

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940  
Release No. 6762 / November 1, 2024

Admin. Proc. File No. 3-19733

In the Matter of  NICHOLAS J. GENOVESE
--

ORDER PARTIALLY GRANTING MOTION FOR DISCOVERY, DENYING MOTION FOR  
EXTENSION OF TIME, AND SCHEDULING BRIEFS

On March 24, 2020, the Securities and Exchange Commission issued an order instituting administrative proceedings (“OIP”) against Nicholas J. Genovese pursuant to Section 203(f) of the Investment Advisers Act of 1940.<sup>1</sup> After Genovese answered the OIP, the parties held a prehearing conference but failed to reach an agreement on next steps for the proceeding. In their prehearing statements filed with the Commission, the Division of Enforcement indicated that it wished to proceed with a summary disposition motion, while Genovese requested discovery beyond the documents that the Division had produced pursuant to Rule of Practice 230.<sup>2</sup>

The Commission subsequently issued an order scheduling briefs, directing the Division to move for summary disposition by March 22, 2024; Genovese to file an opposition brief by May 7, 2024; and the Division to file a reply brief by May 21, 2024.<sup>3</sup> Before the Division filed its motion, Genovese moved for additional discovery and sanctions. The Division then moved for summary disposition. The day before his opposition brief was due, Genovese moved to extend his deadline to file that brief until after the Commission produced documents in response to a Freedom of Information Act (“FOIA”) request that he submitted in February 2024. This order addresses Genovese’s two motions.<sup>4</sup>

---

<sup>1</sup> *Nicholas J. Genovese*, Advisers Act Release No. 5468, 2020 WL 1433033 (Mar. 24, 2020); *see* 15 U.S.C. § 80b-3(f).

<sup>2</sup> 17 C.F.R. § 201.230.

<sup>3</sup> *Nicholas J. Genovese*, Advisers Act Release No. 6571, 2024 WL 1070560, at \*1 (Mar. 11, 2024).

<sup>4</sup> This order does not address the Division’s motion for summary disposition or Genovese’s motion to exclude ex parte communications, both of which will be resolved at a later date.

## I. Genovese's motion for discovery and sanctions

Rule of Practice 230 requires the Division to “make available for inspection and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division’s recommendation to institute proceedings.”<sup>5</sup> Rule 230 further provides that the Division may withhold certain documents, including those that are privileged or are internal writings prepared by a Commission employee that will not be offered in evidence, as long as they do not contain material exculpatory evidence.<sup>6</sup>

Here, the Division represents—supported by counsel’s declaration<sup>7</sup>—that it complied with its Rule 230 obligations by sending Genovese a DVD containing more than 7,000 pages of documents that spanned seven categories.<sup>8</sup> According to the declaration, the Division produced, among other types of documents, bank and brokerage records, communications with and documents produced by Genovese’s “victims/clients,” correspondence with Genovese, and documents from the federal civil and criminal cases against Genovese.<sup>9</sup> Although Genovese claims that he has “received literally no Discovery” “other than copies of a court transcript and a TRO,” he acknowledges in his extension motion that he received the discovery DVD.

Genovese’s motion for additional discovery appears to stem from his belief that there exist additional non-privileged documents within the scope of Rule 230(a) that the Division has not produced.<sup>10</sup> Specifically, Genovese suggests in his motion that there are additional “Investigative files, notes, emails, letters, subpoenas, affidavits, complaints, recordings, [and] interviews” that he is entitled to receive.<sup>11</sup> He assumes that, by the time his office was visited by

---

<sup>5</sup> 17 C.F.R. § 201.230(a)(1).

<sup>6</sup> *Id.* § 201.230(b)(1), (3).

<sup>7</sup> The relevant declaration was filed on March 22, 2024, with the Division’s summary disposition motion. The Division references this declaration in its opposition to Genovese’s discovery motion, which the Division filed on April 2, 2024.

<sup>8</sup> According to the declaration, the Division initially sent the documents via a USB thumb drive, but at Genovese’s request re-produced the documents via DVD.

<sup>9</sup> After the complaint was served on Genovese and the other defendants, the civil litigation was stayed pending the resolution of Genovese’s criminal proceeding. When the civil litigation recommenced, the Commission obtained leave to file a motion for summary judgment, based on its argument that “collateral estoppel made further discovery unnecessary.” *SEC v. Genovese*, 553 F. Supp. 3d 24, 37 (S.D.N.Y. 2021).

