UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19787

In the Matter of

NANO MAGIC INC.,

Respondent.

PETITIONER NANO MAGIC INC.'S REPLY IN SUPPORT OF ITS APPLICATION FOR AN AWARD OF ATTORNEYS FEES AND OTHER EXPENSES PURSUANT TO 17 C.F.R. § 201.31, *ET SEQ.*

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Before the Commission's Administrative Law forum is a true legacy of the Gensler Commission's enforcement program – an unmonitored adversarial and debilitating administrative action that the Commission ultimately conceded and agreed never should have been brought in the first place. With rank indifference to the consequences, the Philadelphia Regional Office's Division of Enforcement Staff ("PRO") did everything in its power to impair, impede and destroy a quality if small entrepreneurial business. For two years, from late April 2020[1] through April 28, 2022,[2] the PRO alone knew that it had lied to the Commission, in violation of its ethical obligations,[3] to obtain the trading suspension. For the next two and one-half years, the PRO fought vigorously to avoid accountability for its lie – having represented to the Commission that a Director of Nano Magic, Inc. ("Nano Magic") had "traded stock to coincide with [] suspicious promotional activity" when, in fact, that Director had not traded.[4] Instead of acknowledging responsibility, the Division of Enforcement ("Division" or "Enforcement") filed an opposition, understandably by the Division's Home Office staff given the lack of credibility of the PRO before any adjudicatory arm of the Commission to say anything more in this matter, attempting to re-litigate a proceeding that the Commission could not have more explicitly stated that Enforcement lost – "grant[ing] Nano Magic's Rule 550 petition and vacat[ing] the trading suspension order *nunc pro tunc* April 30, 2020."[5] This unique proceeding and unprecedented outcome warrants an award of all attorneys' fees and costs under

[1] *Nano Magic Inc.*, Exchange Act Release No. 88789, 2020 WL 2097820 (April 30, 2020).
[2] *Nano Magic Inc.*, Exchange Act Release No. 94818, 2022 WL 1288188 (April 28, 2022) ("Order Denying Motion to Compel").
[3] The Pennsylvania Rules of Professional Conduct, "Candor Toward the Tribunal," provides, in pertinent part, that "[a] lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer … or (3) offer evidence that the lawyer knows to be false." Pa. R. Prof. Cond. 3.3(1), (3).
[4] *Id*.
[5] *Nano Magic Inc.*, Exchange Act Release No. 101298, 2024 WL 4475691 (October 10, 2024) ("Order Vacating Trading Suspension").

the Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412, 17 C.F.R. § 201.35, 17 C.F.R. § 201.44 ("EAJA"), that Nano Magic incurred, including through this reply brief.

There are certain undisputable facts before this Administrative forum. They are:

1. To rule in favor of the Commission would countenance lying to a tribunal, here lying to the Commission.

2. The PRO staff lied. To obtain the trading suspension, the PRO made a material false statement about a Nano Magic Director trading, which did not happen.[6] Had the PRO filed truthfully and completely, on May 15, 2020, the "Information before the Commission at the time of the Trading Suspension,"[7] then four and one-half years of litigation potentially could have been averted. Instead, the PRO ignored and demonstrated its disregard for both its affirmative regulatory disclosure obligation[8] and Commission Order[9] to provide "all information." This was compounded by the Commission's failure to grant promptly (or for that matter ever) "Petitioner's Motion to Compel Production of Information Before the Commission at the Time of the Trading Suspension" necessitated by the PRO's intentional failure to provide "all information."

3. The PRO's action inducing the trading suspension caused real and irreparable harm to Nano Magic.

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[6] The Commission unknowingly disclosed the misstatement: "[The Commission's] review indicates, however, that the following factual information was also before the Commission in the action memorandum….During the period March 2 through March 30, 2020, which coincides with the suspicious promotional activity, two trading accounts held by Ronald Berman sold 1,310 NMGX shares, recognizing trading profits of $3,367." *Nano* Magic *Inc.*, Exchange Act Release No. 94818, 2022 WL 1288188 (April 28, 2022) ("Order Denying Motion to Compel"). Mr. Berman's May 10, 2022 Declaration establishes that this material representation by the PRO was not true. Ex. A, https://www.sec.gov/files/litigation/apdocuments/3-19787-2022-05-16-supplemental-briefing.pdf.

[7] https://www.*sec*.gov/files/litigation/apdocuments/3-19787-event-2020-05-15-information-commission-time-trading-suspension.pdf.

[8] 17 C.F.R. § 201.550(b).

[9] "By May 14, 2020, the Division of Enforcement shall file all the information that was before the Commission at the time of the Trading Suspension Order's issuance," citing 17 C.F.R. § 201.550(b). *Nano Magic Inc.*, Exchange Act Release No. 88841, 2020 WL 2310946 (May 8, 2020) ("Order Requesting Additional Written Submissions").

4. For the first in the Commission's history, the Commission set aside a ten-day trading suspension. The Commission did so *nunc pro tunc*.

The Administrative Law Judge need look no farther than the response of the United States District Court for the District of Utah admonishing and sanctioning the Commission in *SEC v. Digital Licensing, Inc. dba Debt Box*,[10] colloquially referred to as the "*Debt Box*" case, for how to sanction appropriately the Commission for its Enforcement Staff's egregious misconduct in making material misrepresentations to a tribunal. As discussed more fully below, the only appropriate sanction within the jurisdiction of this Administrative forum is to award Nano Magic all professional fees and costs incurred.

