

**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 SECOND REVISED FINRA RULE 9251
MOTION**

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 Department of Enforcement alleges, among other things, that in connection with that offering, Kim (1) “acted in bad faith, and misused customer funds”; (2) had “not confirmed a source of shares for the [Slack] offering at any price”; (3) “did not source [Slack] shares for the offering at any price”; (4) “initiated the closing of escrow for the [Slack offering]; and (5) “actively misled NSC principals.”¹ Kim denied the allegations of wrongdoing.

On December 1, 2023, Kim moved for an order directing the Department of Enforcement to produce records relating to the informal non-transcribed interview Enforcement conducted of Roger Monteforte, allegedly a former senior broker at NSC who sourced pre-IPO shares for NSC’s private offerings, including the Slack offering (“Motion”).² The Motion also seeks a list of persons Enforcement interviewed informally during the investigation, as well as all the records from an investigation by Enforcement resulting in a Letter of Acceptance, Waiver, and Consent No. 2019061652404 submitted by NSC (“NSC AWC”).³

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

² Compl. ¶ 17.

³ Kim filed an initial motion under FINRA Rule 9251 on December 1, 2023. Later that day, he filed two superseding motions: a revised motion under FINRA Rule 9251 followed by a second revised motion under that rule. The second revised motion mooted the two earlier motions. In this order, I refer to the second revised motion as the “Motion.”

Enforcement filed an opposition to the Motion on December 15, 2023 (“Opposition”). The Opposition is supported by, among other things, a declaration under penalty of perjury from Enforcement’s lead attorney in this case, Robert Kennedy. Enforcement argues that it has complied with its discovery obligations and that Kim is not entitled to receive the requested documents and information. For the reasons set forth below, I deny the Motion.

II. Law Governing Discovery

FINRA Rules 9251 through 9253 govern discovery in FINRA proceedings. The scope of discovery under these rules is substantially less than what is permitted in federal courts under the Federal Rules of Civil Procedure.⁴ FINRA Rule 9251(a)(1) requires Enforcement to make available for inspection and copying to a respondent the documents that were “prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings.”⁵ If Enforcement wants to withhold documents because they are irrelevant or for other good cause, it must obtain leave from the Hearing Officer.⁶ Otherwise, all documents within the scope of the Rule must be produced unless Enforcement is authorized to withhold them under FINRA Rule 9251(b)(1). That provision permits Enforcement to withhold certain documents from production, including privileged documents or documents that constitute attorney work product,⁷ internal memoranda or other notes or writings prepared by FINRA employees that shall not be offered into evidence,⁸ or documents that would reveal an enforcement technique or guideline.⁹

Nevertheless, under FINRA Rule 9251(b)(3), if any exempt documents contain material exculpatory evidence, then Enforcement must produce them. FINRA applies Rule 9251(b)(3) in accordance with principles espoused by the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963).¹⁰ The Court held in *Brady* that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the

⁴ OHO Order 21-12 (2019061232601) (Oct. 28, 2021), at 10, <https://www.finra.org/sites/default/files/2022-05/21-12-Alpine-Order-Regarding-Doubek-Discovery.pdf>.

⁵ FINRA Rule 9120(t) defines the term “Interested FINRA Staff.”

⁶ FINRA Rule 9251(b)(1)(D).

⁷ FINRA Rule 9251(b)(1)(A).

⁸ FINRA Rule 9251(b)(1)(B).

⁹ FINRA Rule 9251(b)(1)(C). Enforcement has discretion to withhold documents that fall under these enumerated categories except in one circumstance: if a document “is prohibited from disclosure by federal law,” then Enforcement has no discretion and “shall withhold” it. FINRA Rule 9251(b)(2).

