

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-12107

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
March 13, 2006

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In the Matter of :  
: ORDER ON MOTION TO  
NEIL FORMISANO : SET ASIDE DEFAULT  
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On January 20, 2006, I issued an Order Making Findings and Imposing Sanction by Default (Default Order) in this proceeding. The basis for the default was Neil Formisano's (Formisano) failure to answer the allegations in the Securities and Exchange Commission's (Commission) Order Instituting Proceedings (OIP); his failure to appear, in person or through a representative, at the prehearing conference on January 18, 2006, of which he had notice; and his failure to otherwise defend the proceeding. See 17 C.F.R. §§ 201.155(a), .220(f), .221(f). Based on the default, I found the allegations in the OIP to be true and barred Formisano from association with any broker or dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act).

On February 1, 2006, I issued an Order on Default finding that Formisano's letter postmarked January 25, 2006, was not a motion to set aside the Default Order because it failed to "state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding." 17 C.F.R. § 201.155(b).

On February 21, 2006, I received a Motion to Set Aside Default Order dated January 20, 2006 (Motion to Set Aside) from Formisano.<sup>1</sup> Formisano states that he first learned of the proceeding on January 11, 2006, and he first learned of the January 18, 2006, telephonic prehearing conference on January 15, and chose not to participate because: (1) he did not have ample time to consult an attorney and to access and review any documents; (2) he did not understand the Commission's Rules of Practice or civil law; and (3) he anticipated a complex case by the Division. Formisano's argument that he needs more time to prepare his defenses for many of the allegations in the OIP is not, in these circumstances, sufficient grounds to set aside the Default Order.

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<sup>1</sup> Formisano failed to file a certificate of service with the Motion to Set Aside. Because Formisano is incarcerated and appears *pro se*, this Office sent copies to the Office of the Secretary and the Division of Enforcement (Division).

On March 2, 2006, the Division filed: (1) an Opposition to the Motion to Set Aside; (2) a Memorandum in Support of the Opposition; and (3) a Declaration of Stephen B. Holden in Support of the Opposition with Exhibits A through S.

### Findings

On October 21, 2005, and December 27, 2005, the United States District Court for the Southern District of New York entered a Final Judgment of Permanent Injunction and Other Relief and an Amended Final Judgment, respectively, in SEC v. eWealth, No. 02 Civ. 8626 (JES) (S.D.N.Y.).<sup>2</sup> (Exhibits B, C.) The Amended Final Judgment permanently enjoined Formisano from: (1) violating Section 5 of the Securities Act of 1933 (Securities Act), Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; (2) aiding and abetting any violation of Sections 17(a) and 17(b) of the Exchange Act; and (3) participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock. The Amended Final Judgment ordered Formisano to: (1) disgorge \$9,798,950, plus prejudgment interest in the amount of \$3,907,300.62, for a total of \$13,706,250.62; and (2) pay a third-tier civil penalty in the amount of \$550,000.

On March 21, 2003, Formisano pled guilty to one count of conspiracy to commit securities fraud, mail fraud, and wire fraud and one count of securities fraud in United States v. Neil Formisano, No. 03 Cr. 362 (S.D.N.Y.).<sup>3</sup> (Exhibits O, P.) The criminal information in the criminal case was based on the same facts and circumstances underlying the civil complaint. (Declaration at 6.) Formisano was sentenced to incarceration for seventy-eight months on each count. (Exhibit O.)

On November 23, 2005, the Commission sent the OIP by certified mail to the same address that Formisano included on the envelope transmitting his Motion to Set Aside, Neil Formisano, No. 54876-054, Metropolitan Detention Center, Brooklyn, N.Y. 11232. An unknown person at the Metropolitan Detention Center signed, but did not date, the green card acknowledging receipt of the OIP. (Exhibit E.) The Commission received the signed green card on December 5, 2005. (Memorandum at 2.) I find that this evidence establishes that Formisano received a copy of the OIP issued November 23, 2005, by December 5, 2005, at the latest.

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<sup>2</sup> The Commission's civil complaint was filed on October 29, 2002. (Exhibit A.)

<sup>3</sup> On June 14, 2005, Judge Chin denied Formisano's motion that he was denied effective assistance of counsel in the criminal proceeding. (Exhibit Q at 2.)

On November 28, 2005, and December 16, 2005, the Commission sent Formisano copies of orders issued in this proceeding.<sup>4</sup> (Exhibit G.) The Commission mailings were sent by first class mail to the same address that Formisano included on the envelope transmitting his Motion to Set Aside. On December 6, 2005, the Division sent Formisano a letter asking that Formisano advise it of a convenient time for a prehearing conference and enclosed the Order Scheduling Hearing and Designating Presiding Judge and an information sheet designed primarily for pro se Respondents. (Exhibit H.) There is no evidence in the record that Formisano responded to the Division's request. On December 7, 2005, a guard at the Metropolitan Detention Center signed for the December 6, 2005, letter that the Division sent by Federal Express addressed to Formisano. (Exhibit I.)

