UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19787

In the Matter of

NANO MAGIC INC.,

Respondent.

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

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Nano Magic, Inc. ("Nano Magic"), through undersigned counsel, files this application under the Equal Access to Justice Act for award of all attorneys' fees and expenses as Nano Magic actually incurred in connection with this entire proceeding. The reason is simple – the Staff of the Philadelphia Office of the Division of Enforcement ("PRO") (hereafter the "Division of Enforcement" without reference to the PRO is short-formed as the "Division") lied to and misled the Commission to obtain the ten-day trading suspension. Only an unrelenting, aggressive and persistent defense uncovered the wrong perpetrated on Nano Magic. Neither Nano Magic nor counsel take lightly the ten-day trading suspension wrongfully pursued and wrongfully obtained, premised largely on the Staff lying to and misleading the Commission.[1] Not only did the PRO obtain an unwarranted trading suspension, but the PRO also fought vigorously to conceal its misconduct and avoid the truth of it having misled the Commission to impose the trading suspension. The facts were revealed only when the Commission itself innocently published the previously undisclosed fact as a basis for the trading suspension almost 24 months to the date of the trading suspension and 23½ months after Nano Magic's demand for "just the facts" of what the PRO told the Commission – two years after the trading suspension is when the Staff's material misrepresentation first become known to Nano Magic.[2] Nano Magic's previous description of this case as the Commission's "Debt Box"[3] in its adjudicative capacity was not an understatement.[4] There is a high probability that any federal court would have sanctioned the

[1] The use of the phrase "lying to the Commission" is not without extensive thought and consideration. That is exactly what occurred, and to "sugar coat" or otherwise minimize the fact that the PRO inexcusably made an affirmative representation about and accusation against a Director of Nano Magic that was entirely untrue would be disingenuous, given the significant harm to Nano Magic.

[2] *Nano Magic Inc.*, Exchange Act Release No. 94818, 2022 WL 1288188 at 3 (April 28, 2022).

[3] *SEC v. Digital Licensing Inc. (d/b/a "Debt Box"), et al.*, No. 2:23-cv-00482-RJS-DBP (Memorandum Decision and Order entered May 28, 2024).

[4] Reply Brief of Petitioner Nano Magic Inc. Addressing Non-Mootness of Rule 550 Petition to Terminate Trading Suspension Issued Pursuant to Section 12(K)(1)(A) of the Securities Exchange Act of 1934 (filed June 5, 2024), available at www.sec.gov/files/litigation/apdocuments/3-19787-2024-06-05-reply.pdf.

offending PRO Staff, and a Bar Association likely would have done so as well, for lying to a tribunal. The effect and results obtained for Nano Magic because of its counsel's specialized knowledge, experience and persistent advocacy ultimately led to the Commission granting – in an unprecedented decision – Nano Magic's petition and vacating the trading suspension order *nunc pro tunc* to April 30, 2020.[5]

The Commission began the process of "making right" the grievous wrong inflicted by the PRO when the Commission, for what appears to be the first time in the Commission's history, granted a Petition to set Aside a Trading Suspension. Now, the Commission can take another step towards righting the PRO's wrong, by awarding all the professional fees and costs that Nano Magic had to occur. As discussed more fully below, not only does Nano Magic unquestionably qualify for the award, but the "special factor" enhancement must be available under 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"), because of, *inter alia*, the distinctive knowledge and specialized skills that undersigned counsel and his team brought to the proceedings. Accordingly, Nano Magic files timely this Petition for an award of professional fees and costs totaling $572,478.93 incurred through January 7, 2025.[6]

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

[6] As discussed more fully below, Nano Magic's due date for this EAJA application is today, January 8, 2025. An application for fees and expenses under EAJA must be filed no "later than 30 days after the Commission's final disposition of the proceedings." 17 C.F.R. § 201.44(a). In turn, a "final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceedings . . . becomes ***final and unappealable, both within the Commission and to the courts***." (emphasis added) 17 C.F.R. § 201.44(b). Applying the Commission's EAJA Regulations, specifically with respect to timing for filing an EAJA application, the United States District Court for the District of Columbia held "that § 504(a)(2) of EAJA is to be interpreted as creating a bright-line rule, discernible by looking at the category of order in question and the applicable law of appealability. When a potential appeal exists under the relevant statute, the time for appeal must lapse, or the appeal be completed, before the 30-day deadline begins to run. *See Myers* [*v. Sullivan*], 916 F.2d at 671–72, 674 [(11th Cir. 1990) (finding that the 30-day requirement "should be interpreted broadly and that overtechnical constructions of the requirement should be avoided.")]. Because [Appellant] could have potentially appealed the Commission's order of dismissal pursuant to § 25(a)(1) of the Securities Exchange Act, 15 U.S.C. § 78y(a)(1), the 30-day deadline did not begin to run until 60 days following the order of dismissal had lapsed."
Footnote continued on next page …

I. BACKGROUND

Nano Magic set forth in considerable detail some of the procedural history of the prejudicial nature of this proceeding in its May 8, 2024 Opening Brief of Petitioner Nano Magic Inc. Addressing Non-Mootness of Rule 550 Petition to Terminate Trading Suspension Issued Pursuant to Section 12(K)(1)(A) of the Securities Exchange Act of 1934.[7] Nano Magic will not repeat the detail here and, instead, respectfully invites the Commission to review that filing – as well as all filings – in the proceeding. In this Application Nano Magic simply will highlight elements of the history through select pleadings that confirm the appropriateness of the Commission awarding the "special factor" enhancement under the EAJA because of the distinctive knowledge and specialized skills that undersigned counsel and his team brought to the proceedings.