<sup>10</sup> Genovese similarly sought additional discovery and sanctions in a related civil case, which the federal district court denied. *See Genovese*, 553 F. Supp. 3d at 38–39 (noting that Genovese “has not specified what [unproduced] materials . . . could be relevant to his defense in this case” and that the SEC had stated that it “has no other non-privileged documents”).

<sup>11</sup> Genovese claims that the Division has violated “Rule 26,” “1114.31,” “180.500, and 225.10.” These appear to be references to rules and regulations that do not apply to proceedings

investigators, those investigators must have already accumulated non-privileged documents, like customer complaints, and that there are also customer interviews, forms, and bank records. But the Division's counsel has declared that the Division produced all communications with, and documents produced by, Genovese's "victims/clients," and that transcripts of pre-enforcement interviews do not exist because the pre-enforcement investigation was expedited and no such interviews were conducted. Genovese provides no further detail about what other documents might exist or to what issues in this proceeding they might relate. And the Division's counsel has declared that no other non-privileged documents exist beyond the more than 7,000 pages of documents that it has already produced.

Genovese has not introduced evidence to contradict the Division counsel's declaration. Genovese submitted a letter from a Commission FOIA research specialist indicating that the specialist had "identified approximately 14 gigabytes of electronically maintained records . . . that may be responsive" to Genovese's pending FOIA request. But that estimated volume was later corrected by the FOIA Branch Chief, who explained that only 2 gigabytes of potentially responsive records had been identified and who withheld the records pursuant to 5 U.S.C. § 552(b)(7)(A), which exempts from FOIA's general production requirements "records or information compiled for law enforcement purposes" to the extent that the production of such materials "could reasonably be expected to interfere with enforcement proceedings."<sup>12</sup> The estimated volume of potentially responsive records is not obviously disproportionate to the volume of documents that the Division produced, let alone enough for us to conclude that the Division has not, as it represents, produced all non-privileged documents that Genovese is entitled to under Rule 230(a).<sup>13</sup>

---

before the Commission. *See* Fed. R. Civ. P. 26 (setting forth general discovery obligations in civil cases before federal district courts); 49 C.F.R. § 1114.31 (addressing failure to respond to discovery in proceeding before Surface Transportation Board); 24 C.F.R. § 180.500 (setting forth general discovery obligations in proceedings before Department of Housing and Urban Development). In lieu of those rules and regulations, proceedings before the Commission are governed by its Rules of Practice, codified at 17 C.F.R. § 201.31 *et seq.*

<sup>12</sup> 5 U.S.C. § 552(b)(7)(A). The Branch Chief further noted that, because Exemption 7(A) applies, "we have not determined if other exemptions apply" and "we reserve the right to assert other exemptions when Exemption 7(A) no longer applies."

<sup>13</sup> *Cf. Pierre v. County of Nassau*, No. 17-cv-6629, 2022 WL 2872651, at \*10 (E.D.N.Y. July 21, 2022) ("[T]his Court could not compel production of [evidence] . . . that the County has certified does not exist, and would not do so based on Plaintiff's bare speculation and conjecture that such [evidence] must exist."); *United States ex rel. Sasaki v. New York Univ. Med. Ctr.*, No. 05-cv-6163, 2011 WL 13257693, at \*4 (S.D.N.Y. Aug. 23, 2011) (recognizing that the court cannot "issue a discovery order solely on the basis of one party's subjective belief that the adversary's production is incomplete" and that a representation that a party has no responsive documents "is generally the final word here, unless [the moving party] offers some evidence, beyond speculation, that additional documents exist").

Genovese suggests that the failure to order further discovery would violate his due process rights and the principle of disclosure established in *Brady v. Maryland*.<sup>14</sup> We disagree. Although the Commission has incorporated the *Brady* doctrine into its Rules of Practice,<sup>15</sup> the Commission applies the well-established principle that *Brady* “does not authorize respondents to engage in ‘fishing expeditions’ through confidential Government materials in hopes of discovering something helpful to their defense.”<sup>16</sup> Here, Genovese only speculates that relevant non-privileged documents exist; he has not introduced evidence that such documents exist, let alone that such documents contain material exculpatory evidence. We will not order a fishing expedition into the Division’s records based on such speculation, particularly where Genovese has made no attempt to demonstrate how any materials he believes may exist could be relevant to this proceeding.<sup>17</sup>

Nor has Genovese provided a basis for sanctioning the Division’s counsel for not producing a privilege log. Indeed, our Rules of Practice specify that the Division is not required to produce such a document unless directed to do so.<sup>18</sup> The Division has indicated, however, that it “is prepared to create . . . a [privilege] log and produce it to Genovese.” Given this representation, we find it appropriate to direct the Division to prepare a privilege log here. The Division should both file the privilege log with the Commission and serve a copy on Genovese.