¹⁰ OHO Order 14-04 (2012032519101) (Sept. 30, 2014), at 4, https://www.finra.org/sites/default/files/OHO_Order_14-04_ProceedingNo.2012032519101_0_0_0_0.pdf.

prosecution.”¹¹ In the context of a FINRA disciplinary action, the term “material exculpatory evidence” means evidence relating “to liability or sanctions” that “might be considered favorable to the respondent’s case,” and which, “if suppressed, would deprive the respondent of a fair hearing.”¹² “A respondent bears the burden of establishing a basis for claiming that Enforcement’s withheld documents must be produced because they contain material exculpatory evidence.”¹³ “Mere speculation from the Respondent that FINRA documents may contain material exculpatory information is not sufficient” to meet that burden.¹⁴ Instead, “a respondent must ‘first establish a basis for claiming that the documents contain material exculpatory evidence’ by making a ‘plausible showing’ that the requested documents contain information that is both favorable and material to its defense.”¹⁵

Enforcement must also produce certain types of witness statements. FINRA Rule 9253(a)(1) states that upon a motion, Enforcement must produce any document containing a substantially verbatim transcription of a statement made by a potential witness where the transcription was made contemporaneously with the making of the statement. And under Rule 9253(a)(2), Enforcement must produce a contemporaneously written statement made by Interested FINRA Staff during a routine exam or inspection about the substance of oral statements made by a non-FINRA person if either person testifies as a witness and the statement for which production is sought directly relates to that person’s testimony.

“While FINRA Rule 9251(a)(1) requires Enforcement to make available certain documents in discovery, it does not foreclose the production of additional documents.”¹⁶ Under FINRA Rule 9251(a)(3), Enforcement retains discretion “to make available any other Document . . . ,” and a Hearing Officer is authorized “to order the production of any other Document.”

Finally, FINRA Rule 9251(c) authorizes a Hearing Officer to require that Enforcement submit a list of withheld documents for the Hearing Officer’s review. After reviewing the list, the Hearing Officer may order that Enforcement make the list or any withheld document available to the other party, unless federal law prohibits the disclosure of the document or its

¹¹ *Brady*, 373 U.S. at 87. The Supreme Court later held in *United States v. Bagley*, 473 U.S. 667, 676 (1985), that the duty also includes impeachment evidence as well as exculpatory evidence.

¹² OHO Order 22-01 (2018057235801) (Jan. 12, 2022), at 8, <https://www.finra.org/sites/default/files/2022-05/22-01-Order-Omnibus-Order-on-Pre-Hearing-Motions-and-Objections.pdf> (quoting *Dep’t of Enforcement v. Respondent*, No. 2012034936005, 2015 FINRA Discip. LEXIS 72, at *4 (OHO Jan. 27, 2015)).

¹³ OHO Order 21-12, at 10.

¹⁴ OHO Order 14-04, at 5 (citing *Jett*, Exchange Act Release No. 514, 1996 SEC LEXIS 1683, at *1–2 (June 17, 1996)).

¹⁵ OHO Order 17-10 (2014042524301) (Apr. 11, 2017), at 3, https://www.finra.org/sites/default/files/OHO_Order_17-10_2014042524301_0_0.pdf (quoting *Jett*, 1996 SEC LEXIS 1683, at *2).

¹⁶ OHO Order 19-26 (2015045312501) (July 10, 2019), at 4, https://www.finra.org/sites/default/files/2019-10/OHO_Order_19-26_2015045312501.pdf.

existence. But a motion to require Enforcement to produce a list of withheld documents must “be based upon some reason to believe” that Enforcement has improperly withheld a document.¹⁷

Against this legal framework, I address each of Kim’s requests.