I. UNDENIABLE COMPARISON TO "DEBT BOX"

In *Debt Box*, a United States District Court judge in the District of Utah sanctioned the Commission for "gross abuse of power" in a cryptocurrency case against Debt Box, dismissing the case with prejudice and ultimately ordering the Commission to pay approximately $1.8 million in total fees. In *Debt Box*, "[t]he Commission's conduct demonstrated it knew its representations were false and it was deliberately perpetuating those falsehoods—continuing to abuse the judicial process in defense of the ex parte TRO that should not have issued." *Debt Box 1*, 2024 WL 1157832 at *28. The District Court expressed that "failing 'to identify inaccuracies in those assertions once discovered' means continuing to abuse the judicial process by communicating additional falsehoods to the court in support of prior falsehoods and in violation of professional duties." *Id.* at *29. As a result, the Court "conclude[d] the Commission engaged in bad faith conduct in seeking, obtaining, and defending the ex parte TRO, asset freeze, and appointment of a receiver. The court imposes sanctions under its inherent authority for the

[10] *SEC v. Digital Licensing, Inc.*, Slip. Op., Fed. Sec. L. Rep. P 101,826, 2024 WL 1157832 (D. Utah, Mar. 18, 2024) ("Debt Box 1"); Slip Op., Fed. Sec. L. Rep. P 101,869, 2024 WL 2728019 (D. Utah, May 28, 2024) ("Debt Box 2").

Commission's abuse of judicial process." *Id.* at *35. The Court ordered the Commission to pay Debt Box's and the Receiver's attorneys' fees and legal costs arising from the TRO and the Receivership. *Id.*

There is no functional difference between the TRO in *Debt Box* and the trading suspension in Nano Magic. Nor should the Commission's administrative forum adopt any difference in approaching the deserved full compensatory award. The *Debt Box* court's stern approach to the Commission related to a Complaint and application *ex-parte* for a TRO filed on July 26, 2023. The March 2024 Order imposing sanctions entered against the Commission in *Debt Box* was eight months after the Commission's staff began misleading the tribunal. Here the Order remedying the unwarranted, undeserved and unjustified trading suspension – analogous to a TRO – took four and one-half years. Not only did the Commission pay a total of approximately $1.8 million in total fees and costs in *Debt Box*, but the Commission also determined that it was in the agency's administrative interest to close its Salt Lake City Office, the office responsible for the Commission's *Debt Box* debacle. The PRO Staff's conduct resulting in the Commission vacating the instant trading suspension *nunc pro tunc* mirrors the egregiousness of *Debt Box* and warrants similar relief.

II. ARGUMENTS REFUTING DIVISION OF ENFORCEMENT'S OPPOSITION

A. The Underlying Matter is an Adversary Adjudication.

The Division first argues that Nano Magic "is not eligible for an EAJA award because neither the Trading Suspension [under section 12(k)(1) of the Securities Exchange Act of 1934 ("Exchange Act")] 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." (Opp'n at 18). The Division is wrong.

EAJA defines "adversary adjudication" as "an adjudication under [5 U.S.C. § 554] in which the position of the United States is represented by counsel or otherwise." 5 U.S.C. § 504(b)(1)(C). Section 554 applies to every "adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a). The statutes governing petitions for termination of summary suspensions pursuant to Section 12(k)(1)(A) do not expressly *require* adjudications to be decided on the record after opportunity for agency hearing. 17 CFR § 201.550. The Division argues that "[t]he lack of these procedures is fatal to [Nano Magic's] argument that the underlying matter was an 'adversary adjudication.'" (Opp'n at 20). However, the Division ignores that the Commission is permitted to "schedule a hearing on the matter, request additional written submissions, or decide the matter on the facts presented in the petition and any other relevant facts known to the Commission." 17 CFR § 201.550(b). And, importantly, "[i]f the petitioner ***fails to cooperate with, obstructs, or refuses to permit the making of an examination by the Commission***, such conduct ***shall be grounds to deny the petition***." *Id*. (emphasis added). Thus, read in isolation, subsection (a) of Rule 550 does not *require* a petition for termination of suspension to be decided on the record after an opportunity to be heard. But, when read as a whole, Rule 550 vests in the Commission the discretion to impose, as the Division puts it, "these procedures," and summarily deny a petition for failure to "cooperate." In fact, the Commission itself has characterized Rule 550 Petitions as "a special mechanism to allow persons adversely affected by a suspension to petition for relief after a suspension goes into effect, ***and thereby obtain an opportunity to be heard***." *Bravo Enters. Ltd.*, Exchange Act Release No. 75775, 2015 WL 5047983 (Aug. 27, 2015) (emphasis added).[11]

[11] Yet another irony is the Commission expressly recognized the factual and substantive thoroughness of Nano Magic's Petition acknowledging the absence of a need for Nano Magic to file additional opening briefing and the Footnote continued on next page …

Congress identified two reasons for limiting EAJA fees to "adversary adjudications": (1) to ensure fees were awarded only where "participants have a concrete interest at stake" and (2) to prevent the United States from being held liable for fees in a proceeding in which its position was not represented. H.R. Rep. No. 96-1418, at 14 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953, 4993 (participants' interest); H.R. Rep. No. 96-1418, at 12, 1980 U.S.C.C.A.N. at 4991 (position of the agency). To determine whether a proceeding qualifies as an adversary adjudication, the Judge must determine whether the proceeding is (1) an adjudication, *i.e.*, a proceeding where the United States was represented, and (2) in which the agency took a position that was adverse to the governed party. Here, before the Administrative forum is a Commission adjudication in a proceeding in which the Commission, represented by counsel, took a position overtly and undeniably adverse to Nano Magic.