Accordingly, IT IS ORDERED that, by December 16, 2024, the Division shall file a privilege log with the Commission and serve it on Genovese.

IT IS FURTHER ORDERED that, to the extent that Genovese’s motion requests any relief beyond the production of a privilege log, his motion for discovery and sanctions is DENIED.

---

<sup>14</sup> 373 U.S. 83, 87 (1963) (holding that the prosecution’s suppression of evidence favorable to a criminal defendant “violates due process where the evidence is material either to guilt or to punishment”).

<sup>15</sup> See Rule of Practice 230(b)(3), 17 C.F.R. § 201.230(b)(3).

<sup>16</sup> *Orlando Joseph Jett*, Release No. 514, 1996 WL 360528, at \*1 (June 17, 1996) (reversing law judge order directing the Division to submit documents for *in camera* review).

<sup>17</sup> Cf. *Genovese*, 553 F. Supp. 3d at 38, 42 (noting that Genovese had not specified what unproduced materials “could be relevant to his defense in this case” and applying collateral estoppel to grant summary judgment in favor of the Commission after finding unpersuasive Genovese’s argument that the conduct at issue in the civil case might differ from the conduct underlying his criminal conviction).

<sup>18</sup> See Rule of Practice 230(c), 17 C.F.R. § 201.230(c) (requiring the Division to produce a privilege log if ordered to do so).

## II. Genovese's motion for an indefinite extension

Rule of Practice 161 allows us to extend or shorten any filing time limits “for good cause shown.”<sup>19</sup> Although Rule 161 establishes a general “policy of strongly disfavoring such requests” unless “the requesting party makes a strong showing that the denial of the request . . . would substantially prejudice their case,”<sup>20</sup> the Commission has ordered that “all reasonable requests for extensions of time will not be disfavored as stated in Rule 161,” pending further order of the Commission.<sup>21</sup> But this does not remove the requirement that a movant establish good cause for an extension.<sup>22</sup>

Genovese seeks to extend the time for him to respond to the Division's motion for summary disposition until after the Commission processes his FOIA request. But after Genovese filed his motion, the FOIA Branch Chief sent him a letter denying his FOIA request. We thus find that Genovese has not shown good cause for the extension that he requests, and IT IS ORDERED that Genovese's motion for an indefinite extension is DENIED.

However, because Genovese filed his extension motion before the deadline for his opposition brief and the time for him to file that brief has now expired, we find good cause to set new deadlines for Genovese's opposition brief and the Division's reply brief. Accordingly, IT IS ORDERED that Genovese's opposition brief shall be filed by January 27, 2025; and the Division's reply brief shall be filed by February 17, 2025.

We finally note that, in multiple recent filings, the Division has indicated that its staff has not received Genovese's filings by email or United States mail. Genovese is reminded that he must serve the Division with a copy of any document that he files with the Commission.<sup>23</sup>

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

Vanessa A. Countryman  
Secretary

---

<sup>19</sup> 17 C.F.R. § 201.161(a).

<sup>20</sup> *Id.* § 201.161(b)(1).

<sup>21</sup> *Pending Administrative Proceedings*, Exchange Act Release No. 88415, 2020 WL 1322001 (Mar. 18, 2020).

<sup>22</sup> *See Edward M. Daspin*, Exchange Act Release No. 90271, 2020 WL 6286279, at \*1 & n.7 (Oct. 26, 2020) (denying motion for indefinite extension of time to file reply brief based on failure to establish good cause); *cf. Donald J. Fowler*, Exchange Act Release No. 89226, 2020 WL 3791560 (July 6, 2020) (denying motion to indefinitely stay, postpone, or adjourn proceeding pending resolution of respondent's pending civil appeal).

<sup>23</sup> Rule of Practice 150(a), 17 C.F.R. § 201.150(a). The Division of Enforcement is represented by Alexander M. Vasilescu and Karen Lee, Securities and Exchange Commission, New York Regional Office, 100 Pearl Street, Suite 20-100, New York, NY 10004-2616.