A. Relevant History Preceding the Commission's Order Granting Petition to Terminate Trading Suspension

The following represents select events from the factual and procedural history that followed the Commission's April 30, 2020 Order pursuant to Section 12(k) of the Securities Exchange Act of 1934 suspending trading in the securities of Nano Magic and preceded the October 10, 2024 Commission Order vacating the trading suspension Order *nunc pro tunc*:

> May 7, 2020: Nano Magic filed a 31-page detailed Petition to Terminate the Trading Suspension.[8] That Petition addressed in detail the factual and legal issues and addressed the real and adverse consequences of the suspension. The robust and expeditiously filed Petition reflected an acute appreciation and unique knowledge of the idiosyncrasies of Commission trading suspensions and the legal issues they present. The Commission, in its first scheduling Order, undoubtedly recognized the Petition's completeness and thoroughness, writing "[i]n view of the detail provided in NMGX's petition and supporting exhibits, the apparent

Footnote continued from previous page …

Adams v. S.E.C., 287 F.3d 183, 191 (D.C. Cir. 2002). Thus, *Adams* makes clear that the Commission's October 10, 2024 Order did not become final and unappealable until December 9, 2024, and Nano Magic's EAJA application thus did not become due until 30-days later, on January 8, 2025.

[7] www.sec.gov/files/litigation/apdocuments/3-19787-2024-05-08-brief.pdf at 2-7.

[8] www.sec.gov/files/litigation/apdocuments/3-19787-event-2020-05-07-petition-terminate-trading-suspension.pdf.

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."[9]

May 8, 2020: Nano Magic filed a Motion to Expedite Schedule for Submissions in Consideration of Sworn Petition to Terminate Trading Suspension. [10] After the Commission issued its initial Order Requesting Additional Submissions,[11] Nano Magic requested expedited scheduling and proposed a reasonable yet aggressive briefing schedule that would enable the Commission to resolve fully the Petition within ten days of its filing. The Division did not respond, which the Commission reasonably could have and should have interpreted as an unopposed Motion. This Motion too, upon which the Commission never ruled, uniquely recognized the importance of expedited action, particularly in light of the importance of the "piggy-back exemption," and which would have optimized investor protection and ensured timely resolution for Nano Magic. Four and one-half years after filing the Motion to Expedite Consideration, the Commission determined that this Motion was moot. Order Vacating Trading Suspension at 2.

May 18, 2020: Nano Magic filed a Motion to Compel Production of Information Before the Commission at the Time of Trading Suspension.[12] This Motion, had the Commission considered and granted it timely, could have eliminated another four and one-half years of litigation, including pursuit of Writ of Mandamus relief from the United States Court of Appeals. Motivating this Motion was the Division's language in its Information before the Commission at the Time of the Trading Suspension[13] ignoring its statutory obligation and instead "setting forth [only what in the Division's subjective view were] the substantive facts before the Commission at the time it issued the order suspending trading in Nano Magic Inc. securities on April 30, 2020." (emphasis added). As referenced below, the Commission ultimately ruled on this Motion,[14] albeit only after a Writ of Mandamus Petition was pending in the United States Court of Appeals. Critically, in that Commission Order, the Commission effectively disclosed publicly that the Division had misled the Commission as to a material reason for suspending trading, specifically the PRO's false assertion that a Director of Nano Magic had traded Nano Magic stock when that was not true. Had the PRO disclosed that fact at the start and as required, years of litigation and harm to Nano Magic could have been avoided.

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[9] *Nano Magic Inc.*, Exchange Act Release No. 88841, 2020 WL 2310946 at 2 (May 8, 2020). Typically, when a party files a Petition to Terminate a Trading Suspension, the Commission's initial briefing schedule calls for Petitioner to file an Opening Brief. That was unnecessary here because of counsel's specialized knowledge evident from the initial filing.

[10] www.sec.gov/files/litigation/apdocuments/3-19787-event-2020-05-08-motion-expedite-schedule-submissions.pdf.

[11] *Id.*

[12] www.sec.gov/files/litigation/apdocuments/3-19787-event-2020-05-18-motion-compel-filing.pdf.

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

[14] *Nano Magic Inc.*, Exchange Act Release No. 94818, 2022 WL 1288188 (April 28, 2022).

May 27, 2020: Nano Magic filed a 31-page detailed Closing Submission in Support of Termination of Trading Suspension, and requested relief in the form of (1) declaring the trading suspension vacated upon Nano Magic's original filing of the Petition; (2) declaring that Nano Magic should not have lost its piggy-back exemption, *ab initio*; and (3) making a finding that the Commission has concluded any investigation of Nano Magic.[15] This filing, separate entirely from its comprehensive and compelling factual arguments, again reflected an acute appreciation of and distinctive knowledge of the idiosyncrasies of Commission trading suspensions and processes and the legal issues they present, the scope of the relief that the Commission has the authority to grant to an injured party, and the specialized skills brought to their analysis and presentation.

