

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19733

<p>In the Matter of</p> <p>NICHOLAS J. GENOVESE</p>

**DIVISION OF ENFORCEMENT’S MOTION TO STRIKE RESPONDENT’S
LATE FILING OR ALTERNATIVELY TO ACCEPT THE DIVISION’S ADDITIONAL
REPLY TO RESPONDENT’S LATE OPPOSITION TO THE DIVISION’S MOTION
FOR SUMMARY DISPOSITION**

The Division moves to strike Respondent Nicholas J. Genovese’s (“Respondent”) untimely opposition to the Division’s Motion for Summary Disposition. Respondent’s opposition was due to be filed by February 27, 2025, but Respondent did not file it or serve it on the Division until March 25, 2025. The Commission should not consider Respondent’s late filing because of his long history of delayed filings and because his proffered excuse does not support his extension request. Alternatively, if the Commission accepts Respondent’s opposition, then the Commission should consider the Division’s additional reply to Respondent’s opposition in Section II below. Because Respondent’s three legal argument defenses have no basis, the Commission should grant the Division’s motion for summary disposition and permanently bar Respondent.

PRIOR PROCEEDINGS

On March 24, 2020, the Commission issued this administrative proceeding (“OIP”) against Respondent. Subsequently, the Commission granted Respondent four extensions to answer the OIP: first, by September 14, 2020, then by June 8, 2023, then by September 14, 2023, and finally by November 27, 2023. (*See* Adv. Act Rel. Nos. 5521, 6289, 6357, 6389). After three years of extensions, Respondent still filed his answer nearly one month late, on December 13, 2023.

On March 11, 2024, the Commission issued an order setting a briefing schedule for the Division's proposed motion for summary disposition. (*See* Adv. Act Rel. No. 6571). The Division promptly filed its motion for summary disposition and supporting exhibits on March 22, 2024. Respondent, however, failed to file his opposition to the Division's motion for summary disposition by the ordered date of May 7, 2024; instead, he filed a motion on May 6, 2024, requesting an extension of time to file his opposition brief pending the resolution of a discovery motion that he had filed in March 2024. Thereafter, on November 1, 2024, the Commission issued an order partially granting Respondent's discovery motion and setting an updated briefing schedule for the Division's summary disposition motion. (Adv. Act Rel. No. 6762). The Commission order directed the Division to file a privilege log and serve it on Respondent;¹ set January 27, 2025, as the deadline for Respondent to file a brief in opposition to the Division's summary disposition motion; and set February 17, 2025, as the deadline for the Division to file a reply brief.

On January 28, 2025, the day after Respondent's due date had passed, he sent the Commission a request to extend the filing deadline for his opposition brief from January 27, 2025 to February 27, 2025. The Division consented to Respondent's extension request and asked that its own reply brief deadline be extended to March 17, 2025. By Order dated February 12, 2025, the Commission granted Respondent's extension request; set February 27, 2025, as the deadline for Respondent to file his opposition brief; and granted the Division's request to file its reply brief by March 17, 2025. (Adv. Act Rel. No. 6851).

On March 14, 2025, the Division filed its reply for its motion for summary disposition, which stated that the Division had not received any opposition from Respondent, and the Division requested that the Commission grant its motion for summary disposition.

¹ On December 11, 2024, the Division filed with the Commission its List of Withheld Documents and served a copy on Respondent.

On the evening of March 25, 2025, the Division's counsel received Respondent's proposed late opposition and its supporting exhibits via electronic mail. See Exhibit A. Prior to March 25, 2025, Respondent had not sought a request for an extension of the February 27, 2025 deadline to file his opposition brief. Given this late filing, and Respondent's history of missed filing deadlines in this matter, the Commission should strike his opposition brief as untimely. It has been one year since the Commission set the initial briefing schedule and the Division filed its motion for summary disposition. Respondent has already been given two extensions, and his proffered excuse for failing to timely file does not support his current extension request. In the alternative, the Commission should consider the Division's additional reply to that opposition in Section II below, and grant the Division's motion for summary disposition.

ARGUMENT

I. Given Respondent's Repeated Delays, Respondent's Late Opposition Filing Should be Stricken and Not Considered by the Commission.

For years, Respondent has repeatedly delayed this follow-on administrative proceeding, which commenced on March 24, 2020. Respondent failed to file a timely answer to the OIP despite the Commission giving him four extensions over the course of three years. For the past year, Respondent repeatedly delayed filing his opposition to the Division's motion for summary disposition, and the Commission has already granted Respondent multiple extensions.

