

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

EUGENE H. KIM
(CRD No. 2264940),

Respondent.

Disciplinary Proceeding
No. 2019064508802

Hearing Officer—DRS

**ORDER DENYING RESPONDENT'S MOTION
FOR LEAVE TO PERMIT EXPERT TESTIMONY**

I. Introduction

The Complaint charges Respondent Eugene H. Kim with violating FINRA Rule 2010 by acting unethically in connection with a private offering of pre-IPO shares of Slack Technologies sold by his former broker-dealer employer, National Securities Corporation (“NSC”). The private offering was for interests in the NAM Special Situations Fund V (the “Fund”) which would purchase pre-IPO shares of Slack (the “Offering”). The Department of Enforcement alleges, among other things, that in connection with the Offering, Kim: (1) “acted in bad faith, and misused customer funds”; (2) had “not confirmed a source of shares . . . at any price”; (3) “did not source [Slack] shares . . . at any price”; (4) “initiated the closing of escrow”; and (5) “actively misled NSC principals.”¹ Kim denied the allegations of wrongdoing.

On January 19, 2024, Kim moved for leave to permit the expert testimony of Lowell A. Jobe, a certified public accountant. The motion states that Jobe is expected to testify about “the PCAOB Auditing Standards concerning what an auditor must obtain from management of the company being audited which allows the auditor to rely on financial statements and management representations when conducting an independent audit.”² Enforcement opposed the motion on February 2, 2024, on the grounds that Jobe’s proposed testimony (1) is irrelevant, “and therefore would be unhelpful to the panel,” and (2) would “unnecessarily clutter the record, and waste

¹ Complaint (“Compl.”) ¶¶ 1–2; *see also* Compl. ¶¶ 22, 60–62.

² Motion (“Mot.”) 2.

time.” Further, according to Enforcement, Kim failed to show that Jobe “is qualified as an expert.”³ For the reasons below, I deny the motion.

II. Governing Standards

The Hearing Officer has broad discretion whether to permit expert testimony.⁴ In applying that discretion, as with all proffered evidence, the guiding principal is relevance.⁵ The Hearing Officer may admit evidence that is relevant, but may exclude evidence that is “irrelevant, immaterial, unduly repetitious, or unduly prejudicial.”⁶ In determining whether to permit expert testimony, the Federal Rules of Evidence, and related case law, though not binding in this proceeding,⁷ are instructive.⁸ Under Rule 702(a), a witness who is “qualified as an expert by knowledge, skill, experience, training or education” may provide opinion testimony if the witness’s “scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue,” and if the testimony is reliable.⁹ Rule 401 provides that evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence to determining the action.” The key factor is whether the proposed testimony would help the Hearing Panel.¹⁰

Movants have the burden of establishing the conditions for admissibility of expert testimony.¹¹ They must also comply with the Case Management and Scheduling Order’s (“CMSO”) provisions governing motions for expert testimony. Under the CMSO, a motion seeking permission to offer expert testimony must include certain items, including, “a statement establishing that the witness’s opinion will help the Hearing Panel understand the evidence or determine a material fact in issue.”¹²

³ Opposition (“Opp.”) 1.

⁴ See, e.g., OHO Order 23-11 (2021071137001) (Feb. 28, 2023), at 3, https://www.finra.org/sites/default/files/2023-05/oho_order_23-11_2021071137001_lek.pdf; OHO Order 17-07 (2013035817701) (Mar. 21, 2017), at 1, https://www.finra.org/sites/default/files/OHO_Order_17-07_2013035817701.pdf.

⁵ OHO Order 12-01 (2009018771602) (Mar. 14, 2012), at 2, <https://www.finra.org/sites/default/files/OHODecision/p126068.pdf>; OHO Order 23-11, at 3.

⁶ See FINRA Rule 9263(a).

⁷ See FINRA Rule 9145(a) (“The formal rules of evidence shall not apply in a proceeding brought under the Rule 9000 Series.”).

⁸ OHO Order 23-11, at 3; OHO Order 17-07, at 1.

⁹ See also OHO Order 15-04 (2011025706401) (Feb. 3, 2015), at 2, https://www.finra.org/sites/default/files/OHO-Order-15-04-ProceedingNo.2011025706401_0.pdf (citing *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. Apr. 18, 2002) (“In short, expert testimony is admissible only if it is both relevant and reliable.”)).

¹⁰ OHO Order 23-11, at 3.

¹¹ OHO Order 12-01, at 4 (“It is the proponent’s burden to show that the expert’s testimony satisfies the conditions for admission.”).

¹² CMSO 10.