1. A Petition for Termination of Suspension Results in an Adjudication.

The administrative process for challenging a suspension pursuant to Section 12(k)(1)(A) is an adjudication for purposes of EAJA. An adjudication is the "agency process for the formulation of an order." 5 U.S.C. § 551(7). An "order" is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making . . ." § 551(6). The process for challenging a suspension outlined in Rule 201.550 can result only in an "order" as defined in 5 U.S.C. § 551(6), and the agency process associated with a petition for termination of a suspension pursuant to Section

Footnote continued from previous page …

Commission's ability to decide the adversarial proceeding on the submissions of Nano Magic and the PRO. The Commission wrote that "[i]n view of the detail provided in NMGX's petition and supporting exhibits, the apparent narrowness of the factual matters in dispute, and NMGX's request for expedited consideration, the Division shall file, by May 21, 2020, a substantive response to the petition, which is not to exceed 8,000 words….NMGX's petition []will be resolved with due regard for NMGX's request for expedited consideration, consistent with the Commission's other responsibilities." *Nano Magic Inc.*, Exchange Act Release No. 88841, 2020 WL 2310946 (May 8, 2020) ("Order Requesting Additional Written Submissions"). Now the Division is trying to use the good work of counsel to deprive Nano Magic of its rightful reimbursement for those professional fees and costs.

12(k)(1)(A) is an adjudication. Here, the Commission issued an Order "grant[ing] Nano Magic's Rule 550 petition and vacate[d] the trading suspension order *nunc pro tunc* April 30, 2020."[12] The Commission, through Enforcement, did not appeal the Order. Thus, the Commission's Order of October 10, 2024 was a final Order.

2. The PRO's Position in Connection with the 550 Petition was Adversarial.

The administrative adjudication of a petition for termination of a trading suspension is adversarial. An adjudication is adversarial for purposes of EAJA when the United States takes a position and the position "is represented by counsel or otherwise." 5 U.S.C. § 504(b)(1)(C). EAJA does not require the United States' position to be represented by an attorney or that the representative appear in person; written argument by a non-attorney agency representative is enough. *See Escobar Ruiz v. INS*, 813 F.2d 283 n.4 (9th Cir. 1987) ("Representation of the government's position by non-lawyers ... does not preclude EAJA coverage."); *Handron v. Sec'y Dep't of Health & Human Servs*., 677 F.3d 144, 149-52 (3d Cir. 2012) (written argument is sufficient).

The agency's "position" in an adversary adjudication includes both the agency's position in the administrative proceedings and the action that gave rise to them. 5 U.S.C. § 504(b)(1)(E). An adjudication that begins as a non-adversarial proceeding can become adversarial if the agency takes a position at any time. H.R. Rep. No. 96-1434, at 23 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5003, 5012. Congress' sole concern in limiting EAJA to adversary adjudications was to prevent an agency from being held liable for fees in a proceeding in which the United States did not take a side. H.R. Rep. No. 96-1434, at 23, 1980 U.S.C.C.A.N. at 5012. Proceedings on the suspension of a license, for example, are not subject to that concern, and

[12] *Nano Magic Inc.*, Exchange Act Release No. 101298, 2024 WL 4475691 (October 10, 2024) ("Order Vacating Trading Suspension").

Congress specifically identified those types of proceedings as adversary adjudications to which EAJA applies. *See* H.R. Rep. No. 96-1418, at 15, 1980 U.S.C.C.A.N. at 4994 (stating that "[a] party who prevails in [a proceeding on a license suspension] is entitled to an award of attorney fees under [EAJA]").

In this case, the Commission took a decisive position when, on the PRO's recommendation, it issued a ten-day order of suspension of trading of Nano Magic's stock on April 30, 2020. After Nano Magic filed its Rule 550 Petition on May 6, 2020, the PRO opposed the Rule 550 Petition and defended the Trading Suspension on May 21, 2020. The PRO's position in the adjudication of the Nano Magic Rule 550 Petition was, therefore, adversarial.

3. Due Process Required that Nano Magic be Heard.

Congress defined "adversary adjudication" as an "adjudication under [S]ection 554" as a matter of convenience. See 5 U.S.C. § 504(b)(1)(C). The reference allowed Congress to distinguish – without further explanation – between the two types of agency actions identified in the APA: rule-making (5 U.S.C. § 553) and adjudication (5 U.S.C. § 554). *See U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act* 12-14 (1947). The EAJA applies only to adjudications. H.R. Rep. No. 96-1418, at 14, 1980 U.S.C.C.A.N. at 4993. The reference excludes the type of functions agencies perform as a matter of business. *Marathon Oil Co. v. Envtl. Prot. Agency*, 564 F.2d 1253, 1263 (9th Cir. 1977). Nowhere in the EAJA's legislative history did Congress state or imply that the EAJA applies only to adjudications for which a hearing is required by statute. *See generally* H.R. Rep. No. 96-1418, 1980 U.S.C.C.A.N. 4984; H.R. Rep. No. 96-1434, 1980 U.S.C.C.A.N. 5003; H.R. Rep. No. 99-120 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132. Such a proposition simply is a Staff-invented fiction.