September 1, 2021: The lead-up to this Order again evidenced a willingness to use specialized skills and unique knowledge to call out the Commission for its inaction and indifference to Nano Magic after 16 months of silence since the completion of briefing on the Petition. In response to a letter from undersigned counsel to the Commission inquiring about a ruling on the Petition and the Commission's perceived indifference to the harm to Nano Magic by the then 16 month failure to rule, and a Commission Order requesting additional written submissions to explain the prejudice to the company,[16] Nano Magic filed its Supplemental Filing Addressing Prejudice and Timeliness of Commission Consideration of Sworn Petition to Terminate Trading Suspension Issued Pursuant to Section 12.[17] Counsel's distinctive knowledge and specialized skills enabled recognition of the importance and value of submitting an expert opinion regarding the adverse effect of the Commission's failure to rule on Nano Magic's stock and its shareholders.[18]

February 14, 2022: After nearly two years of indifference to Nano Magic's plight from the Commission not having ruled, other members of Nano Magic's legal team with particularized expertise in pursuing writs of mandamus and skilled drafting of appellate court briefs filed a Petition for Writ of Mandamus (Agency Action Unreasonably Delayed) with the United States Court of Appeals for the District of Columbia Circuit.[19] The purpose was to obtain Appellate Court intervention for the Commission's apathy and disinterest in the continuing harm to Nano Magic. Striking was the language in the Commission's brief both admitting, in substance, that the Commission was too busy to care about the debilitating trading suspension, and was "working diligently and in good faith to resolve Nano Magic's request to terminate the trading suspension…."[20] It took the Commission another 31 months plus of "diligence and good faith" -- and

[15] www.sec.gov/files/litigation/apdocuments/3-19787-event-2020-05-27-petitioners-closing-submission-support-termination-trading-suspension.pdf.
[16] *Nano Magic Inc.*, Exchange Act Release No. 92703, 2021 WL 3666995 at 2 (Aug. 18, 2021).
[17] www.sec.gov/files/litigation/apdocuments/3-19787-2021-09-01-supplemental-filing-petitioner-nano-magic.pdf.
[18] *Id. at Ex. B.*
[19] *In re Nano Magic Holdings, Inc.*, No. 22-1021 (Petition filed Feb. 14, 2022).
[20] *In re Nano Magic Holdings, Inc.*, No. 22-1021, Doc. No. 1945201 (SEC Opposition filed May 2, 2022) at 18, 33.

prolonged harm -- to Nano Magic before Nano Magic's unwavering persistence and advocacy of counsel resulted in the vacating of the trading suspension.

April 28, 2022: Almost two years to the day of the Commission having issued the trading suspension, the Commission entered its Order Denying Motion to Compel [Production of the Information Before the Commission at the Time of Trading Suspension].[21] In that Order, perhaps believing that it was helping the Division by pointing out what the Commission deemed four innocuous facts that the Division omitted from its obligatory and statutorily-required filing to disclose to Petitioner the information before the Commission at the time of the trading suspension, the Commission instead revealed that the Division, either intentionally or through gross negligence, conclusively misled the Commission. The Division Staff, in its sworn declaration, asserted that one of the directors of Nano Magic had traded during the period underlying the trading suspension. In fact, that director, a highly regarded lawyer and father of Nano Magic's CEO, had <u>not</u> traded, and so informed the Commission in a Declaration filed on May 16, 2022.[22]

May 16, 2022: Nano Magic filed Supplemental Briefing in Further Support of its Motion to Compel Production of Information before the Commission at the Time of Trading Suspension,[23] which included the opportunity to "address[] any matter directly implicated by the resolution of Nano Magic's motion as set forth herein."[24] The underlying Motion to Compel Production reflected Nano Magic's counsel's distinctive knowledge of the difference between an Action Memorandum in support of an enforcement recommendation and a recommendation for an administrative non-enforcement trading suspension. Using the specialized skills and distinctive knowledge of its counsel, Nano Magic asserted that for the Commission to allow its denial Order to become effective would establish precedent that no federal agency should find tolerable, which is permitting its staff to provide patently false information as a definitive basis for agency action. Moreover, Nano Magic argued that the denial Order already stood for the proposition that statutory obligations placed on Division Staff and the language of a Commission Order are merely suggestions if the Division Staff unilaterally chooses not to follow the Order, let alone follow the law, by protecting Staff who did not provide <u>all</u> information presented to the Commission to induce entry of the trading suspension. <u>Had all the information been provided, the misstatement could have been corrected; Nano Magic would still have been harmed but the cost from the loss of the trading market and the costs of the litigation would have been much less.</u> Nano Magic argued and unambiguously requested that the Commission reconsider its Order and order the Division to produce forthwith to Nano Magic the Division's Action Memorandum, with non-factual content redacted, relating and giving rise to the trading suspension. The Commission never ruled on the express request for reconsideration.

[21] *Nano Magic Inc.*, Exchange Act Release No. 94818, 2022 WL 1288188 (April 28, 2022).
[22] www.sec.gov/files/litigation/apdocuments/3-19787-2022-05-16-supplemental-briefing.pdf.
[23] www.sec.gov/files/litigation/apdocuments/3-19787-2022-05-16-supplemental-briefing.pdf.
[24] *Nano Magic Inc.*, Exchange Act Release No. 94818, 2022 WL 1288188 at 3 (April 28, 2022).

June 29, 2022: The United States Court of Appeals, Per Curiam, in a non-published decision dismissed as moot in part and denied in part the Writ of Mandamus.[25] The Panel wrote that it relied on the fact that "the SEC has indicated that it has made significant progress towards a decision on the petition to terminate and expects to issue a decision in the coming months."[26] "Coming months" included two long winters, eight seasons and an inability of Nano Magic to continue to raise capital because of the cloud associated with the flawed trading suspension.

