unqualified enthusiasm might mislead investors in the middle of a global pandemic was apparent—particularly since, according to Petitioner, many people were asking the company when PVP-I was coming to market. These circumstances are similar to what befell the issuer in *Immunotech*. There, the Commission determined a press release was misleading because while the company genuinely believed its HIV/AIDS immune-therapeutic drug potentially could be used to treat other infectious diseases like the Ebola virus, the press release omitted information about the likelihood of success in doing so. *Immunotech*, 2015 WL 5081237, at *4. In rejecting the contention the Division had not proffered a "scientific basis" to support the trading suspension, the Commission observed the suspension was not premised on "an assessment of the effectiveness of" the therapies or the truth of the issuer's theories about the components, but rather about the "accuracy and adequacy of publicly disseminated information regarding [the issuer's] Ebola related business prospects." *Id.* at *8.

As with the misleading marketplace claims, the inquiry in this EAJA proceeding concerning the April 7 Press Release is not to resolve competing interpretations of the evidence or even to credit Petitioner's explanations and motivation for the announcement itself.[17] Instead, the independent

[17] Petitioner also took issue with what it implied was the inadequacy of the Division's questions during the staff's interview about the April 7 Press Release, and proceeded to fault the staff for not making a "follow-up request verbally or in writing for more information" and for not "request[ing] any documents" from the company. (550 Petition, at 21.) But the Commission already has rejected arguments like this. Indeed, in *Apotheca*, the issuer claimed that neither FINRA nor Division staff contacted it before the trading suspension was entered and suggested that such contact "would have easily yielded a response from th[e] Company." *Apotheca*, 2020 WL 7632296, at *11. In dismissing that position, however, the Commission observed that "neither we nor FINRA are obliged to contact an issuer to inform the issuer of concerns about the accuracy or adequacy of its press releases or suspicious trading in its securities, which might lead to a trading suspension, and we have stated that providing an issuer with advance notice of a potential trading suspension could harm investors and frustrate regulatory objectives." *Id.*

evaluation the Administrative Law Judge must conduct here of the Division's case as a whole in seeking the Trading Suspension on the additional basis of the April 7 Press Release is focused solely on whether the Division had a reasonable basis to do so. And "one permissible" view of the evidence, *Villa*, 2000 WL 300264, at *4 n.9, is that the press release was both misleading in the information it did provide and inadequate in the information it did not. Given the importance placed on the public interest and the protection of investors in the 12(k)(1) context, the Commission's focus in a trading suspension—as was the case here—is on "the absence of sufficient public information to permit informed investment decisions" about a company. *Apotheca*, 2020 WL 7632296, at *6.

That the Commission ultimately vacated the Trading Suspension over four years after its issuance is of no moment because that has no bearing on whether the suspension was warranted in the first instance. Petitioner itself even conceded it "ha[d] no doubt" that "the Commission exercised its subjective judgment as authorized by statute and did what it then believed was justified to protect investors or the public interest." (First Motion to Expedite, at 3.) And so, the Division was substantially justified in seeking and defending the trading suspension based on the evidence of record and applicable law, even if the Division's evidence in a litigated context would not have been sufficient to meet its burden of proof. *See*, *e.g.*, *Pierce*, 487 U.S. at 569 (noting that the government can take a position that is substantially justified yet still lose); *Adams*, 2003 WL 21539570, at *5 ("[D]etermination of substantial justification may properly be premised on testimony and other evidence that was rejected by the trier of fact"); *McCook*, 2003 WL 1542104, at *3 (reversing the law judge's initial decision and denying the EAJA application because the law judge failed to conduct an independent evaluation, choosing instead to base the "substantial justification" analysis on the same findings made against the Division in the underlying action); *Lathen*, 2018 WL 4143861, at *13 (law judge finding applicants' arguments "unconvincing" because while law judge agreed with

applicants' favorable evidence in the underlying matter, applicants "ignore[d] other less favorable aspects of the record" in the EAJA proceeding); *Montgomery*, 2001 WL 1618266, at *1 (rejecting applicant's contention the Division improperly attempted to "relitigate" findings in the EAJA proceeding made in the applicant's favor in the underlying matter, noting the EAJA standard is different).