The EAJA's definition of adversary adjudications qualifying as adjudications "under [S]ection 554" encompasses all adjudications that are adversarial in nature and for which a party has a right to be heard. *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51 (1950), *superseded by statute on other grounds* (reasoning that Congress intended Section 554 to apply to any adjudication in which a party has a right to be heard whether by statute or by procedural due process); *Abela v. Gustafson*, 888 F.2d 1258, 1263 (9th Cir. 1989) (explaining that Congress intended the EAJA's definition of adversary adjudications "to be read broadly"). Courts have stated there are no "specific words" within a statute for Section 554 to apply. *Marathon Oil Co*., 564 F.2d at 1263. Rather, adjudications are adversarial for purposes of Section 554 when they are "deserving of special procedural protections," regardless of whether "particular talismanic language was used." *Id*. at 1264.

The Division argues that because Nano Magic "was not entitled to any additional procedural protections in challenging the Trading Suspension" beyond those associated with its Rule 550 Petition, "the underlying matter cannot qualify as an 'adversary adjudication."' (Opp'n at 21). The Division premises its argument on the idea that, because Nano Magic was afforded an opportunity to challenge the trading suspension after it went into effect, Nano Magic was not deprived of due process. In support of its argument, the Division cites to two Commission decisions for the proposition that "the procedure under Rule 201.550 allowing aggrieved parties to challenge a temporary trading suspension satisfies the requirements of the Due Process Clause." (Opp'n at 20-21). However, both of those Commission decisions rely on a Ninth Circuit Court of Appeals Order, which provides that the procedure under Rule 201.550 only satisfies due process when it provides "a ***prompt*** post-deprivation review of the trading suspension." *Xumanii Int'l Holdings Corp. v. U.S. Sec. & Exch. Comm'n*, 670 F. App'x 508, 509 (9th Cir. 2016)

(emphasis added). Thus, the Division cannot rely on Rule 201.550 as a backstop for its argument that the procedures outlined therein take the instant case out of the realm of the EAJA when such procedures were not even available to Nano Magic. Indeed, there was nothing "prompt" about the Commission's resolution of Nano Magic's Rule 550 Petition, especially considering that the Division used concerted efforts to delay – and prevent the truth from becoming known – whenever it could, leaving for the Commission to impose final resolution in a dispositive adjudicatory decision.

In sum, the underlying proceedings unquestionably constituted an "adversary adjudication" for purposes of EAJA, and the Division's arguments to the contrary do not support a denial of Nano Magic's Petition.

B. <u>Nano Magic is the Prevailing Party.</u>

The Division next argues that Nano Magic is not a "prevailing party" for purposes of EAJA because "this matter effectively became moot before the Commission ruled on the 550 Petition." (Opp'n at 21). The Division then goes on to cite a litany of cases outside of the EAJA context in support of its position that Nano Magic cannot be the prevailing party here because the Commission's Order did not create "a material alteration of the relationship between the parties." (*Id*.) In fact, the Commission, by "vacat[ing] the trading suspension order" retroactive to the date of its imposition, created a material alteration of the relationship between the parties as it existed for four years and operated as an adjudicatory expungement of an improperly entered Order *ab initio*.

What the Division ignores in its argument, however, is that "[a] plaintiff may be a 'prevailing party' for EAJA purposes even if (as here) the lawsuit is rendered moot by the granting of relief, as long as plaintiff demonstrates that 'it is more probable than not that the

government would not have performed the desired act absent the lawsuit.'" *Chen v. Slattery*, 842 F. Supp. 597, 598 (D.D.C. 1994) (quoting *Public Citizen Health Research Group v. Young*, 909 F.2d 546, 550 (D.C. Cir. 1990)). In other words, "[c]ase law makes clear that a litigant may be considered a prevailing party [for purposes of EAJA] even though the case is settled before trial or otherwise becomes moot, as long as the litigant has substantially achieved what he has set out to do by commencing the litigation." *Wilderson v. Sullivan*, 780 F. Supp. 1347, 1348 (D. Colo. 1992). If Nano Magic had not filed its Petition within ten days of the trading suspension Order, there is zero possibility the Commission would have vacated the Order *sua sponte*.

Here, it is indisputable that the Commission would not have vacated the trading suspension order, let alone done so *nunc pro tunc*, but for Nano Magic filing timely its Petition.[13] In fact, the Division all but ***admits*** that the ultimate vacatur of the Commission's trading suspension order would not have occurred but for Nano Magic having filed the Rule 550 Petition, as the Division affirmatively states that the Commission entertained the Rule 550 Petition based on the parties' agreement "that the Commission should decide this matter." (Opp'n at 22). That "agreement" necessarily could not have occurred had the Rule 550 Petition never been filed. Moreover, that "agreement" effectively was a recognition that a dispute between the parties still existed as of April 17, 2024.[14]

As such, based on settled authority concerning prevailing party status for purposes of EAJA and the viability of an EAJA claim, Nano Magic is the prevailing party in this action and qualifies for an award of fees and costs under EAJA.