III. Discussion

A. Records Relating to the Informal Non-Transcribed Interview of Roger Monteforte

Kim requests that Enforcement produce a copy of all records relating to or reflecting what occurred during an informal interview Enforcement conducted with Roger Monteforte in connection with the investigation that led to this proceeding. The Motion states that upon reading the investigative testimony transcripts (“OTRs”) Enforcement produced in discovery, Kim’s counsel learned that Monteforte participated in an informal, non-transcribed interview conducted by Enforcement.¹⁸ Kim claims that “Monteforte was a material participant in the events giving rise to this proceeding”¹⁹ and is referenced repeatedly in the discovery materials in connection with those events.²⁰

Kim asserts two grounds for the request. First, he argues that it is plausible that the records contain materially exculpatory evidence and must be produced under FINRA Rule 9251(b)(3). The Motion represents that Kim testified during his OTR that Monteforte “had relationships with sources for [Slack] shares, engaged in ongoing negotiations with sources for [Slack] shares and advised Kim that Monteforte could obtain the [Slack] shares needed for the [offering].”²¹ Kim asserts that he “reasonably relied on Monteforte’s having sourced the relevant Pre-IPO shares.”²² Continuing, he claims that it is plausible “to believe that Monteforte made oral statements during the non-transcribed interview with Enforcement relating to his efforts to secure shares of [Slack]” and his communications with Kim about those efforts.²³ Thus, according to the Motion, what Monteforte told Enforcement is critically material to Kim’s defense to the Complaint’s allegations that he did not source Slack “shares for the offering at any price” and “actively misled NSC’s principals.”²⁴ Continuing, the Motion asserts “upon information and belief” that “the only record of the Monteforte interview is an internal memorandum” that “Enforcement refuses to produce under the doubtful claim of work-product protection.”²⁵ Thus, Kim reasons, Enforcement must produce records

¹⁷ FINRA Rule 9251(c).

¹⁸ Motion (“Mot.”) 4.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 5.

²⁴ Mot. 4; Compl. ¶ 2.

²⁵ Mot. 4–5.

relating to Monteforte's statements because there is a reasonable basis to conclude that these records contain "material exculpatory evidence to defend the untrue allegations that Kim did not source shares of [Slack] and misled NSC principals."²⁶

Kim's second argument is that "any summary of the substance of Monteforte's non-transcribed interview meets the definition of documents required to be produced under Rule 9253(a)(1)."²⁷ Kim contends that because Monteforte was involved in the events leading to this proceeding, he is likely to be a witness at the hearing.²⁸ And, therefore, "[a]ny contemporaneous internal summary document made by a FINRA staff member containing the substance of statements by Monteforte during the non-transcribed interview are required to be produced."²⁹

Enforcement opposes Kim's request on the grounds that it has fully complied with its discovery obligations under FINRA Rule 9251 and 9253. It also denies withholding any documents containing material exculpatory evidence.³⁰ Kennedy's declaration supports these representations. Kennedy states that he is familiar with the investigation that led to this proceeding as well as the documents that FINRA prepared or obtained in connection with it.³¹ Kennedy goes on to detail Enforcement's compliance with its discovery obligations. He states that he reviewed the case's investigative file;³² consulted with FINRA's staff who participated in the investigation;³³ and participated in, and oversaw, Enforcement's document production.³⁴ The declaration also describes the production Enforcement made to Kim, and gives examples of the documents it produced.³⁵ Kennedy represents that he is aware of Enforcement's duty to produce material exculpatory evidence; that Enforcement complied with its duty; and that Enforcement has not withheld any such evidence.³⁶

Additionally, Kennedy represents that Enforcement produced the transcripts of OTR testimony it took from several individuals, and that these transcripts are "[t]he only verbatim (or substantially verbatim) contemporaneous recitals of oral statements made by any potential hearing witness that pertains, or is expected to pertain, to direct testimony."³⁷ Without referencing Monteforte specifically, Kennedy admits that Enforcement has "certain

²⁶ Mot. 5.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Opposition ("Opp.") 3-4; Kennedy Declaration ("Kennedy Decl.") ¶¶ 5-11.

³¹ Kennedy Decl. ¶ 2.

³² *Id.* ¶ 3.

³³ *Id.*

³⁴ *Id.* ¶ 4.

³⁵ *Id.*

³⁶ *Id.* ¶ 7.