* * * * *

In sum, the Division emphasizes the Trading Suspension served its purpose by protecting potential investors in NMGX during the time Petitioner's stock price was significantly affected by the misinformation in the marketplace and served to "pr[y] loose" more accurate information about Petitioner's products and the limits of the products' capabilities. *See Bravo*, 2015 WL 5047983, at *13 n.75. Given the Division's position with respect to the suspension was substantially justified, the fact the suspension was vacated does not equate to an entitlement of fees and expenses in this EAJA proceeding. The Administrative Law Judge therefore should deny the Application.

E. Petitioner's Claimed Fees and Expenses are Excessive and Contrary to the Rules of Practice

The Division submits the Administrative Law Judge may dispose of the Application either procedurally, because Petitioner is not eligible for an EAJA award, or substantively, because the Division's position was substantially justified. In that regard, it is unnecessary for the Administrative Law Judge to review Petitioner's actual claimed fees and expenses here.

Assuming, however, such an inquiry is appropriate, the Division respectfully requests an order of further proceedings under Rule of Practice 201.55 with respect to the fees and expenses sought in the Application because even the cursory review below shows they are excessive and contrary to the Rules of Practice.

Petitioner bears the burden of adequately documenting the amounts to which it claims it is entitled by, among other things, "showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided." Rule of Practice 201.43. To that end, the "supporting documentation 'must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended.'" *See Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004) (quoting *In re Olson*, 884 F.2d 1415, 1428 (D.C. Cir. 1989)). Petitioner, however, fails to meet that burden here.

Specifically, Petitioner impermissibly seeks fees and expenses that: (i) arise from other proceedings; (ii) are a result of unauthorized, unnecessary, and unsuccessful filings; (iii) may not, in fact, have been incurred by Petitioner; (iv) exceed the maximum hourly rate of $75.00 applicable to Commission proceedings; and (v) are insufficiently documented or otherwise unreasonable.

1. Petitioner May Not Recover Fees and Expenses from Other Proceedings

Petitioner only may recover "fees and other expenses incurred . . . in connection with [this] proceeding." 5 U.S.C. § 504 (a)(1); *see also* Rule of Practice 201.33(a) ("The Act applies to adversary adjudications conduct by the Commission."); Rule of Practice 201.33(c) ("If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, *any award made will include only fees and expenses related to covered issues*.") (emphasis added). Notwithstanding this limitation, Petitioner impermissibly seeks to recover fees and expenses from other proceedings.

Most notably, Petitioner seeks to recover at least $198,807.88 in purported fees and expenses related to its petition for writ of mandamus relief filed with the U.S. Court of Appeals for the District of Columbia Circuit. (App., Ex. 4, Invoice No. 092888-00006, at 1.)[18] Needless to say, Petitioner's mandamus petition is a separate and distinct legal action from the administrative proceeding to terminate a trading suspension before the Commission underlying the Application. Moreover, given the Court of Appeals dismissed the mandamus proceeding as moot in part and denied in part, Petitioner did not even prevail in that separate federal court proceeding.

In addition, Petitioner seeks to recover at least $15,609.06 in purported costs in response to a Commission subpoena unrelated to this proceeding. (App., Ex. 2.) This, too, is inappropriate in the context of the Application. *See* Adopting Release, *Equal Access to Justice Act Rules*, 47 Fed. Reg. 609, 610 (Jan. 6, 1982) (the EAJA does not apply to Commission investigations).

Accordingly, Petitioner's fees and expenses attributable to its mandamus petition or its response to a subpoena were not incurred in connection with this proceeding, and therefore are not recoverable.

2. Petitioner Should Not Recover Fees and Expenses Incurred as a Result of Unauthorized, Unnecessary, and Unsuccessful Filings

The Division submits fees and expenses incurred by Petitioner in pursuit of unauthorized, unnecessary, and ultimately unsuccessful filings should not be recoverable.

Petitioner should not receive fees and expenses associated with its motions to expedite and to compel. As an initial matter, the Commission expressly stated: "No briefs in addition to those specified in this order may be filed without leave of the Commission." (Written Submissions Order,

[18] There are at least some billing entries relating to the mandamus petition in other fee records as well. (*See*, *e.g.*, App., Ex. 4, Invoice No. 092888-00001, at 4; Ex. 4, Invoice No. 092888-00004, at 2.)

at 2.)[19] And yet, even after issuance of the order, and in apparent disregard thereof, Petitioner nevertheless proceeded to file the Second Motion to Expedite (May 8, 2020) and its motion to compel (May 18, 2020), without first receiving leave of the Commission.[20] Moreover, these motions had no merit—as reflected by the fact they were denied by the Commission. (*See* Motion to Compel Order; Termination Order.) Instead, the motion practice constituted an effort to "unduly or unreasonably protract[] the proceeding" through unnecessary filings. *See* Rule of Practice 201.35(b).