April 17, 2024: Almost four full years after imposing the ten-day trading suspension, the Commission issued an Order requesting additional briefing as to why the Petition no longer was moot, given that trading of Nano Magic had resumed.[27] A reasonable analogy would be the shooting of a living creature, leaving it to die and hoping that it would die over a four-year period, and then invite argument as to why the creature which should be dead still is living. Benefiting yet again from the specialized skills and distinctive knowledge of its legal team, Nano Magic set forth the obvious and legally cognizable injuries to Nano Magic. These included that a mootness determination would violate the constitutional principle of "capable of repetition yet evading review," the Commission's denial to Nano Magic of due process and outright ignoring Supreme Court precedent, and precluding the opportunity for Nano Magic to pursue an EAJA claim. That preclusive effect, as counsel argued, would constitute a conflicted self-interested pecuniary action by the Commission, similar to the concept of loss-avoidance insider trading cases. Then, prior to Nano Magic filing its reply brief, the egregious misconduct by the PRO only came to be eclipsed by the reported Memorandum Decision and Order reiterating that the trial court had "determined it [] improvidently entered [a TRO and receivership requested by the Commission] and noting [the Court's] concerns about representations the Commission made in obtaining and defending the relief" sought by Division of Enforcement Staff in "Debt Box."[28] That litigation, which resulted in the Commission closing the agency's Salt Lake City Office, provided a useful analogy to this trading suspension litigation. Following briefing, the Commission granted the Order terminating the instant trading suspension.

B. The Order Granting Petition to Terminate Trading Suspension

On October 10, 2024, the Commission issued its Order Granting Petition to Terminate Trading Suspension. *Nano Magic Inc.*, Exchange Act Release No. 101298, 2024 WL 4475691

[25] *In re Nano Magic Holdings, Inc., Per Curiam*, No. 22-1021 (D.C. Cir., filed June 29, 2022).
[26] *Id.*
[27] *Nano Magic Inc.*, Exchange Act Release No. 99980, 2024 WL 4475691 (April 17, 2024).
[28] *SEC v. Digital Licensing Inc. (d/b/a "Debt Box"), et al.*, No. 2:23-cv-00482-RJS-DBP (D. Utah, Memorandum Decision and Order entered May 28, 2024) at 2.

(Oct. 10, 2024). In the Order, the Commission noted that "the trading suspension has expired and that Nano Magic has regained piggyback eligibility," but nonetheless entertained the Petition "given the parties' agreement that the Commission should decide this matter." (*Id*. at 1-2). The Commission granted "Nano Magic's Rule 550 petition and vacate[d] the trading suspension order *nunc pro tunc* April 30, 2020." (*Id*. at 2). The Commission denied as moot "Nano Magic's motion for expedited consideration of its petition, the Division of Enforcement's motion for leave to respond to Nano Magic's supplemental brief filed after the Commission denied Nano Magic's motion to compel, and Nano Magic's motion to strike the Division's motion." (*Id*.) This outcome, the first occasion on which the Commission ever vacated a trading suspension, was the result of four and one-half years of Nano Magic benefiting from the distinctive knowledge and specialized skills brought to bear at every turn.

II. LEGAL STANDARD FOR AN AWARD UNDER EAJA

To be eligible for an attorney fee award under EAJA, a claimant must establish that (1) it is the "prevailing party" in the proceeding, 17 C.F.R. § 201.35(a); (2) its petition was timely filed, 17 C.F.R. § 201.44(a); (3) the government's position was not substantially justified, 17 C.F.R. § 201.35(a); and (4) no special circumstances make an award against the government unjust, 17 C.F.R. § 201.35(b). *See also Castaneda-Castillo v. Holder*, 723 F.3d 48, 57 (1st Cir. 2013); 28 U.S.C. § 2412(d)(1)(A)–(2)(B). The statute aims to "ensure that certain individuals ... will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved." *Aronov v. Napolitano*, 562 F.3d 84, 88 (1st Cir. 2009). It also "reduces the disparity in resources between individuals ... and the federal government." *Id*. (citing H.R. Rep. No. 99–120(I), at 4 and 1985 U.S.C.C.A.N. at 133). Pursuant to 17 C.F.R. § 201.35(a), "[t]he burden of proof that an award should not be made to an eligible prevailing

applicant is on [the Division]." Here, Nano Magic was the "prevailing party" in the proceeding, filed timely its petition, was at all times subject to the government's position which was not substantially justified or justifiable, and no special circumstances make an award against the government unjust. In fact, an award against the government is just and warranted.

III. ARGUMENT

A. Nano Magic is the Prevailing Party in this Action and Qualifies for a Fee Award under EAJA.

There should be no dispute that Nano Magic has met the threshold requirements to qualify for an award of fees and expenses under EAJA. The proceedings against Nano Magic was an "adversary adjudication" within the meaning of EAJA. *See* 5 U.S.C. § 504(b)(1)(C). Nano Magic prevailed in this matter in that the Commission granted "Nano Magic's Rule 550 petition and vacate[d] the trading suspension order *nunc pro tunc* April 30, 2020." (Order Vacating Trading Suspension at 2). *See* 5 U.S.C. § 504(a)(1). Additionally, Nano Magic is a "party" consistent with the requirement of 5 U.S.C. § 504(b)(1)(B) in that Nano Magic did not have more than 500 employees and its net worth did not exceed $7,000,000 at the time the adversary adjudication was initiated. (*See* **Exhibit A**, Declaration of Tom J. Berman, ¶ 5). At the time the Commission initiated the proceeding, Nano Magic had fewer than 500 employees. *Id.* Nano Magic creates and brings to market nanotechnology powered products formulated and packaged in the U.S.A. with special expertise in liquid products to apply to surfaces such as glass, porcelain, and ceramic. Consumer products include lens care, electronic device cleaning and protection, and anti-fog solutions (sports and safety), as well as household cleaning and auto protection. *See* 17 C.F.R. § 201.41(a)-(b).