³⁷ *Id.* ¶ 8.

contemporaneous non-verbatim interview notes made by FINRA staff in connection with FINRA's cause examination and investigation relating to Respondent Kim as well as a memorandum summarizing the notes."³⁸ Kennedy further states that "[t]hese contemporaneous interview notes and the memorandum summarizing the notes, made during a cause examination and investigation relating to Kim, are not substantially verbatim recitals of oral statements made by the interview witnesses."³⁹ As result, he concludes, they "are not within the scope of FINRA Rule 9253 and are properly withheld under FINRA Rule 9251(b), and therefore have not been produced to Respondent."⁴⁰ Kennedy also denies that these interview notes and the memorandum contain material exculpatory evidence.⁴¹

After considering the Motion and Opposition, I find that Kim has not made a plausible showing that the requested documents contain information both favorable and material to his defense. In the Motion, which was unsupported, Kim claims that Monteforte has material exculpatory evidence regarding the allegations that Kim failed to source the Slack offering. Kim, however, does not describe what material exculpatory information, if any, he reasonably believes Monteforte provided to Enforcement and why he believes Monteforte actually provided it. These omissions are fatal. The issue is not simply whether Monteforte has material exculpatory evidence, but whether Enforcement has such evidence and failed to produce it. Kim is speculating that FINRA has exculpatory evidence. And "mere speculation from the Respondent that FINRA documents may contain material exculpatory information is not sufficient to warrant production."⁴² Indeed, "FINRA Rule 9251 does not entitle respondents to conduct a 'fishing expedition' in Enforcement's file."⁴³ "Nor is the defense entitled to receive every scintilla of evidence that might be beneficial."⁴⁴

Kim's arguments under FINRA Rule 9253 fare no better. FINRA Rule 9253(a)(1) only applies to a substantially verbatim transcription of a statement made by a potential witness where the transcription was made contemporaneously with the making of the statement. Enforcement denies it has any transcription that meets this standard, and Kim has not shown that this denial is likely inaccurate. Nor does FINRA Rule 9253(a)(2) apply; it only compels certain contemporaneously written statements made by an Interested FINRA Staff member during a

³⁸ *Id.* ¶ 10. The Opposition appears to concede that Enforcement did interview Monteforte and created notes of interview. Opp. 5 ("Interview notes made by a FINRA staff member of oral statements by Monteforte during a cause examination of Kim are not subject to production under Rule 9253(a)(2). Accordingly, by its own terms, FINRA Rule 9253 does not apply here and Respondent's motion should be denied with respect to the Monteforte documents the motion seeks.")

³⁹ Kennedy Decl. ¶ 11.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² OHO Order 15-05 (2012034936005) (Jan. 27, 2015), at 3, https://www.finra.org/sites/default/files/OHO-Order-15-05-ProceedingNo.2012034936005_0_0_0_0.pdf.

⁴³ OHO Order 17-10, at 5.

⁴⁴ OHO Order 01-14 (CAF000013) (May 21, 2001), at 10, http://www.finra.org/sites/default/files/OHODecision/p007866_0_0_0_0.pdf.

routine exam or inspection. “[T]here is a clear, objective, distinction between routine examinations to which all firms are subject on a standardized cycle, as compared with cause examinations, which may be initiated based upon investor complaints or referrals from other regulators, among other reasons.”⁴⁵ As noted above, Enforcement represents that interview notes made by a FINRA staff member of oral statements by Monteforte were in connection with a cause examination, not a routine exam or inspection. Kim has not shown otherwise.

In conclusion, Kim’s arguments are not sufficient to overcome Kennedy’s detailed statements, made under penalty of perjury, that Enforcement complied with its discovery obligations under FINRA Rules 9251 and 9253. Accordingly, Kim’s request for staff interview notes or memoranda of such notes is **DENIED**.