On January 10, 2006, the Division arranged with Formisano's case worker at the Metropolitan Detention Center for Formisano to be available for the prehearing conference on January 18, 2006, and it sent the case worker additional copies of the OIP, my two orders, the Amended Final Judgment entered in SEC v. eWealth, No. 02 Civ. 8626 (JES) (S.D.N.Y. 2005), and a letter from the Deputy Clerk of the United States District Court for the Southern District of New York, which the case worker said he would personally deliver to Formisano. (Exhibits K, L.) On January 12, 2006, the case worker confirmed to the Division that Formisano received the materials. (Declaration at 5.) At the telephonic prehearing conference on January 18, 2006, the case worker stated that Formisano knew of the prehearing conference and chose not to participate. (Tr. 4-5.)

### **Ruling**

Rule 155(b), 17 C.F.R. § 201.155(b), states that a motion to set aside a default order shall state the reasons for the failure to appear or defend, and specify the nature of proposed defenses. A default may be set aside for good cause shown at any time.

Language in the OIP, the cover letter sent with the OIP, and the information sheet for pro se respondents, informed Formisano well before the January 18, 2006, telephonic prehearing conference that the Commission's Rules of Practice required him to file an Answer within twenty days after service of the OIP and that he was subject to a default order if he failed to do so, or if he failed to participate in a prehearing conference. (Exhibits D, F, H.) Formisano's claims that: (1) he was not aware of this administrative proceeding until January 11, 2006; (2) he became aware of the telephonic prehearing conference on January 15, 2006, and did not have time to consult an attorney and review documents before the telephonic prehearing conference occurred on January 18, 2006; and (3) he did not understand the rules and anticipated that the Division would put on a complicated case are unpersuasive.

Based on the evidence set forth above, I find that Formisano knew about this administrative proceeding well before January 11, 2006; that he knew about the prehearing

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<sup>4</sup> On November 28, I issued an Order Scheduling Hearing and Designating Presiding Judge and on December 16, 2005, I issued an Order Postponing Hearing and Scheduling Prehearing Conference. (Exhibits F, J.)

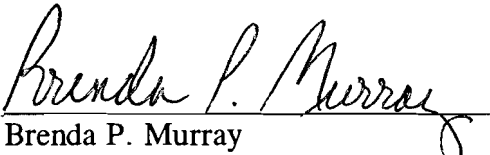
conference before January 15, 2006, and that he was able to attend the telephonic prehearing conference, but he chose not to participate without any valid reasons. Formisano should have participated in the telephonic prehearing conference and requested additional time voicing the concerns that he expressed in the Motion to Set Aside, instead he chose to ignore this administrative proceeding until over a month after the telephonic prehearing conference concluded when he filed the Motion to Set Aside.

Formisano not only failed to participate in the telephonic prehearing conference and to otherwise defend the proceeding, but Formisano has failed to file an Answer to the allegations in the OIP. The Motion to Set Aside does not show good cause because Formisano has not given any valid reason for his failure to appear at the telephonic prehearing conference or to defend the allegations in the OIP. In addition, by failing to file an Answer as required by the Commission's Rules of Practice Formisano has not specified the nature of his proposed defenses to the allegations in the OIP.<sup>5</sup> See James W. Bullard, Jr., 60 SEC Docket 2000. (Nov. 9, 1995). The Order Making Findings and Imposing Sanction by Default did not create an injustice and Formisano has not shown conditions that make it appropriate to set aside that Order. 17 C.F.R. § 201.155(b); cf. Richard Kern, 84 SEC Docket 2923 (Feb. 1, 2005).

#### Order

For all the reasons stated, I DENY the Motion to Set Aside the Default Order dated January 20, 2006.

I FURTHER ORDER that the Division Exhibits A through S are allowed into evidence. 17 C.F.R. § 201.111.

  
Brenda P. Murray  
Chief Administrative Law Judge

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<sup>5</sup> The only allegation in the OIP is that a civil injunction was entered against Formisano in SEC v. eWealth, No. 02 Civ. 8626 (JES) (S.D.N.Y. 1995). Contesting this allegation would be difficult in view of the court's Amended Final Judgment. Under the doctrine of collateral estoppel, Formisano could not contest the facts which were the basis for the Amended Final Judgment. Blinder Robinson & Co., Inc. v. SEC, 837 F.2d 1099, 1103-04 (D.C. Cir. 1988); Kimball Securities, 39 S.E.C. 921, 924 n.4 (1960).