

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 6571 / March 11, 2024

Admin. Proc. File No. 3-19733

In the Matter of
NICHOLAS J. GENOVESE

ORDER SCHEDULING BRIEFS

On March 24, 2020, the Securities and Exchange Commission issued an order instituting proceedings (“OIP”) against Nicholas J. Genovese (“Respondent”) pursuant to Section 203(f) of the Investment Advisers Act of 1940.¹ After Respondent filed an answer to the OIP, the Commission ordered the parties to conduct a prehearing conference.²

On March 5, 2024, the Division of Enforcement filed a statement detailing its efforts to confer with Respondent, who is currently incarcerated. The Division stated that it had successfully reached Respondent by telephone on February 29, 2024, and conducted a prehearing conference with him. According to the Division’s statement, Respondent disputes that the Division has complied with its obligations to produce documents under Rule of Practice 230, and he did not agree to the Division filing a motion for summary disposition.³ The Division states, however, that it provided Respondent “[a]ll relevant documents connected to” this proceeding on July 21, 2020, and that it is appropriate for it to seek summary disposition because this follow-on proceeding is based on Respondent’s criminal conviction. The Division proposes a briefing schedule for its anticipated motion.

Under the circumstances, we believe it would serve the interests of justice and not result in prejudice to the parties to set a briefing schedule for the Division’s motion for summary disposition and for the parties to address their dispute regarding the Division’s compliance with

¹ *Nicholas J. Genovese*, Advisers Act Release No. 5468, 2020 WL 1433033 (Mar. 24, 2020).

² *Nicholas J. Genovese*, Advisers Act Release No. 6542, 2024 WL 450813 (Feb. 5, 2024).

³ See Rule of Practice 250(b), 17 C.F.R. § 201.250(b) (providing that “any party” may make a motion for summary disposition “after a respondent’s answer has been filed and documents have been made available to that respondent for inspection and copying pursuant to” Rule of Practice 230, 17 C.F.R. § 201.230).

Rule 230.⁴ Accordingly, IT IS ORDERED that the Division’s motion for summary disposition against Respondent shall be filed by March 22, 2024; Respondent’s opposition brief shall be filed by May 7, 2024;⁵ and the Division’s reply brief shall be filed by May 21, 2024.⁶

The motion for summary disposition should address each statutory element of the relevant provisions of Section 203(f) of the Advisers Act.⁷ The motion should also discuss relevant authority relating to the legal basis for, and the appropriateness of, the requested sanctions and include evidentiary support sufficient to make an individualized assessment of whether those sanctions are in the public interest.⁸ And in this case, the motion should attach

⁴ See Rule of Practice 100(c), 17 C.F.R. § 201.100(c).

⁵ Because he is proceeding pro se and is incarcerated, documents that Respondent sends to the Office of the Secretary for filing in this proceeding are considered “filed” when delivered to prison authorities. See *Nicholas J. Genovese*, Advisers Act Release No. 6389, at *2 n.12 (Aug. 30, 2023). As referenced below, he must also mail those documents to the Division.

⁶ Attention is called to Rules of Practice 150-153, 17 C.F.R. §§ 201.150-153, with respect to form and service, and Rule of Practice 250(e) and (f), 17 C.F.R. § 250(e) and (f), with respect to length limitations. See also *Pending Admin. Proceedings*, Exchange Act Release No. 88415, 2020 WL 1322001 (Mar. 18, 2020) (stating that “pending further order of the Commission, all reasonable requests for extensions of time will not be disfavored as stated in Rule 161” (citing 17 C.F.R. § 201.161(b)(1))).

⁷ See generally *Rapoport v. SEC*, 682 F.3d 98, 108 (D.C. Cir. 2012) (requiring “meaningful explanation for imposing sanctions”); *McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005) (stating that “each case must be considered on its own facts”); *Ross Mandell*, Exchange Act Release No. 71668, 2014 WL 907416, at *2 (Mar. 7, 2014) (requiring explanation of “why the facts and circumstances of this case warrant the [sanctions] imposed”), *vacated in part on other grounds*, Exchange Act Release No. 77935, 2016 WL 3030883 (May 26, 2016); *Gary L. McDuff*, Exchange Act Release No. 74803, 2015 WL 1873119, at *3 (Apr. 23, 2015) (remanding for development of additional evidence to “determine whether [the respondent] was acting as a broker or dealer at the time of his misconduct”).