In addition, Petitioner should not be awarded fees and expenses in connection with its letters to the Office of the Secretary on May 19, 2020, June 1, 2020, or September 20, 2021, given these communications had no substantive bearing on this proceeding.

In light of these circumstances, amounts associated with these filings cannot be said "to be necessary for the preparation of the party's case" or to be "reasonable attorney or agent fees." 5 U.S.C. § 504(b)(1)(A). Rather, assuming the Application were to have merit—which it does not—any request for fees and expenses should be limited to the preparation of the filings made in compliance with the Commission's procedures for challenging the trading suspension and the Commission's orders in this proceeding—that is, reasonable fees and expenses related to: (i) the 550 Petition; (ii) the Closing Submission; (iii) the Supplemental Filing; (iv) the Opening Brief; (v) the Reply Addressing Non-Mootness; (vi) the Application; and (vii) Petitioner's to-be-filed reply in support of the Application under Rule of Practice 201.53.

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[19] Authorized filings were limited to the Information Statement, the Division Opposition Brief, and the Closing Submission. (Written Submissions Order, at 1-2.)

[20] There is no merit to the argument that a motion is distinguishable from a brief and thus not prohibited by the Written Submissions Order, given the requirement under the rules that a motion be accompanied by a brief. *See* Rule of Practice 201.154(a) ("Unless made during a hearing or conference, a motion shall be in writing . . . and shall be accompanied by a written brief of the points and authorities relied upon.").

3. Petitioner May Not Actually Have Incurred Fees and Expenses

Under the EAJA, applicants may recover only those fees and expenses they actually "incurred." *See* Rule of Practice 201.35(a). As a general matter, "litigants 'incur' fees under the EAJA when they have an express or implied legal obligation to pay over such an award to their legal representatives." *Turner v. Comm'r of Social Sec.*, 680 F.3d 721, 725 (6th Cir. 2012); *see also Roberts v. Nat'l Transp. Safety Bd.*, 776 F.3d 918, 919 (D.C. Cir. 2015) (requiring a finding as to whether "Petitioner was obligated to pay his attorneys for the value of their services" based on the applicable facts and law). The factual record Petitioner has presented here, however, raises questions concerning how much, if any, legal fees Petitioner actually "incurred."

Indeed, although counsel's first billing entry for this matter was almost five years ago, on May 1, 2020, the invoices submitted with the Application all are dated January 7, 2025—the day before the Application was filed. (*See* App., Ex. 4, Invoice Nos. 092888-00001, 092888-00004, and 092888-00006, at 1.)[21] It is not apparent, therefore, from the submission whether Petitioner had been invoiced for these legal services over the past five years, or whether there was an intention to charge for these services at all.[22]

Moreover, assuming counsel's fee records are accurate, they do not reflect any actual payments having been made. (*Compare* App., Ex. 3, at 1 (reflecting full payment and a $0.00 balance due), *with* App., Ex. 4, Invoice Nos. 092888-00001, 092888-00004, and 092888-00006, at 1 (reflecting no payment)). Petitioner's own supporting declaration does not directly answer this

[21] By contrast, the Precision Legal Services and Oyster Consulting invoices are dated at or around the time the work described in the invoices was performed. (*See generally* App., Ex. 2; App., Ex. 3.)

[22] The fact the invoices only are recently dated also raises the related question of hourly rates, and whether those rates (*e.g.*, $975.00 and $570.00 for lead counsel, *see* App., Ex. B., at ¶¶ 16-22) were in effect throughout the entirety of the five-year period of representation, or whether they varied. The supporting documentation submitted by Petitioner does not appear to answer this question.

question, but instead compounds the confusion. Mr. Berman states he "ha[s] personal knowledge of the fees paid by Nano Magic Inc." (*see* App., Ex. A, at ¶ 4), but does not provide any further detail or the amount of fees that were, in fact, "paid." He then further states he "ha[s] reviewed the application for fees prepared by our counsel and the information provided in the application is true and correct." (*Id.* at ¶ 6.) *See* Rule of Practice 201.41(e) (fee application must be accompanied by "a written verification under oath or under penalty of perjury that the information provided in the application is true and correct."). But the Division questions how Berman could have reviewed and attested, under oath, to the accuracy of an application dated January 8, 2025, when his declaration is dated two months before that, November 6, 2024.[23]