III. Discussion

According to the motion, Kim asserts as part of his defense that he did not mislead NSC's principals in connection with the Fund because, among other reasons, they knew the Fund had not purchased any pre-IPO securities at the time of the Fund's closing until November 2018 because they knew that during that period, the Fund's only asset was cash.¹³ Continuing, Kim maintains that NSC's principals knew this because, among things, (1) of "their agreement, review and verification of the Fund's management prepared year-end financial statements [that] were audited by" the Fund's independent auditor; (2) other records and reviews show that they knew about the Fund's condition; and (3) they provided the Fund's statements and management representation letters annually to the Fund's auditors, as required by Public Accounting Oversight Board ("PCAOB") rules and the auditor's procedures.¹⁴ Further, the motion claims that the Fund's audits were required to comply with PCAOB rules and standards and that PCAOB rules and Auditing Standards govern an auditor's reliance on the management-prepared financial statements and management representation letters.¹⁵

The motion states that PCAOB auditing standards are critical to Kim's defense and Jobe has expertise on this subject.¹⁶ Accordingly, Kim seeks permission to offer Jobe's "testimony relating to the PCAOB Auditing Standards concerning what an auditor must obtain from management of the company being audited which allows the auditor to rely on financial statements and management representations when conducting an independent audit."¹⁷ The motion explains that Jobe's testimony will help the Hearing Panel because it will show (1) "that the Fund's auditors received the Fund's financials and representation letters from management while the auditors were conducting the Fund's independent audit"; and (2) "the significance and implication of such financials and representations under PCAOB standards."¹⁸

The motion lists the following specific subjects on which Jobe will opine:

- How PCOAB rules and accounting standards require the preparation of a company's annual financial statements.
- The PCAOB standard for requirement to obtain management representation letters.
- The PCAOB standard for the use of management representations letters.

¹³ Mot. 2.

¹⁴ Mot. 2.

¹⁵ Mot. 2

¹⁶ Mot. 3.

¹⁷ Mot. 2.

¹⁸ Mot. 5.

- What is reasonable for preparation of annual financial statements.
- Whether a Chief Executive Officer (“CEO”) and Chief Financial Officer (“CFO”) have an affirmative responsibility to review a company’s annual financial statements prior to submission to the auditor for certification.
- Whether a CEO and CFO have an affirmative responsibility to review a company’s annual financial statements prior to execution of a management representation letter.
- Interaction of responsibility that management has under Sarbanes Oxley whereby a CEO and CFO certifies filings filed with the Securities [and] Exchange Commission and the interface with PCAOB rules and standards.¹⁹

I find that Kim did not establish that Jobe’s testimony would help the Hearing Panel understand the evidence or determine a material fact in issue. As Enforcement correctly points out in its opposition, “[t]his is not a case about audit standards or anyone’s failure to use due care to meet audit standards.”²⁰ And “Jobe’s proposed testimony about PCAOB audit standards has nothing to do with whether Respondent misled NSC representatives and customers or misused, or caused to be misused, customer funds as alleged.”²¹ Rather, the question regarding whether Kim misled NSC’s principals is, in the classic Watergate terminology: what did they know, and when did they know it?²² These are factual issues that, as Enforcement persuasively argues,

should not be decided by considering the expert testimony of what PCAOB audit standards required of the auditor for the Slack offering, inferring from those standards the due diligence obligations of NSC’s principals, and then further inferring from those obligations whether NSC principals actually

¹⁹ Mot. 5. The Motion also attached Jobe’s curriculum vitae setting forth his expert qualifications; a list of all proceedings in which he has given expert testimony in the last four years; and a list of publications he has authored or co-authored in the last ten years.

²⁰ Opp. 6.

²¹ Opp. 6.

²² See, e.g., *Drummond, Inc. v. Collingsworth*, No.: 2:11-cv-3695-RDP, 2015 U.S. Dist. LEXIS 197309, at*8 n.6 (N.D. Ala. Dec. 7, 2015) (“The central issue in this case is ‘who knew what and when did they know it, to borrow the old Watergate question.’”); *Smith v. City of Holland Bd. of Pub. Works*, No. 1:99-CV-142, 2000 U.S. Dist. LEXIS 17407, at *4 (W.D. Mich. Nov. 30, 2000) (“To paraphrase a famous statement from the Watergate Investigation, the issue in this case is what did Defendants know, and when did they know it.”).

knew about the status of the offering. This attenuated string of inferences would not be helpful to the panel.²³

I agree and therefore **DENY** the motion.²⁴

SO ORDERED.


David R. Sonnenberg
Hearing Officer

Dated: February 7, 2024

Copies to:

Martin H. Kaplan, Esq. (via email)
Robyn Paster, Esq. (via email)
Robert Kennedy, Esq. (via email)
Roger Kiley, Esq. (via email)
John R. Baraniak, Jr., Esq. (via email)
Jennifer L. Crawford, Esq. (via email)

²³ Opp. 7.

²⁴ In light of this conclusion, it is unnecessary for me to address whether Kim proved that Jobe is qualified to give expert testimony on subjects identified in the motion.