**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.**

# REPLY OF DIVISION OF ENFORCEMENT TO RESPONDENT'S RESPONSE IN OPPOSITION TO MOTION FOR DEFAULT DISPOSITION AND FOR IMPOSITION OF REMEDIAL SANCTIONS

The Division of Enforcement ("Division"), hereby submits its Reply to Respondent's Response opposing the Division's Motion for Default Disposition.

## FACTUAL SUMMARY

As discussed in the Division's Motion, on September 29, 2021, the Court in the underlying civil action (*Securities and Exchange Commission v. Ibrahim Almagarby, et al.*, Case Number 17-62255-CIV-COOKE/HUNT (S.D. Fla.) entered an order pursuant to the SEC's motion for remedies. The Order permanently enjoined Almagarby from future violations of Section 15(a)(1) of the Exchange



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Act, and imposed the other relief sought by the SEC against the Defendants including disgorgement, civil penalties, a penny stock bar, and other relief. (Gordon Decl. Ex. A).[1]

On October 13, 2021, the Commission issued the Order Instituting Administrative Proceedings ("OIP") pursuant to Section 15(b) of the Exchange Act. (Gordon Decl. Ex. C). The OIP alleged that a final judgment had been entered against Almagarby enjoining him from violations of Section 15(a) of the Exchange Act and ordered a hearing to determine what administrative remedial sanctions against Almagarby were in the public interest. (*Id.*).

The SEC served Almagarby and his counsel with the OIP at his counsel's office by U.S. Postal Service certified mail. (Gordon Decl. ¶ 4 and Exs. D & E). Delivery was made to counsel's office on October 18, 2021 (*Id.*). Pursuant to Rule 220(b) of the Commission's Rules of Practice, Almagarby was required to answer or otherwise defend the proceeding by no later than November 8, 2021. Approximately seven months later, Almagarby has not filed an answer or otherwise responded to the OIP. (Gordon Dec. ¶ 6).

On February 15, 2022, following a motion by the Commission to amend the Court's judgment pursuant to Fed. R. Civ. P. 59(e) (a section entitled Motion to

[1] All evidentiary citations in this Reply are to the Declaration and exhibits filed with the Motion for Default.

Alter or Amend a Judgment), the Court entered an amended version of the order, imposing essentially the same relief (but using the more extensive and standard phraseology) and including the term "Final Judgment" in the title of the document. (Gordon Decl. Ex. B).

## ARGUMENT

Respondent now opposes entry of a default, contending that the Court's September 29 Order was not a final judgment, among other reasons because it was not set out in a separate document as required by Fed. R. Civ. P. 58, and arguing that the OIP is in error because it alleged that a "final judgment" permanently enjoining Respondent was entered on September 29, serving as the basis for potential remedies. Although Respondent went seven months without filing an answer, he argues that his counsel commented to Division counsel Gordon his opinion that the OIP was not valid. The stray comment by Respondent's counsel obviously doesn't satisfy the requirements of the Rules of Practice for filing a response to the OIP. Significantly, Respondent's counsel does not allege that Gordon suggested any agreement with his claim or otherwise indicated that Respondent did not need to follow the Rules of Practice and respond to the OIP. Indeed, Respondent still has not filed a response to the OIP.

Respondent's substantive argument also fails, because Section 15(b) of the Exchange Act does not require a "final judgment" as a basis for relief. Section

15(b)(4) provides for remedies where a subject has been "permanently or temporarily enjoined by order, judgment or decree of any court…". An order permanently enjoining Respondent is sufficient, and the September 29 Order clearly meets that standard. Further, although the September 29 Order was not labeled a "final judgment" by the Court, it did resolve the remaining issues in the case, and therefore, was a final decision in fact, whether labeled as such or not. The Supreme Court has articulated the standard that a decision is final when it is "a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" (internal quotation omitted) *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S. Ct. 669 (1981). That an amended version of the order was later issued, or that Respondent filed an appeal, does not change its nature. Finally, the "separate document" requirement of Rule 58 does not mandate a different conclusion. An order ruling on a motion and imposing ultimate relief may still constitute a final order, provided the Court intended it as such. *See*, *Christy v. Lansing*, 863 F. 2d 47 (6th Cir. 1988); *Bankers Trust Company v. Mallis*, 435 U.S. 381, 383 (1978).[2] In this case, the September 29 Order was plainly intended to resolve all of the remaining issues in the case.

[2] FRCP 58 was subsequently amended to provide that a judgment not entered by separate document will be considered entered 150 days after entry of the order. That time period has also more than run out. The purpose of the change was to ensure that parties will not have forever to appeal where no separate judgment is entered. *Outlaw v. Airtech Air Conditioning and Heating, Inc.,* 412 F. 3d 156, 163 (D.C. Cir. 2005).

## CONCLUSION

For the reasons set forth herein and in its Motion, the Division requests that Commission find Almagarby in default pursuant to Rule 155(a) of the Rules of Practice and impose the requested industry-wide associational bars as authorized by Section 15(b) of the Exchange Act.

Dated: June 10, 2022.

Respectfully submitted,

William P. Hicks

William P. Hicks
Robert K. Gordon
Counsel for the Division of Enforcement
U.S. Securities and Exchange Commission
Atlanta Regional Office
950 East Paces Ferry Rd., Suite 900
Atlanta, Georgia 30326
(404) 536-3800
hicksw@sec.gov

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 1069 words, fewer than the 7,000 words permitted.

William P. Hicks
Counsel for the Division of Enforcement



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## CERTIFICATE OF SERVICE

Undersigned Counsel for the Division hereby certifies that he has served a copy of the foregoing document by e-mail to the following:

James D. Sallah, Esq.
jds@sallahlaw.com
Joshua A. Katz, Esq.
jkatz@sallahlaw.com
Sallah Astarita & Cox, LLC
3010 N. Military Trail, Ste. 210
Boca Raton, FL 33431

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

This 10th day of June, 2022.

William P. Hicks
William P. Hicks