B. Request for a List of Withheld Documents

Relying on FINRA Rule 9251(c), Kim requests that Enforcement identify those persons besides Monteforte who FINRA staff and/or Enforcement informally interviewed in the investigation. The Motion explains that Kim needs this list so he can determine “whether such persons may have made statements which contain exculpatory information” and “who [he] may call as a witness for the defense of the Complaint.”⁴⁶

I **DENY** his request for several reasons. As Enforcement correctly argues in its Opposition, Kim has failed to meet the requirement that he provide “some reason to believe” that Enforcement has improperly withheld a document from him.⁴⁷ Moreover, Enforcement represents that it has not withheld any documents that it was required to produce, and Kim has provided no reason to believe that is untrue.⁴⁸ Finally, Kim’s request for a list of persons informally interviewed by the staff does not request a list of withheld documents; rather, the request is akin to an interrogatory. The discovery rules, however, do not provide for a respondent to propound interrogatories to Enforcement.⁴⁹

⁴⁵ OHO Order 05-43 (C05050005) (Dec. 15, 2005), at 2, https://www.finra.org/sites/default/files/OHODecision/p016006_0_0.pdf.

⁴⁶ Mot. 6.

⁴⁷ Opp. 6.

⁴⁸ OHO Order 11-03 (2007011413501) (Mar. 18, 2011), at 6, https://www.finra.org/sites/default/files/OHODecision/p123467_0_0_0_0.pdf (rejecting request for withheld document list under Rule 9251(c)) (denying request for a list of withheld documents when Respondents failed to provide “any evidence sufficient to overcome Enforcement’s sworn declaration that it has complied with its disclosure obligations.”).

⁴⁹ *See, e.g.*, OHO Order 17-10, at 4 (“FINRA’s rules do not allow for the use of interrogatories, requests for admissions, document production requests, or other discovery outside the parameters established by the FINRA Rule 9250 Series.”).

C. Documents from the Investigation of NSC Resulting in the AWC No. 2019061652404

The Motion states that on or about June 23, 2022, FINRA sanctioned NSC under an AWC for violative conduct engaged in by the firm's Investment Banking Department. This department, according to the Motion, "had primary responsibilities for underwriting and shared responsibility with NSC's Syndicate Department for communicating the details of particular offerings to the firm's sales representatives."⁵⁰ Kim states that the AWC relates to NSC's failure to supervise the Investment Banking Department and the Syndicate Department. He seeks all records that underly the investigation that led to the AWC because they purportedly contain material exculpatory evidence regarding his defense to the allegations that he "actively misled NSC principals" and "initiated closing of escrow" for the Slack offering.⁵¹ Kim asserts that these records,

particularly the OTRs and informal non-transcribed interviews taken in the investigation will demonstrate the procedures relating to the individual(s) authorized to release escrow, the procedures relating to the preparation of a commitment committee memorandum, the commitment committee's evaluation of information for approving an offering, the course of conduct relating to sourcing shares for offerings and the course of conduct and individuals responsible for communication to the sales force. These are the same subject matter and conduct at issue in this action.⁵²

Continuing, Kim contends that the records will show that "he acted in accordance with NSC's Investment Banking Department procedures and course of conduct."⁵³ He states that he intends to use the requested documents to show that he "was not a supervisor, had no authority to release escrow funds and was not responsible for communicating details of the completed offering to the retail sales force."⁵⁴ In sum, according to the Motion, the requested records contain material exculpatory evidence that Kim will use to defend against the allegations that he "actively misled NSC principals" and "initiated closing of escrow" for the Slack offering.⁵⁵

I find no basis for granting Kim's request that Enforcement produce the entire file for the investigation that led to the NSC AWC. Enforcement was under no obligation to produce that file. "Under Rule 9251(a)(1), document production is narrowly focused on evidence that is

⁵⁰ Mot. 7.

⁵¹ *Id.* at 7–8.