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[13] If an issuer does not file a Rule 550 Petition within ten days, then the Commission would reject outright the Petition.

[14] *Nano Magic Inc.*, Exchange Act Release No. 99980, 2024 WL 1672043 (April 17, 2024) ("Order Requesting Additional Briefs" (including "to address whether the Commission should dismiss Nano Magic's Rule 550 petition as moot")).

C. The Government's Position Never was Justified, Let Alone "Substantially Justified."

In its Petition, Nano Magic explained that the Division cannot carry its burden to show that its position in this matter was substantially justified because (1) the initial trading suspension was based on misstatements of fact in the Division's recommendation to the Commission to issue the suspension, and (2) the Division unjustifiably defended the initial suspension after Nano Magic presented evidence that the suspension should not have been issued in the first instance. While the Division briefly addresses Nano Magic's arguments, (*see* Opp'n at 12-15), the Division spends nearly ***20 pages*** of its Opposition in an attempt to rewrite the record and justify its defense of the initial suspension for now almost ***five years***. While it accuses Nano Magic of "attempt[ing] to distract from the sole issues at stake in this EAJA proceeding," it is the Division that is doing so. The Division actually is sweeping under the rug and burying the real issue germane to the resolution of the instant Application.

As explained in the Application, when the Commission "ruled" in April 2022 on Nano Magic's May 18, 2020 Motion to Compel Production of Information Before the Commission at the Time of Trading Suspension, the Commission disclosed publicly that the Division had misled the Commission as to a material reason for suspending trading: the Division's false assertion that a Director of Nano Magic had traded Nano Magic stock when that was not true. (Pet. at 4). In that same Order, which the Commission entered on April 28, 2022,[15] the Commission also pointed out three additional but inconsequential facts that the Division omitted from its filing to disclose to Nano Magic the information before the Commission at the time of the trading suspension. (*Id*. at 6). This is the position the Division asserts – having knowingly and

[15] *Nano Magic Inc.*, Exchange Act Release No. 94818, 2022 WL 1288188 (April 28, 2022) ("Order Denying Motion to Compel").

intentionally misled the Commission as to a material fact – that renders its position in this matter ***not*** substantially justified.

In response, the Division attempts to sweep its lack of candor under the rug, arguing that Nano Magic is speculating as to the impact that the false information provided to the Commission had on the Commission's decision to issue the trading suspension. (Opp'n at 15). The Division then engages in its own brand of what it deems "conjecture," and goes on to argue that the false information provided to the Commission was not relevant to the Commission's decision to issue the trading suspension at all. Instead, the Division claims that it provided the purportedly irrelevant false information "to alert the Commission of the staff's intention to investigate a separate issue and *not* as a basis for the Trading Suspension." (Opp'n at 14) (emphasis in original). The Division's message to the world by its incredulous position is "whether a corporate director sells stock 'coincident with suspicious promotional activity'" is an irrelevant fact to the Commission's consideration.[16] ***This*** is the Division's rationale in support of its argument that its position was substantially justified. Specifically, the Division seeks a decision that embraces as proper a material misrepresentation to the Commission at the outset to induce the Commission to act *ex parte*.[17]

The Division advocates for a decision standing for the proposition that any unjustified position – unjustified because it was untrue – taken by the government during the entire course of a proceeding must be forgiven, so long as a majority of the government's positions were substantially justified. Such a position ignores *Debt Box* and every state's Code of Professional

[16] It is foreseeable that such a preposterous position will be thrown in the Staff's face in future disputes for time immemorial, citing to the Division's own submission.

[17] The logical rationale underlying the regulatory requirement and the Commission's Order that the Staff disclose <u>all</u> facts pending before the Commission at the time the Commission entered the trading suspension is to subject the facts to the adjudicative process and assure that Division upholds its burden to establish that the facts put forward to justify the trading suspension are true. By disregarding this, the Division, through the PRO, deprived Nano Magic of its due process rights.

Responsibility requirement of candor to a tribunal. In fact, the D.C. Circuit has rejected a rule that would preclude a claim-by-claim determination on the ground that such a rule would render EAJA a "virtual nullity" because government conduct is nearly always grouped with or part of some greater, and presumably justified, action. *Air Transport Ass'n of Canada v. F.A.A.*, 156 F.3d 1329, 1332 (D.C. Cir. 1998). In the same vein, the Seventh Circuit has cautioned against application of the Division's proposed approach, holding that it "does not address the question whether allocation is permissible under the [EAJA], thus allowing an award of fees for the part of the government's case that was not substantially justified." *Gatimi v. Holder*, 606 F.3d 344, 350 (7th Cir. 2010).

Even those courts that do encourage review of the administrative record as a whole hold that courts should consider the government's positions on discovery and other non-merits issues, *i.e.*, the government's ***conduct*** as a whole. *See United States v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996) (citing *United States v. Powell*, 379 U.S. 48 (1964)) (considering government's conduct during discovery when performing substantial justification inquiry)).