Accordingly, should further proceedings be deemed necessary here, the Administrative Law Judge should order Petitioner to "provide vouchers, receipts, or other substantiation for any fees or expenses claimed." *See* Rule of Practice, 201.43. But as it stands now, the Division submits Petitioner has not met its burden to show that it incurred fees, as required under the EAJA.[24]

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[23] Another payment discrepancy appears in the Precision Legal Services invoices. (*Compare* App., Ex. 2, Invoice No. 3914, at 6 (payment of only $2,500 out of the $8,116.22 total), *with* App., Ex. 2, Invoice Nos. 4001, 4071, 4254, and 4344 (reflecting no payments)). As discussed above in Subsection 1, however, these invoices pertain to the unrelated subpoena response and would not be recoverable, whether payment was made or not. The Division notes a further discrepancy with the Oyster Consulting invoice. The invoice is addressed to counsel. But despite the invoice's total amount of $15,347.10 reflected as having been paid with a $0.00 balance due (*see* App., Ex. 3, at 1), only one disbursement to Oyster Consulting in the amount of $1,730.89 appears in counsel's fee records. (*See* App., Ex. 4, Invoice No. 092888-00004, at 6.)

[24] The Division acknowledges there may be other factual circumstances in which a party who did not agree to pay for fees and expenses nevertheless may be entitled to recovery under the EAJA. For instance, the Sixth Circuit determined the existence of a representation agreement between a client and an attorney in which the client agreed to assign to the attorney any EAJA fees recovered could be sufficient to meet the "incurred" requirement. *Turner*, 680 F.3d at 723-25. Here, however, not only has Petitioner not provided any evidence such an arrangement was in place, but the existence of such an arrangement also would conflict with the facts and representations made in the Application.

4. Commission EAJA Regulations Cap Hourly Rates at $75.00

Rule of Practice 201.36(b) expressly provides that "[n]o award of the fee of an attorney or agent under these rules may exceed $75.00 per hour." Yet despite acknowledging that rule (*see* App., at 17 n.30), Petitioner has disregarded the Commission's restriction entirely by calculating its fees at hourly rates as high as $975.00—thirteen times the limit. (*Id.*, Ex. B, at ¶¶ 16, 18.)

The Commission has rejected the argument that 5 U.S.C. § 504(b) mandates the calculation of fees at an hourly rate of $125.00 and continues to calculate fee awards at an hourly rate of $75.00. *See*, *e.g.*, *Douglas W. Powell, et al.*, Rel. No. 2377, 2005 WL 936889, at *2 (Apr. 21, 2005) (rejecting applicant's request for attorneys' fees at hourly rates ranging from $175 to $550, because "[t]he Commission's EAJA Regulations provide no award of fees for an attorney may exceed $75.00 per hour."); *Flanagan I*, 2003 WL 22767598, at *15-17 (explaining why the Commission continues to adhere to the maximum hourly rate of $75.00 prescribed in Rule of Practice 201.36(b)).

Moreover, contrary to Petitioner's argument that the Administrative Law Judge *must* provide for a "special factor" enhancement (*see* App., at 2), the statute permits, but does not require, "the agency determine[] by regulation that . . . a special factor . . . justifies a higher fee." 5 U.S.C. § 504(b)(1)(A). The Commission has not passed such a regulation, and thus no special factor enhancement is applicable here. *See Flanagan I*, 2003 WL 22767598, at *15-17; *see also Wurts*, 2001 WL 1343997, at *5 (rejecting applicant's contention the higher EAJA hourly rate of $125 under 5 U.S.C. § 504 is "controlling," holding the Commission "has not amended its Rules to raise the allowable maximum, which remains at $75 per hour.")

Accordingly, although the Division respectfully submits an award of any attorneys' fees and expenses is altogether inappropriate, in the event the Administrative Law Judge were to conclude otherwise, at the very least the hourly rates for Petitioner's attorneys and agents should be limited to $75.00 per hour pursuant to Commission regulations.