In addition, Respondent has not shown good cause for his most recent request for an extension to file his opposition, or for his failure to timely seek an additional extension to file. In his March 25, 2025 filing, Respondent claims that he underwent surgery on March 3, 2025, and was medically incapacitated from February 20, 2025 until March 20, 2025. In support of his claims, Respondent only offered as evidence what appears to be a two-page patient discharge instruction. These instructions (which are not authenticated by any declaration) purport to describe Respondent's March 3, 2025 "same day surgery." As for physical limitations, these instructions purportedly only limit Respondent from not bathing or swimming for two weeks and not lifting more than fifteen pounds for six weeks. Respondent's filing does not explain how these limitations, which began on March 3, 2025, an entire week *after* his filing deadline, precluded him from making a timely filing, or in the alternative, a timely request for an additional extension. The discharge instructions do not in any way explain how Respondent's purported surgery incapacitated him between February 20, 2025 and March 20, 2025, as he claims in his filing. Even if the Commission accepted Respondent's unsupported claim that he was indeed "incapacitated" starting on February 20, 2025, Respondent offered absolutely no explanation as to why, before February 20, 2025, he could not have filed his opposition brief or at least requested an additional extension.

Because of Respondent's long history of repeated delays, and Respondent's failure to provide good cause for failing to file his opposition brief by February 27, 2025, the Commission should strike his opposition as untimely and not consider it when deciding the Division's motion for summary disposition.

II. Alternatively, Respondent's Opposition Has No Merit And the Commission Should Grant the Division's Motion for Summary Disposition.

There is no basis to the three legal defenses that Respondent raises in his late opposition to the Division's motion for summary disposition.

A. Respondent Can Not Rely on "SEC v. Siebel, 2005 WL 2400332 (SDNY)".

Respondent claims that in this follow-on administrative proceeding, the Commission should not consider his criminal plea in the parallel criminal case. For that proposition, he cites only "SEC v. Siebel, 2005 WL 2400332 (S.D.N.Y.)." However, no "SEC v. Siebel" decision exists at the Westlaw cite. The Division sought to find a case at the cite "2005 WL 24000332" and did not find any decision, let alone one that supports Respondent's argument. There is an "SEC v. Siebel Systems, Inc." decision issued by the court in 2005: *SEC v. Siebel Systems, Inc.*, 384 F. Supp.2d (SDNY, 2005). However, that "Siebel" decision concerns granting a motion to dismiss in an SEC Regulation FD case against a public company and two of its executives. Nothing in that decision supports the proposition that in a follow-on administrative proceeding, the Commission should not consider a respondent's guilty plea in a parallel criminal case.

In the Division's motion for summary disposition, the Division properly set out the basis for summary disposition based on Respondent's criminal conviction and guilty plea in the parallel criminal case. (*See* Division of Enforcement's Motion for Summary Disposition, entered on March 22, 2024, at 2, 8-12, and Exhibits 1, 1B, 1C, 2, 3, 7, which relate to *USA v. Nicholas J. Genovese*, 18-cr-00183 (SDNY)).

B. This Proceeding Is Not Inconsistent With Jarkesy As No Civil Penalty Is Being Sought And the Commission Itself Can Properly Decide the Summary Disposition Motion.

Respondent states the "ALJ system violates Article II per Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022)." That circuit decision was superseded by the Supreme Court's decision in *SEC v.*

Jarkesy, 2024 WL 3187811 (Sup.Ct. Jun. 27, 2024). This proceeding, however, is not impacted by *Jarkesy* because no civil penalty or monetary remedy is being sought in this follow-on administrative proceeding, no ALJ is currently assigned to this matter, and the Commission itself can decide the motion for summary disposition. The Division further addressed the lack of merit to Respondent’s *Jarkesy* defense on pages 13 to 14 of its Motion for Summary Disposition brief filed on March 22, 2024.

C. Respondent Has No Basis To Rely on *Kokesh v. SEC*.

Respondent’s final argument is the claim that the monetary relief ordered in the criminal case, approximately \$13 million, “makes further penalties unconstitutional under *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).” However, the *Kokesh* decision is not applicable in this proceeding as no financial penalty, or any other penalty, is being sought in this proceeding. As detailed in its brief in support of a motion for summary disposition, the Division is only seeking a remedial remedy to protect the investing public, *i.e.*, a permanent bar from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. (*See* pages 9 to 12 of its Motion for Summary Disposition brief filed on March 22, 2024.)

CONCLUSION

For the foregoing reasons, and those in its prior filings in this proceeding, the Division respectfully requests that its motion for summary disposition against Respondent be granted, and that Respondent be permanently barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent or nationally recognized statistical rating organization.

March 31, 2025

Respectfully submitted,

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