The Commission's position ignores that, if it had been forthright with the Commission and Nano Magic from the outset, Nano Magic could have corrected the Division's misrepresentations within the less than one-month briefing window from Nano Magic's initial filing of its Rule 550 Petition.[18] Moreover, the Division continued, and continues, to multiply these proceedings by defending its unjustified position, and attempting to minimize the material false statements it made at the outset. The proceedings that followed the Division's initial

[18] Nano Magic's argument in its original "Petition … to terminate the suspension in the trading of the securities of Nano Magic Inc. ordered on April 30, 2020" filed with the Commission on May 6, 2020, was prescient, writing that "albeit imposed for the permitted statutory duration, the Commission's decision to suspend trading without the benefit of the instant facts that could have and should have been presented by the PRO staff to the Commission may have resulted in the conclusion not to suspend trading in Nano Magic's common stock." https://www.sec.gov/files/litigation/apdocuments/3-19787-event-2020-05-07-petition-terminate-trading-suspension.pdf at 24.

unreasonable position, and staunch defense of the same, conclusively justify an award of fees here. Indeed, "***an unreasonable prelitigation position*** will generally lead to an award of attorney's fees under the EAJA." *United States v. 515 Granby, LLC*, 736 F.3d 309, 315–17 (4th Cir. 2013) (emphasis added).

D. Nano Magic is Entitled to Recover all of its Claimed Fees and Expenses Incurred.

The Division argues that Nano Magic may not recover fees and expenses incurred in relation to its petition for writ of mandamus filed in the United States Court of Appeals for the District of Columbia Circuit or its response to a Commission subpoena. (Opp'n at 41-42). The Division further argues that Nano Magic may not recover fees and expenses incurred in relation to what it deems "unnecessary" filings. (*Id*. at 42-43). Again, the Division is wrong.

In *Hensley*, the Supreme Court set out a two-pronged approach for determining the amount of fees to be awarded when a plaintiff prevails on only some of his claims for relief or achieves "limited success." *Sorenson v. Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983). First, the Supreme Court asks: "[D]id the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded?" *Hensley*, 461 U.S. at 434. This inquiry rests on whether the "related claims involve a common core of facts or are based on related legal theories," *Webb v. Sloan*, 330 F.3d 1158, 1168 (9th Cir. 2003) (citing *Hensley*, 461 U.S. at 435), with "the ***focus*** . . . on whether the claims arose out of a common course of conduct," *id*. at 1169 (emphasis added). Second, the Supreme Court asks whether "the plaintiff achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Hensley*, 461 U.S. at 434. If the court concludes the prevailing party achieved "excellent results," then it may permit a full fee award—that is, the entirety of those hours reasonably expended on both the prevailing and unsuccessful but related claims. *Id*.

at 435; *Schwarz*, 73 F.3d at 905-06.

The Division argues that Nano Magic should not be permitted to recover fees and expenses incurred in relation to its writ of mandamus because it was dismissed as moot in part and denied in part. (Opp'n at 42). Of course, the Division ignores that the reason for the dismissal as moot and denial in part was the Commission's untrue representation to the District of Columbia Circuit that the Commission was "working diligently and in good faith to resolve Nano Magic's request to terminate the trading suspension…."[19] An additional two and one-half years was neither diligent nor acting in good faith. The Division further argues that Nano Magic should not be permitted to recover fees and expenses for various filings and submissions in connection with these proceedings because they were either unsuccessful or "had no substantive bearing on this proceeding." (*Id*. at 43). Discovery motions exist specifically to ferret out the material falsity that the PRO advanced to induce the Commission to order a trading suspension, which the Commission ultimately recognized never should have been entered in the first place. Confirming the appropriateness of rejecting the Division's approach, at least three United States Courts of Appeals have declined to employ this "apportionment" concept. The Sixth Circuit "decline[d] the government's invitation to apportion [plaintiff's] attorney fees to the single claim addressed in [its] previous opinion." *Sakhawati v. Lynch*, 839 F.3d 476, 480 (6th Cir. 2016). The Eighth Circuit also refused to reduce fees where the district court found in plaintiffs' favor on their state claim without reaching the federal claims, because plaintiffs' federal claims "were alternative grounds for the result the district court reached" and "plaintiffs fully achieved [their] goal by prevailing on their state constitutional claim." *Emery v. Hunt*, 272 F.3d 1042, 1047 (8th Cir. 2001). And, the Seventh Circuit rejected defendants' argument that plaintiff did not succeed

[19] *In re Nano Magic Holdings, Inc.*, No. 22-1021, Doc. No. 1945201 (SEC Opposition filed May 2, 2022) at 18, 33.

on her sexual harassment claim where "the court did not find in [defendant's] favor on the sexual harassment claim; it merely did not reach the merits of the issue." *Dunning v. Simmons Airlines, Inc*., 62 F.3d 863, 874 (7th Cir. 1995).