Further, and as noted above in Note 5, Nano Magic filed the instant EAJA Application timely. The Commission issued its Order Granting Petition to Terminate Trading Suspension on

October 10, 2024. An application for fees and expenses under EAJA must be filed no "later than 30 days after the Commission's final disposition of the proceedings." 17 C.F.R. § 201.44(a). In turn, a "final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceedings . . . becomes final and unappealable, both within the Commission and to the courts." 17 C.F.R. § 201.44(b). Under Securities Exchange Act of 1934 section 25(a)(1), 15 U.S.C. § 78y(a)(1), both the Commission and Nano Magic had 60-days to appeal the Commission's October 10, 2024 Order to the United States Court of Appeals (for the District of Columbia), making the Commission's October 10, 2024 Order "final and unappealable" on December 9, 2024. Thus, Nano Magic's application is timely by virtue of its submission on or before January 8, 2025. *See Adams v. S.E.C.*, 287 F.3d 183, 191 (D.C. Cir. 2002) (interpreting 17 C.F.R. § 201.44(b) and holding that "[b]ecause [appellant] could have potentially appealed the Commission's order of dismissal pursuant to § 25(a)(1) of the Securities Exchange Act, 15 U.S.C. § 78y(a)(1), the 30-day deadline [to file an application for fees and expenses under EAJA] did not begin to run until 60 days following the order of dismissal had lapsed.").

B. <u>The Government's Position was not Substantially Justified.</u>

In *Pierce v. Underwood*, the Supreme Court defined "substantially justified" as having a "reasonable basis both in law and fact," or being "justified in substance or in the main." 487 U.S. 552, 565 (1988) (citations and internal quotations omitted). Therefore, and in theory, the government's position could be justified in substance even if ultimately incorrect, as long as "a reasonable person could think it correct." *Id*. at 566 n. 2. The government, however, is not exempt "from liability under the EAJA merely because it prevailed at some interim point in the judicial process." *Sierra Club v. Sec'y of Army*, 820 F.2d 513, 517 (1st Cir. 1987). In other

words, a previous decision in favor of the government during the adversary proceeding "is not sufficient, in and of itself, to show that the Government's position was substantially justified." *Davidson v. Veneman*, 317 F.3d 503, 507 (5th Cir. 2003).

Rather, "[t]he most powerful indicator of the reasonableness of an ultimately rejected position is a decision on the merits and the rationale which supports that decision." *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir.1995). Moreover, the government must show "that it acted reasonably at all stages of the litigation." *Davidson*, 317 F.3d at 506 (citing 28 U.S.C. § 2412(d)(2)(D)). The government alone bears the burden of proving that its position was substantially justified. *Friends of Boundary Waters Wilderness*, 53 F.3d at 885.

The Division cannot meet its burden to show that its position was substantially justified in these proceedings. On April 30, 2020, the Commission suspended trading of the securities of Nano Magic for ten business days, from April 30 through May 14, 2020. As its sole justification for the suspension, the Commission cited "questions regarding the accuracy and adequacy of information in the marketplace since at least February 24, 2020 … [relating to] publicly available information concerning NGMX including: (a) information in the marketplace claiming that NGMX has a patent for a disinfectant that kills 'coronavirus'; and (b) a statement made by NGMX on April 7, 2020 regarding NGMX's involvement in the fight against COVID-19." The Commission pointed in subsequent briefing to the press release and about 450 posts on an internet message board (as well as additional ones on Twitter) "promoting NMGX generally and discussing whether to purchase NMGX stock"—which was not surprising given Nano Magic's new leadership, cash infusion, overhaul of operations, actually filing SEC disclosures to become current, and rebranding campaign—and also noting that some of those posts mentioned the

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coronavirus. The internet message boards are portals independent of the companies and serve as media for investors and others to discuss the companies and enjoy First Amendment protections. The 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.

On May 7, 2020, well within the ten-day trading suspension, Nano Magic filed a sworn petition to terminate the trading suspension and a motion to expedite briefing and consideration so that the suspension could be terminated before its expiration. Nano Magic's lengthy petition explained the company's history and bona fides, its business operations, and its products in production or development. The petition explained that the statements from the internet message boards were not from the company, and that the April 7, 2020 press release was accurate and was not misleading. Nano Magic detailed at considerable length that there was no factual or legal basis for the trading suspension, and that the suspension was causing severe prejudice to Nano Magic's existing investors. In its motion to expedite consideration, Nano Magic emphasized that "[a] ruling by the Commission in favor of Petitioner entered after the expiration of the trading suspension would be a Pyrrhic victory for Nano Magic."

The following day, May 8, 2020, the Commission issued an order for additional written submissions by the Division of Enforcement and Nano Magic commencing May 14, 2020 and concluding May 28, 2020, after expiration of the ten-day trading suspension. The Commission expressly acknowledged in its May 8, 2020 scheduling Order a rationale for advancing consideration expeditiously and efficiently: "In 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…."