5. Petitioner May Not Recover Fees and Expenses That Are Insufficiently Documented or Otherwise Unreasonable

Rule of Practice 201.43 requires "[a] separate itemized statement" showing, among other things "a description of the specific services performed." Although some of the fee record entries in Petitioner's supporting documentation comply with this requirement, many do not. For instance, the following entries are rendered unintelligible through redactions for claimed privileged information:

> Review **[Redacted – Attorney Work Product**] and recirculate (0.2);
>
> Read, consider and reply to e-mail from Jeanne Rickert, General Counsel, about **[Redacted – Legal Advice]** (0.2); . . .
>
> Read and respond to e-mail from Ron Berman about **[Redacted – Legal Advice]** approach (0.2); . . .
>
> Read and respond to e-mail from Tom Berman about **[Redacted – Legal Advice]** strategy consideration and **[Redacted – Legal Advice]** (0.2)

(*See*, *e.g.*, App., Ex. 4, Invoice No. 092888-00001 at 2 (emphasis in original)). Indeed, similar redactions appear extensively throughout the fee records. To be clear, the Division is not suggesting Petitioner needs to disclose otherwise privileged information. Rather, the Division submits that absent further information, the Administrative Law Judge may be unable adequately to assess "[t]he time reasonably spent in light of the difficulty or complexity of the issues in the proceeding" in the determination of the reasonableness of the legal fees, as prescribed by Rule of Practice 201.36(c)(4),

and considerable *in camera* review of the fee records may be required, should further proceedings be deemed necessary.

That said, however, Petitioner is requesting an award for over 550 hours of legal work. (App., Ex. 4, Invoice No. 092888-00001, at 16 (245.20 hours); Invoice No. 092888-00004, at 6 (90.20 hours); Invoice No. 092888-00006, at 11 (221.40 hours)). Apart from the other infirmities underlying the Application, the Division submits this total fee amount vastly exceeds what is reasonable for a proceeding such as this involving a discrete set of briefing. *See* Rule of Practice 201.36(c)(4); *Van Sant v. U.S. Postal Servs.*, 805 F.2d 141, 142-43 (4th Cir. 1986) (awarding only $5,000 of the $194,162.47 in fees and expenses and noting "[w]e are of course mindful that there need not be strict proportionality between the amount recovered and the fee awarded, yet the gross disproportionality between Van Sant's recovery and the fee requested is a factor we consider") (internal citation omitted). So too is the over $18,000 in computerized legal research expenses, given the claimed "highly specialized skill and talent" of Petitioner's counsel. (App., at 17-19 (discussing background and qualifications of counsel); Ex. 4, Invoice No. 092888-00001, at 16 ($12,976.00 in research expenses); Invoice No. 092888-00004, at 6 ($2,391.00); Invoice No. 092888-00006, at 11 ($2,984.00)); *see also Keating v. FERC*, 1993 U.S. App. LEXIS 12975, at *8 (D.C. Cir. Apr. 1, 1993) (computerized legal research expenses compensable under the EAJA "only if necessary for the preparation of the party's case.").

And to compound the difficulty here, Petitioner's evidentiary support is inconsistent. On the one hand, Petitioner claims total professional legal fees of $519,710, but on the other, the fee records included in the supporting documentation show total professional legal fees of $496,381. (*Compare* App., Ex. B, at ¶ 15, *with* App., Ex. 4, Invoice No. 092888-00001, at 1 ($222,402.50); Invoice No.

092888-00004, at 1 ($79,885.50); Invoice No. 092888-00006, at 1 ($194,093.00)). Petitioner has not offered any explanation for the discrepancy.

Accordingly, to the extent fees are awarded in this matter, they should be reduced to eliminate any request that is insufficiently documented or otherwise unreasonable based on the circumstances of this proceeding.

IV. CONCLUSION

For the foregoing reasons, the Division of Enforcement respectfully requests Petitioner's Application for an award of fees and expenses under the EAJA be denied in its entirety.

Date: February 21, 2025

Respectfully submitted,

By: /s/ Patrick R. Costello

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OS Received 02/21/2025

STATEMENT OF ELECTRONIC FILING AND CERTIFICATE OF SERVICE

I certify that on February 21, 2025, I caused to be filed the foregoing DIVISION OF ENFORCEMENT'S ANSWER TO PETITIONER'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND OTHER EXPENSES PURSUANT TO 17 C.F.R. § 201.31, *ET SEQ.* with the Commission through the Office of the Secretary by the eFAP filing system, and further caused the same to be served on the following persons in the manner indicated:

By Electronic Mail:

Office of Administrative Law Judges
Email: alj@sec.gov

By Electronic Mail:

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/s/ Patrick R. Costello
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