Moreover, the Court made clear in *Hensley* that, while hours spent on an unsuccessful claim "that is distinct in all respects from [the plaintiff's] successful claim" should be excluded, "[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." 461 U.S. at 440. Construing the *Hensley* Court's statement that claims are "unrelated" if they are "entirely distinct and separate" from the prevailing claims, courts have held that "related claims involve a common core of facts or are based on related legal theories." *Webb*, 330 F.3d at 1168 (citations omitted); *see also Murphy v. Smith*, 864 F.3d 583, 586 (7th Cir. 2017) ("Where claims are closely related, however, a plaintiff who obtains excellent results should recover a fully compensatory fee even if he did not prevail on every contention in the lawsuit or if a court rejected or did not reach certain grounds supporting the excellent result." (citation omitted)); *Sakhawati v. Lynch*, 839 F.3d 476, 480 (6th Cir. 2016) (declining to reduce fees where all of the claims pertained to one asylum application and related evidence). Following the language of *Murphy*, 864 F. 3d at 586, Nano Magic could not have achieved a more excellent result than the Commission's decision to vacate the trading suspension order *nunc pro tunc*.

Here, all of Nano Magic's claimed fees were incurred in relation to furthering its interests in these proceedings, and the Division does not argue otherwise. Instead, the Division again attempts to cast blame on Nano Magic for incurring substantial legal fees and expenses when, in reality, the Division alone is to blame for the length of these proceedings. The Administrative Court should reject outright the Division's invitation to apportion Nano Magic's incurred fees

and costs.

E. Application of a "Special Factor" Enhancement to the Recoverable Hourly Rate is Proper.

In its Application, Nano Magic explained that it is entitled to a "special factor" enhancement over and above the presumptive $75.00 hourly rate contained in Rule of Practice 201.36(b). Nano Magic explained that the unique qualifications of its counsel and the nature of these proceedings warranted a deviation from the presumptive cap on recoverable hourly rates. In response, the Division does not dispute that the circumstances warrant a special factor enhancement under prevailing caselaw interpreting EAJA. Instead, the Division only argues that a special factor enhancement is unavailable under the Local Rules of Practice. (Opp'n at 46).

Nano Magic submits that a special factor enhancement is not only available, but is particularly appropriate given the Division's bad-faith conduct. Although attorneys' fees are capped under EAJA at $125 per hour, 28 U.S.C. § 2412(d)(2)(A)(ii), the statute also provides that "[t]he United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law."[20] 28 U.S.C. § 2412(b). Thus, under the common law a court may assess attorneys' fees against the government if it has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008) (quoting *Chambers v. NASCO, Inc*., 501 U.S. 32, 45–46 (1991)). All

[20] *E.g.*, Appellant's Application for Fees and Expenses Pursuant to the Equal Access to Justice Act, No. 23-1290, SEC v. Carrillo, Et Al. (1st Cir. 2024) at 1 ("Sanchez-Diaz EAJA Claim"). In the case against Appellant - Relief Defendant Sanchez-Diaz, the First Circuit had determined that the Commission's position both in the trial court and on appeal had "no basis," and that the SEC did not contest the "basic facts" relevant to resolution of that dispute. *SEC v. Sanchez-Diaz*, 88 F.4th 81 (1st Cir. 2023). The First Circuit's holding came after years of litigation, wherein Ms. Sanchez-Diaz was forced to defend against the SEC's plainly unreasonable position, one which Ms. Sanchez-Diaz challenged from the outset. In the Sanchez-Diaz EAJA Claim, Ms. Sanchez Diaz sought $394,263.03 in professional fees and $90,060.03 in incurred costs. The Commission and Ms. Sanchez Diaz settled, with the Commission paying $231,000, representing 58.6% of the total demand, well above both the "statutory rate" and a locality-adjustment to the statutory rate. In short, the Commission pays EAJA claims above the statutory rate when confronted with untenable and unsupportable legal positions, as here.

four adjectives are appropriate descriptors of the PRO's behavior towards Nano Magic in this matter.

Precedent in the United States Court of Appeals for the District of Columbia Circuit, which is responsible for hearing appeals from Commission decisions, supports Nano Magic's position. "[W]e hold the government to the same standard of good faith that we demand of all non-governmental parties." *Copeland v. Martinez, 603 F.2d 981, 984 (D.C. Cir. 1979).* The purpose of such an award is to "deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process." *Id*. "The district court may award attorney fees at market rates for the entire course of litigation, including time spent preparing, defending, and appealing the two awards of attorney fees, if it finds that the fees incurred during the various phases of litigation are in some way traceable to the [government's] bad faith." *Brown v. Sullivan*, 916 F.2d 492, 497 (9th Cir. 1990). And, in evaluating whether the government acted in bad faith, we may examine the government's actions that precipitated the litigation, as well as the litigation itself. *Rawlings v. Heckler*, 725 F.2d 1192, 1195–96 (9th Cir. 1984); see also *Hall v. Cole*, 412 U.S. 1 (1973) (concluding that "the dilatory action of the union and its officers" in expelling an individual from the union following his resolutions unsuccessfully condemning union management's alleged undemocratic and short sighted policies constituted bad faith (internal quotation marks and citation omitted)); *Dogherra v. Safeway Stores, Inc*., 679 F.2d 1293, 1298 (9th Cir. 1982) (concluding that an employer would have acted in bad faith if it pursued a defense of an action based on a lie).

Ninth Circuit precedent also provides that where a government agency, there the FAA, acted in bad faith, the prevailing party thereby is allowed to recover fees at a reasonable market rate in an EAJA claim. *Mendenhall v. Nat'l Transp. Safety Bd*., 92 F.3d 871 (9th Cir. 1996). The

court held that "[t]he moment the FAA acknowledged" that its complaint against her was baseless, "the agency was no longer justified in pursuing its action." *Id*. at 877. "The agency's continuation of an action it knew to be baseless . . . is a prime example of bad faith." *Id*. (internal quotation marks omitted).