⁸ See, e.g., *Shawn K. Dicken*, Exchange Act Release No. 89526, 2020 WL 4678066, at *2 (Aug. 12, 2020) (requesting additional information from the Division “regarding the factual predicate for [the respondent’s] convictions” and “why these facts establish” the need for remedial sanctions); see also *Shawn K. Dicken*, Exchange Act Release No. 90215, 2020 WL 6117716, at *1 (Oct. 16, 2020) (clarifying the additional information requested from the Division). In addition, whether preclusive effect will be given to findings made in an underlying case will vary depending on the circumstances giving rise to the prior order or judgment. See, e.g., *McDuff*, 2015 WL 1873119, at *1, *3 (general jury verdict of guilty); *Don Warner Reinhard*, Exchange Act Release No. 61506, 2010 WL 421305, at *3–4 (Feb. 4, 2010) (injunction entered following default), *appeal after remand*, Exchange Act Release No. 63720, 2011 WL 121451, at *5–8 (Jan. 14, 2011); cf. *Reginald Buddy Ringgold, III*, Advisers Act Release No. 6267, 2023 WL 2705591, at *3 (Mar. 29, 2023) (default judgment entered as sanction for litigation misconduct).

record evidence sufficient to conclude that the Division has complied with its obligations under Rule of Practice 230.⁹

An opposition to a motion for summary disposition should precisely specify the basis for that opposition, identify with particularity the material factual issues in dispute, and address relevant legal precedent from a court or the Commission.¹⁰ The opposition cannot rely on bare allegations or denials; it must instead point to evidence that shows there is a genuine and material factual dispute that can be resolved only by conducting an in-person hearing.¹¹ Respondent shall raise any arguments regarding the Division’s compliance with Rule of Practice 230 in his opposition brief.

A party’s failure to file a brief or comply with this order may result in the entry of default, the dismissal of one or more claims, the determination of a particular claim or claims at issue against that party, or the prohibition of the introduction of evidence or the exclusion of testimony concerning an issue.¹² When a party defaults, the allegations in the OIP will be deemed to be true and the Commission may determine the proceeding against that party upon consideration of the record without holding a public hearing.¹³

We remind the parties that any document filed with the Commission must also be served upon all participants in the proceeding and be accompanied by a certificate of service.¹⁴

⁹ In its report, the Division references, but does not attach, a July 21, 2020 cover letter to its document production to Respondent.

¹⁰ See, e.g., *Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *11 & n.68 (Dec. 12, 2013) (discussing appropriateness of summary disposition in follow-on proceedings and providing citations), *petition denied*, 773 F.3d 89 (D.C. Cir. 2014); *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *4–6 (Sept. 26, 2007) (discussing unsuccessful attempt to oppose summary disposition), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008).

¹¹ *Healthway Shopping Network*, Exchange Act Release No. 89374, 2020 WL 4207666, at *2 (July 22, 2020); *James S. Tagliaferri*, Exchange Act Release No. 75820, 2015 WL 5139389, at *2 n.14 (Sept. 2, 2015) (explaining that the party opposing summary disposition cannot merely provide a list of factual issues that are asserted to be material or provide a list of potential witnesses without any “explanation of their expected testimony”).

¹² Rule of Practice 180(c), 17 C.F.R. § 201.180(c).

¹³ Rules of Practice 155, 180, 17 C.F.R. §§ 201.155, .180.

¹⁴ See Rule of Practice 150, 17 C.F.R. § 201.150 (generally requiring parties to serve each other with their filings); Rule of Practice 151(d), 17 C.F.R. § 201.151(d) (“Papers filed with the Commission . . . shall be accompanied by a certificate stating the name of the person or persons served, the date of service, the method of service, and the mailing address or email address to which service was made, if not made in person.”).

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Secretary