Hours later, in fact fewer than four hours later, Nano Magic again moved for an expedited briefing schedule, so that briefing would be completed by May 12, 2020, thereby allowing the Commission to issue a decision before the May 14, 2020 termination of the ten-day trading suspension. In the publicly available docket of Commission trading suspensions, this appears to be the first time the Commission ever received a motion to expedite scheduling after it issued its scheduling order and with a proposed schedule that would have permitted resolution of the petition, after full briefing, before the trading suspension expired.[29]

The Commission never ruled on the request to expedite. As a result, the next filings by the Division of Enforcement were the May 14, 2020 declaration by the nonsupervisory attorney setting forth information before the Commission and its May 21, 2020 brief opposing termination of the suspension. Nano Magic filed its closing submission on May 28, 2020. After 15 months of silence, Nano Magic filed, on August 6, 2021, a letter to the Commission seeking to "ascertain formally the status of the Commission's consideration of the Petition and Motions." Two weeks later, on August 18, 2020, the Commission issued an order acknowledging that Nano Magic's "petition and motions present significant merits and procedural issues, which the Commission is currently considering," even though "the trading suspension has already expired." The Commission stated that it "intend[ed] to resolve [the matter] with due regard for NMGX's request for expedited consideration, consistent with the Commission's other responsibilities." It

[29] As with other "firsts" in this proceeding evidencing the unique and specialized knowledge of Nano Magic's counsel, Nano Magic is not aware and could not find any instance in the history of petitions to set aside trading suspensions in which the petitioner, as here, sought within the ten-day window of the trading suspension to expedite the briefing schedule such that the Commission could have set aside the petition within the ten-day suspension window.

allowed Nano Magic to "make a supplemental filing" concerning any continued prejudice to it from the trading suspension.

Nano Magic filed its supplemental submission on September 1, 2021. Its submission was supported by an expert report of Frank Childress, a securities professional and former President of FINRA's Market Regulation Committee, establishing the continuing prejudice to Nano Magic from the trading suspension despite its expiration. The Division filed a perfunctory two-and-one-quarter-page response on September 15, 2021.

In its April 28, 2022, Order denying Nano Magic's motion to compel, the Commission confirmed it relied on facts that were before it when it issued the trading suspension, facts that the Division of Enforcement did not disclose in its declaration when the Commission had *ordered* it to disclose *all* such information. Nano Magic moved to compel because the declaration of counsel *could not* have been complete by the very language of the sworn declaration. The order denying the motion to compel states 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 [Nano Magic Director] Ronald Berman sold 1,310 NMGX shares, recognizing trading profits of $3,367." Two aspects of that statement are problematic. First, that purported "fact" was *not* contained in counsel's declaration, which belies the Declaration's sworn statement that it was complete.

Second, that "fact" is not even true. Put differently, the PRO lied to the Commission, as Ronald Berman did not trade even one share. As established by Nano Magic's supplemental briefing filed on May 16, 2022, in response to the order denying the motion to compel, Ronald Berman did not sell any Nano Magic shares in March 2020, or for that matter in 2019, 2020, or

2021. Instead, that number of shares was sold on those dates by Robert Berman, Ronald Berman's now-deceased brother. The Commission offered no explanation of either the source of the misattribution of Robert Berman's trades to Ronald Berman, or the conscious inclusion of false information that was admittedly in the Action Memo from the Division of Enforcement's sworn declaration.

Nor is the falsely attributed trading a singular example. As demonstrated by Nano Magic's supplemental briefing, invited by the Commission, the Commission's order identifies two *other* pieces of factual information that was put "before [the Commission] when we suspended trading in Nano Magic's securities" and that were not previously disclosed, and those additional facts as communicated to the Commission also were misleading.

As such, the PRO predicated its entire trading suspension demand and this Commission proceeding on either false or incomplete information. The PRO lied; but then, although the process required the PRO to disclose to Nano Magic <u>all</u> the facts and do so under oath, the PRO provided a deceptively defective, incomplete and inadequate declaration and compounded the problem. Factual errors can be innocent, but failure to disclose corrupts the process designed to ferret out errors. Accordingly, the Division cannot carry its burden to show that its position was substantially justified. Thus, Nano Magic is entitled to recover all fees and expenses incurred in connection with the trading suspension and related proceedings since the Commission issued its trading suspension on April 30, 2020.

C. <u>No Special Circumstances Exist That Would Make an Award Unjust.</u>

The Division has the burden of demonstrating "special circumstances" justifying denial of attorney's fees under 28 U.S.C. § 2412(d)(1)(A). *See McDonald v. Bowen*, 693 F. Supp. 1298, 1302 (D. Mass. 1988), *aff'd in part, remanded in part sub nom. McDonald v. Sec'y of Health &*

Human Servs., 884 F.2d 1468 (1st Cir. 1989). "[T]he sorts of 'special circumstances' that would permit the outright denial of a fee award ... are few and far between." *De Jesus Nazario v. Morris Rodriguez*, 554 F.3d 196, 200 (1st Cir. 2009) (construing the "special circumstances" exception regarding the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988(b)). For example, "'outrageous' or 'inexcusable' conduct on the part of the plaintiff or its counsel during litigation of the case can sometimes constitute 'special circumstances' warranting denial of attorney's fees"; "other 'bad faith or obdurate conduct' might also constitute" such special circumstances; and "an 'unjust hardship that a grant or denial of fee shifting might impose' could also constitute an acceptable reason to deny an award of attorney's fees." *De Jesus Nazario*, 554 F.3d at 200-201 (citations omitted). Nevertheless, "few such special circumstances satisfy these stringent criteria." *Id*. at 201.