Here, the PRO committed the same "prime example of bad faith" that the FAA committed in *Mendenhall*. Almost two years to the day after the Commission entered the trading suspension order, the Commission itself brought to light the PRO's bad faith inducement of the Commission to impose the suspension. Specifically, the Division continued and continues to defend its unjustified position that it occupied from the outset of this matter, notwithstanding that it easily could have resolved this matter years ago. All fees and costs are attributable entirely to the PRO's "bad faith, vexatious [conduct], wanton [abuse of Nano Magic], [and] oppressive reasons [in its pleadings]," applying directly the language of *Rodriguez*, 542 F.3d at 709 (quoting *Chambers*, 501 U.S. at 45–46.

F. <u>The Fees that Nano Magic Seeks in this Application are Reasonable Based on the Nature and Extent of the Legal Services Rendered.</u>

Reasonable fees under EAJA are determined by calculating the number of hours reasonably expended on the litigation multiplied by a reasonable rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The hours worked by an attorney "are considered acceptable if they are 'reasonable in relation to the difficulty, stakes, and outcome of the case,' and where the work carried out 'would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interests.'" 10 Business & Commercial Litigation in Federal Courts § 105:41 (4th ed.), Westlaw (update December 2020) (internal citations omitted). The total professional fees incurred as evidenced by the invoices is, as represented, $496,381.00. The total costs incurred were $52,761.61. The total of professional fees and costs, through preparation of the

Application for Award of Fees and Costs, was $549,142.61.[21] Additional professional fees incurred in connection with reviewing and analyzing the Division's Opposition and the preparation of this Reply is approximately $60,191.50, bringing the total of professional fees and costs to $609,334.11.[22]

The Division argues that Nano Magic did not submit sufficient evidentiary support for its claimed fees and expenses, and that Nano Magic did not adequately show that those fees and expenses were actually incurred. Nano Magic stands on its submissions made in connection with its Application. The use of a single consolidated bill was for ease of reference and for redaction of attorney-client privileged and attorney work product content. And, whether Nano Magic has satisfied in its entirety at this time its fee obligation is irrelevant to its entitlement to a full award of costs and fees. The Division's position is nothing more than a space-occupying red herring in support of the futile positions it asserts in its Opposition.

III. CONCLUSION AND RELIEF REQUESTED

The PRO's approach was drastic, destructive and dangerous, erasing the boundaries between truth and falsehood. By flagrantly ignoring the rules and procedures that provide for integrity to the Commission's process for administering its statutory trading suspension authority, the Division, through the PRO, proved painfully correct the language of Chief Justice Rehnquist in *SEC v. Sloan*, that "[t]he power to summarily suspend trading in a security even for 10 days, without any notice, opportunity to be heard, or findings based upon a record, is an

[21] The Division does not challenge the computation of actual professional fees incurred as $496,381.00. Instead, noteworthy, nonsensical and what should be embarrassing to the Commission, is the extent to which the Division goes to write a "dancing around" narrative to point out a manual arithmetic error of $7.35 in **actual** costs incurred. Instead of expenses incurred being $52,768.96, the correct amount of expenses incurred was $52,761.61. These sums do not include the additional professional fees and costs that Nano Magic has incurred in connection with the preparation of this reply brief and which Nano Magic is entitled to recover.

[22] Professional fees incurred in January 2025, not previously submitted, totaled $28,054.00, and in February totaled $5,907.50. Fees incurred, but not yet billed in March are approximately $26,230.00. These sums are the source of the additional amount that Nano Magic is entitled to recover.

awesome power with a potentially devastating impact on the issuer, its shareholders, and other investors." *SEC v. Sloan*, 436 U.S. 103, 112 (1978).[23] The misstatements of the PRO and the failure to disclose them as required within days of Nano Magic's filing of the Petition makes a mockery of the process. This forum has the authority to put back up the guardrails and reestablish the boundaries between truth and falsehood by awarding all professional fees and costs that Nano Magic incurred.

Accordingly, and for all reasons stated herein, Nano Magic requests that the Commission grant the Application, and that Nano Magic be awarded its full professional fees and costs incurred, which were and are reasonable attorneys' fees and costs under these unique circumstances, in connection with these proceedings.

Dated: March 24, 2025

Respectfully submitted,

/s/

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[23] In this, the sole United States Supreme Court precedent addressing the agency's trading suspension authority, the Chief Justice further wrote that "in this area, Congress considered summary restrictions to be somewhat drastic, and properly used only for very brief periods of time." *Id.*

STATEMENT OF ELECTRONIC FILING AND CERTIFICATE OF SERVICE

The undersigned filed electronically with the Commission this Petitioner Nano Magic Inc.'s Reply in Support of Application for an Award of Attorneys' Fees and Other Expenses Pursuant to 17 C.F.R. § 201.31, *et seq.* via eFap filing system and served or delivered courtesy copies to the following parties and other persons entitled to notice in the manner set forth to the right of each served party:

Securities and Exchange Commission
c/o Hon. Vanessa A. Countryman, Secretary (via e-mail)
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