⁵² *Id.* at 8.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 7.

directly relevant to the particular disciplinary proceeding against respondent.”⁵⁶ “Consistent with the proper construction of Rule 9251, only documents prepared or obtained in the course of investigations directly and proximately leading to the institution of particular proceedings must be produced.”⁵⁷ Further, “[i]n determining whether an investigation led to the institution of a particular proceeding, consideration is given to, among other things, the investigation’s temporal relationship to the proceeding and the degree of identity between the subject matter of the investigation and the allegations of the complaint.”⁵⁸ Put slightly differently,

while Enforcement may have the obligation to search for and produce non-exempt documents in the possession of any FINRA employee who directly participated in the “case at issue” or in a “related” investigation, irrespective of whether the documents are maintained in the formal investigatory file, the related investigation must be one that necessarily led to the institution of the proceeding at issue.⁵⁹

In his declaration, Kennedy represents that no documents prepared or obtained by Interested FINRA Staff in the NSC investigation led to the institution of the instant proceeding against Kim.⁶⁰ The Motion does not make a plausible showing that this representation is incorrect. While Kim asserts that the subject matter and conduct referenced in the NSC AWC are also at issue in this proceeding, Enforcement denies it.⁶¹ And a review of the AWC supports Enforcement’s position. In the NSC AWC, NSC consented, without admitting or denying, to findings of violations for (1) engaging in misconduct intended to influence artificially the market for securities offered by the firm’s corporate affiliates and investment banking clients; (2) making negligent omissions to investors in connection with GPB Capital securities; (3) making inaccurate representations to FINRA that common stock warrants for a public offering would not be sold for a period of 360 days; (4) failing to reasonably supervise one of its representatives and failing to maintain accurate books and records; and (4) failing to obtain locates for short sales as

⁵⁶ OHO Order 14-03 (2010023218601) (Jan. 24, 2014), at 4, https://www.finra.org/sites/default/files/OHO_Order_14-03_ProceedingNo.2010023218601_0.pdf (citing *Dep’t of Enforcement v. Reichman*, No. 200801201960, 2011 FINRA Discip. LEXIS 18 (NAC July 21, 2011) (upholding denial of discovery from Enforcement as fair, where respondent sought information regarding larger investigation that was not relevant to narrow issues of case against respondent); OHO Order 13-06 (2009017529101) (May 2, 2013), at 1, 4–5, https://www.finra.org/sites/default/files/OHO_Order.13-06_ProceedingNo.2009017529101_0_0.pdf (denying motion to compel production because respondent sought documents other than those prepared or obtained in connection with the investigation that led to the proceeding.).

⁵⁷ OHO Order 13-06, at 3; OHO Order 14-03, at 8 (“A respondent’s right to discovery in a FINRA disciplinary proceeding is limited to documents created or obtained by FINRA staff who directly participated in the investigation that led to the institution of the proceeding at issue. Other examinations and other investigations are simply not relevant, and documents relating to those other matters need not be produced in discovery.”).

⁵⁸ OHO Order 13-06, at 3.

⁵⁹ *Id.* at 3–4.

⁶⁰ Kennedy Decl. ¶ 12.

⁶¹ Opp. 7.


required by Rule 203(b)(1) of Regulation SHO.⁶² The conduct referenced in the NSC AWC reflects no overlap with the instant disciplinary proceeding; indeed, the Slack offering that is the subject of this case is not mentioned in it.

Finally, while Enforcement was not obligated to produce the requested file, or to search it for material exculpatory evidence, I have the discretion to order the file's production under FINRA Rule 9251(a)(3). But Kim's claim that the file likely contains material exculpatory evidence is speculative. And his non-targeted, broad request for the entire file indicates that he is on an impermissible fishing expedition for helpful documents. Accordingly, I **DENY** Kim's request that Enforcement produce the entire file of the investigation that resulted in the NSC AWC.

IV. Order

Based on the foregoing, the Motion is **DENIED**.

SO ORDERED.


David R. Sonnenberg
Hearing Officer

Dated: January 5, 2024

Copies to:

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⁶² AWC No. 2019061652404 (June 23, 2022), <https://www.finra.org/sites/default/files/2022-06/finra-letter-of-acceptance-waiver-and-consent-no-2019061652404.pdf>.