Here, there are no indicia of any of the "special circumstances" that should preclude an award of attorneys' fees under EAJA, and the Division cannot carry its burden to show otherwise.

D. <u>Application of a "Special Factor" Enhancement to the Recoverable Hourly Rate is Proper.</u>

Under EAJA, since 1996, hourly rates for attorney fees have been capped at $125.00; however, district courts are permitted to adjust the rate to compensate for an increase in the cost of living. *See* 28 U.S.C. § 2412(d)(2)(A). Moreover, a "special factor" enhancement is available under EAJA if "some distinctive knowledge or specialized skill [is needed] for the litigation in question." *Pierce*, 487 U.S. at 572. Examples of these special factors include an "identifiable practice specialty" and a "knowledge of foreign law or language." *Id*. "Where such qualifications are necessary and can be obtained only at rates in excess of the [$125] cap, reimbursement above

that limit is allowed." *Id.*[30] Here, counsel provided that identifiable practice specialty, distinctive knowledge and special skills.

A "special factor" enhancement is warranted under the circumstances based on counsel with a necessary practice specialty and distinct knowledge. Nano Magic was represented at all times by Jacob Frenkel, and later by Mr. Frenkel, Bennett Cooper and Brooks Westergard also of Dickinson Wright, PLLC ("Dickinson Wright"). (Decl. of J. Frenkel ("Frenkel Decl."), attached hereto as **Exhibit B**). Mr. Frenkel is a Member in Dickinson Wright's Washington D.C. office, and is Chair of the firm's Government Investigations and Securities Enforcement practice across the firm's 20 offices. (*Id*. ¶ 2). Mr. Cooper and Mr. Westergard are Members in Dickinson Wright's Phoenix, Arizona office (*Id*. ¶¶ 7, 14) and Reno, Nevada office, respectively. (*Id*. ¶ 5).

After 14 years in the public sector first as an Assistant District Attorney in New Orleans, then as a Senior Counsel in the SEC's Division of Enforcement at the agency's headquarters, and finally as a U.S. federal criminal prosecutor of public corruption, financial crimes and securities laws, Mr. Frenkel entered private practice and has practiced in the private sector for more than 25 years. (*Id* ¶¶ 8-12). Mr. Frenkel defends investigations by the Commission's Division, compliance examinations of registered firms (including NRSROs), stock exchanges and other capital markets self-regulatory organizations, as well as parties in white-collar criminal investigations by federal and state authorities. Mr. Frenkel also conducts internal investigations for public and non-public companies, and represents officers, directors and employees in internal investigations. (*Id* ¶ 10, Ex. 1). Mr. Frenkel practices regularly before all offices of the

[30] Nano Magic acknowledges that the Commission's EAJA Regulations cap the recoverable hourly rate at $75, and do not include deviation from that cap for a "special factor" enhancement. However, the special factor enhancement should apply in this case. Indeed, statutes always take precedence over conflicting administrative regulations, *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 709 (11th Cir. 1998), and, because EAJA is a statute of general applicability and the Commission's EAJA regulations purport to interpret 5 U.S.C. § 504, the usual deference accorded to an agency's interpretation of its own regulations does not apply in the event of judicial review. *See Adams v. SEC*, 287 F.3d 183, 190 (D.C. Cir. 2002).

Commission, the Department of Justice's Fraud Section, United States Attorneys' Offices throughout the country, FINRA, state securities regulators, and the Public Company Accounting Oversight Board (PCAOB). (*Id*. ¶¶10, Ex. 1). The total professional fees for Mr. Frenkel's work related to this matter, to date, is $366,294.50. (*Id*. ¶ 16).

Mr. Cooper is an accomplished high-stakes appellate lawyer who has argued appeals and writ proceedings in the United States Supreme Court, federal circuit courts, and state supreme and intermediate appellate courts from coast to coast. Mr. Cooper's most recent argument before the U.S. Supreme Court was in March 2023. In the United States Court of Appeals for the Ninth Circuit, Mr. Cooper is the author of Thomson Reuters's 1,000-page treatise *Federal Appellate Practice: Ninth Circuit*. He is a current member of the Ninth Circuit's Advisory Committee on Rules of Practice and Internal Operating Procedures, and previously served as the court-appointed Chair of the Appellate Lawyer Representatives to the Ninth Circuit Judicial Conference. Mr. Cooper is a past Chair of the American Bar Association's Council of Appellate Lawyers. Mr. Cooper also is the lead author of Thomson Reuters's *Arizona Trial Handbook* and the longest-serving member of the State Bar of Arizona's Civil Jury Instructions Committee. The total professional fees for Mr. Cooper's work related to this matter was $93,892.50. (*Id*. ¶ 18).

Mr. Westergard is a former judicial law clerk to the Honorable Justice James Hardesty of the Nevada Supreme Court, and to the Honorable Howard McKibben of the United States District Court, District of Nevada. Mr. Westergard's practice focuses on commercial and business litigation, and securities enforcement and white-collar defense. (*Id*. ¶ 13). Mr. Westergard has represented numerous defendants in SEC enforcement actions, particularly in cases in which the Commission has sought disgorgement of what the Commission alleges are ill-gotten gains. (*Id*.) Mr. Westergard has represented defendants in SEC enforcement actions at all

levels of litigation and appeals, including numerous district courts, the First and Fifth Circuit Courts of Appeals, and the United States Supreme Court. (*Id*.) Mr. Westergard has received perennial recognition as a leader in his field from Nevada Business Magazine and Mountain States Super Lawyers. (*Id*.) The total professional fees for Mr. Westergard's work related to this matter, to date, is $32,353.50. (*Id*. ¶ 17).

