

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 93307 / October 13, 2021

ADMINISTRATIVE
PROCEEDING File No. 3-20622

In the Matter of)
)
)
 IBRAHIM ALMAGARBY,)
)
 Respondent.)
)
)

**RESPONDENT ALMAGARBY’S RESPONSE IN OPPOSITION TO DIVISION OF
ENFORCEMENT’S MOTION FOR DEFAULT AND FOR IMPOSITION OF
REMEDIAL SANCTIONS**

COMES NOW Respondent, Ibrahim Almagarby, by and through his undersigned counsel, and pursuant to Rule 154(b) of the Securities and Exchange Commission’s Rules of Practice and for the reasons set forth below and in the Declaration of Joshua A. Katz, Esq., hereby files his Response in Opposition to Division of Enforcement’s Motion for Default and for Imposition of Remedial Sanctions (the “Response”) as follows:

INTRODUCTION

This action arises from Respondent Almagarby’s purportedly acting as an unregistered dealer under Section 15(a) of the Securities Exchange Act of 1934 (the “Exchange Act”). During the time-period that Respondent purportedly engaged in such conduct he was in his 20s and a part time college student. Respondent Almagarby was not alleged to have engaged in fraudulent or manipulative conduct. He defended himself in the underlying enforcement action

in the District Court for the Southern District of Florida (Securities and Exchange Commission v. Ibrahim Almagarby, *et al.*, Case No. 17-62255-CIV-COOKE/HUNT (S.D. Fla.), but the Securities Exchange Commission (the “SEC”) prevailed on summary judgment (the “District Court Action”). Respondent Almagarby is appealing the District Court’s decision to the Eleventh Circuit Court of Appeals. He has never been dilatory in defending himself which is important to know for purposes of this response.

BACKGROUND FACTS

On October 13, 2021, the Commission issued an Order Instituting Administrative Proceedings (“OIP”) pursuant to Section 15(b) of the Exchange Act. The OIP alleged that Almagarby had been enjoined from violations of Section 15(a) of the Exchange Act (not the Securities Act as stated in the Division of Enforcement’s Motion). The District Court ordered a hearing to determine whether administrative remedial sanctions against Almagarby were in the public interest. While the Division’s Motion properly points out that the OIP was served on Respondent Almagarby’s counsel and counsel for the Division of Enforcement spoke to attorney Joshua A. Katz, Esq., it omits that Mr. Katz made it clear that it was Respondent Almagarby’s position that the OIP was not proper because it purported to be based upon a “final judgment” against Respondent Almagarby. *See* Declaration of Joshua A. Katz, Esq., ¶ 3, attached hereto as **Exhibit A**. Specifically, Section II.B.2 of the OIP states that “[o]n September 29, 2021, a final judgment was entered against Almagarby, permanently enjoining him from future violations of Section 15(a)(1) of the Exchange Act....” OIP at *2. That statement was, and is, incorrect. At the time the OIP was issued, there was no “final judgment” against Respondent Almagarby.

Under Federal Rule of Civil Procedure 58(a), “[e]very judgment and amended judgment must be set out in a separate document....” On September 29, 2021, the District Court simply

issued an Order adopting the Report and Recommendation. *Id.* ¶ 4. That Order did not constitute a “separate document” for purposes of Rule 58(a). Mr. Katz advised Commission Attorney Gordon of this fact and advised him that he would expect that an OIP would be properly issued once a final judgment is entered. **Exhibit A**, ¶ 3-5. Moreover, at the time that the OIP was issued, the Commission had a motion pending to modify the Order adopting the Report and Recommendation. *Id.* ¶ 3-5. Mr. Katz advised Commission Attorney Gordon that the OIP was premature because the SEC had moved to amend the order adopting the Magistrate Judge’s Report and Recommendation. *Id.* ¶ 5. Accordingly, nothing was “final” contrary to the statements contained in the OIP. It was counsel’s understanding from the conversation, and it was counsel’s expectation, that a separate notice of OIP would be issued following the Court’s issuance of a final judgment. *Id.* ¶ 6.

Consistent with the belief that the Order Adopting Report and Recommendation was not a final judgment, and, in light of the SEC’s filing its Motion for Amendment of Order Adopting Magistrate Judge’s Report and Recommendation and Final Judgment as to Defendants and Memorandum in Support, Mr. Katz filed a Notice of Appeal with the Eleventh Circuit Court of Appeals, stating:

The Securities and Exchange Commission (the “SEC”), on October 14th, filed its Motion for Amendment of Order Adopting Magistrate Judge’s Report and Recommendation and Final Judgment as to Defendants and Memorandum in Support [D.E. 145], pursuant to Fed. R. Civ. P. 59(e) . . . , while also seeming to posit in communication that the September 29th Order is a final order. Accordingly, and given the approaching jurisdictional deadline for appeal, the Defendants file this Notice of Appeal in an abundance of caution, to be held in abeyance pending the Court’s entry of an order disposing of the SEC’s Rule 59(e) motion, and eventual entry of a final judgment. *See* Fed. R. App. P. 4(a)(2) providing for premature appeals to be held in abeyance).