The circumstances of this case required the highly specialized skill and talent that Messrs. Frenkel, Cooper and Westergard brought to this action. As such, a special factor enhancement is entirely appropriate under the circumstances. Since a special factor enhancement should apply to the recoverable hourly rate, the Court "should calculate this reasonable hourly rate according to the prevailing market rates in the relevant community, which typically is the community in which the district court sits." *Schwarz v. Sec'y of Health & Human Servs*., 73 F.3d 895, 906 (9th Cir. 1995). Here, the hourly rates sought are comparable to rates charged in Washington, DC. *See* A. Adcox, "DC Litigators Outpaced All Other Cities on Billing Rates in 2023," NAT'L LAW J. (July 12, 2024) (https://www.law.com/nationallawjournal/2024/07/12/dc-litigators-outpaced-all-other-cities-on-billing-rates-in-2023/, last visited Jan. 8, 2025 (stating that, in 2023, "[a] quarter of survey respondents in D.C., which included full-time equivalent litigators, both defense and plaintiffs counsel [had] billing rates in the range of $951 to over $1,300 [per hour]").

Because the rates charged by Nano Magic's counsel were reasonable compared to the prevailing rates in Washington, D.C., as this matter was before the Commission in Washington, and because a special factor enhancement is warranted under the circumstances, Nano Magic should be allowed to recover the full rates charged by its counsel. And, the Commission should recognize readily that it was Mr. Frenkel's expert and specialized knowledge that, *inter alia*,

honed in on the odd way the PRO deceptively was not providing all facts put before the Commission that caused Nano Magic to continue to fight the lack of disclosure.

E. The Fees that Nano Magic Seeks in this Application are Reasonable Based on the Nature and Extent of the Legal Services Rendered.

Reasonable fees under EAJA are determined by calculating the number of hours reasonably expended on the litigation multiplied by a reasonable rate. *See 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).

Here, as detailed in Mr. Frenkel's Declaration, the attorneys' fees that Nano Magic seeks to recoup for the four-and-one-half-year ordeal to which the PRO and the Commission subjected Nano Magic are reasonable based on the nature and extent of the services rendered. (Frenkel Decl. ¶¶ 15, 27). The extent of the fees could have been reduced substantially had the PRO simply been truthful as to the basis for the trading suspension and complied with the requirement to include in its sworn statement all facts before the Commission to obtain the trading suspension. Counsel represented Nano Magic here from filing of the Petition through the unprecedented vacating of the trading suspension Order and during United States Court of Appeals mandamus proceedings; specialized and experiences counsel obtained a completely favorable result based on the time, effort, and attention that counsel dedicated to this matter. Indeed, even a cursory review of the almost half-decade worth of proceedings establishes beyond doubt that a final, favorable resolution of this action justifies compensating in full the fees Nano Magic incurred here.

As such, the hours expended by counsel in these proceedings were both reasonable and necessary under the circumstances, and are recoverable fully under EAJA, particularly given the distinctive knowledge and specialized skills of counsel unique to this matter.

F. Nano Magic is Entitled to its Recoverable Expenses.

The statutory definition for "fees and expenses" as used in EAJA states that "'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case." 28 U.S.C. § 2412(d)(2)(A). Most courts have treated this definition as a guiding principle, rather than as a definitive listing of permissible expenses. *See, e.g., Jean v. Nelson*, 863 F.2d 759, 777 (11th Cir.1988) ("'fees' and 'expenses' are defined in the Act by example, rather than by limitation"), *aff'd on other grounds*, 496 U.S. 154 (1990). Fees for filing, electronic legal research, transcripts, photocopying, postage, travel, and couriers routinely are held to be recoverable under EAJA. *See, e.g., Jean*, 863 F.2d at 759 (allowing recovery for telephone, reasonable travel, postage, and computerized research expenses); *Int'l Woodworkers of Am.*, 792 F.2d at 767 (same).

Accordingly, "fees and other expenses" as used in EAJA are limited only by the requirement that all claimed expenses must be reasonable and necessary to the litigation. As such, the Commission should allow the recovery of the expenses requested herein and supported by the attached exhibits, including computerized legal research, electronic discovery (ESI expert vendor), expert witness report and consultations, search and filing fees, reproduction costs, select external legal services, delivery expenses related to filings, local travel expenses, a service fee, and duplicating supplies. (Frenkel Decl. ¶ 23). The total reasonable and necessary expenses Nano Magic incurred in these proceedings is $52,768.93. (*Id.*)

IV. CONCLUSION AND RELIEF REQUESTED

At no time in connection with this proceeding has the PRO's position been substantially justified or justifiable. To conclude otherwise would require the Commission expressly to condone lying to and misleading the Commission to obtain a trading suspension, countenancing Staff not following a Commission Order, and embracing Staff overtly ignoring of a federal statute. For all reasons stated herein, Nano Magic requests that the Commission grant this Application, and that Nano Magic be awarded its reasonable attorneys' fees incurred totaling (through January 7, 2025) $519,710.00 and expenses totaling $52,768.93 under EAJA, totaling $572,478.93.

Dated: January 8, 2025

Respectfully submitted,

[redacted]

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STATEMENT OF ELECTRONIC FILING AND CERTIFICATE OF SERVICE

The undersigned filed electronically with the Commission this Application of Petitioner Nano Magic Inc. 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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Washington, DC 20549

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