Id. ¶ 7. The Eleventh Circuit apparently agreed that the Court’s September 29 Order was not a final judgment because on November 18, 2021, the Eleventh Circuit issued its Notice of Docket Activity that rescinded its previously issued briefing schedule as a result of the statement above that the order was non-final and the SEC had filed its Motion for Amendment of Order Adopting Magistrate Judge’s Report and Recommendation and Final Judgment as to Defendants and Memorandum in Support. *Id.* ¶ 8.

On February 15, 2022, on the Commission’s Motion, the District Court issued its Amended Order Adopting the Report and Recommendation and *Final Judgment* as to Respondent Almagarby. *Id.* ¶ 9. At that point, counsel for Respondent Almagarby expected that an Amended OIP would have been issued and served. *Id.* ¶ 6. However, it was not. *Id.* ¶ 10. Months have passed and it was not until June 2, 2022 at 10:24 p.m. that Respondent Almagarby’s counsel received the Division’s Motion for Default.

LEGAL ARGUMENT

A default has not been entered in this proceeding. Respondent Almagarby is still not clear whether an operative OIP has been issued, given the fact that it was erroneously based upon a final judgment that had not been issued. If the Commission believes that an operative OIP has been issued, Respondent Almagarby would respectfully request the Commission provide him with notice of such and he will respond to the OIP within five business days.

As the Commission is aware, there are three conditions upon which a default judgment can be vacated. First, a motion to vacate a default be filed “within a reasonable time.” *In the Matter of the Application of David Mura*, Release No. 34-72080, 2014 WL 1744129, at *5 (May 2, 2014) (citing 17 C.F.R. § 201.155(b)). Here, Respondent Almagarby has not been defaulted, and has indicated that he will file a response to the OIP within 5 business days if the Commission

determines that the OIP was properly issued. He will, clearly, move to vacate within a reasonable time or otherwise file a response to the OIP if that is necessary.

Second, “a party must establish sufficient ‘reason[] for the failure to appear or defend’ that led to the default, i.e., that a respondent did not intentionally default or otherwise fail to ‘make defense of a proceeding a priority.’” *Id.* Here, Respondent Almagarby has provided a detailed explanation as to why he did not submit a response to his OIP. He has maintained, since the OIP was issued, that it was deficient in that it was issued based upon the erroneous assumption that a final judgment had been entered. Moreover, Respondent Almagarby has every intention of defending this proceeding if an Amended OIP is issued or the Commission determines that the OIP was properly issued, notwithstanding that it predated the District Court’s entry of a final judgment. He vigorously defended the enforcement action in District Court and is currently working on an appeal to the Eleventh Circuit Court of Appeals.

Third, it is “appropriate to require a party seeking to set aside a default to articulate a meritorious defense to the administrative proceeding.” *Id.* at *6. Respondent Almagarby is prepared to submit a Response to the OIP if the Court determines that the OIP was properly issued or otherwise orders Respondent Almagarby to do so. Respondent Almagarby’s response to the Amended OIP or OIP will be detailed and provide reasons why Respondent Almagarby, whose conduct at most involved failing to properly register as a dealer, should not be barred from the securities industry. Respondent Almagarby is confident that he can rebut the Division of Enforcement’s position which, under *Steadman v. SEC*, 601 F.2d 1126, 1140 (5th Cir. 1979), *aff’d on other grounds*, 450 U.S. 91 (1981), require it to establish evidence of several factors that suggest it is in the public interest to bar Respondent Almagarby.

CONCLUSION

For the reasons set forth above, Respondent Almagarby respectfully request that the Commission deny its Motion for Default and for Imposition of Remedial Sanctions.

Dated: June 7, 2022

Respectfully submitted,

SALLAH ASTARITA & COX, LLC
3010 N. Military Trail, Ste. 210
Boca Raton, FL 33431
561-989-9080 (Tel.)
561-989-9020 (Fax)

/s/James D. Sallah
James D. Sallah, Esq. (Lead Counsel)
Fla. Bar. No. 0092584
jds@sallahlaw.com
Joshua A. Katz, Esq.
Fla. Bar No. 0848301
jkatz@sallahlaw.com

Certificate of Compliance with Rule 154(c)

I hereby certify that the foregoing brief complies with Rule 154(c) of the Commission's Rules of Practice in that it contains 1,513 words, fewer than the 7,000 words permitted.

/s/James D. Sallah
Counsel for the Respondent

CERTIFICATE OF SERVICE

Undersigned Counsel for the Respondent hereby certifies that he has served a copy of the foregoing document by e-mail and United Parcel Service – Overnight Mail to the following:

Robert K. Gordon
gordonr@sec.gov
William P. Hicks
hicksw@sec.gov
U.S. Securities and Exchange Commission
Atlanta Regional Office
950 East Paces Ferry Rd., Suite 900
Atlanta, Georgia 30326

And has filed it using eFAP System (Electronically Filings in Administrative Proceedings).

This 7th day of June, 2022.

/s/James D. Sallah
James D. Sallah