

**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 TO DESIGNATE CERTAIN
WITNESSES AS ADVERSE WITNESSES**

I. Introduction

On May 8, 2024, Respondent Eugene H. Kim filed a motion to designate three witnesses on his witness list as adverse: Michael Mullen, Glenn Worman, and Fred Knopf, Esq. (collectively, “the three witnesses”).¹ As to Mullen and Worman, the motion is based “on the possibility that” the Department of Enforcement calls neither of them to testify and, as a result, Kim will need to call either or both of them in his case.²

According to the stipulations, during all relevant times: (1) Mullen simultaneously held senior management positions at both NSC [National Securities, Corp.] and NAM [National Asset Management]. Mullen was the Chief Executive Officer of NSC and NHLD [National Holdings, Corp.], and was the Executive Chairman of NAM”;³ and (2) “Worman was the Chief Financial Officer for NHLD”.⁴ Kim’s witness list identifies Knopf’s current occupation as “[e]mployed by

¹ While the first sentence of the motion states that Kim seeks to designate two witnesses as adverse witnesses, the rest of the motion makes it clear that he seeks to designate three as adverse. Also, the motion did not contain a meet-and-confer certification as required by the Case Management and Scheduling Order 10, § V.E. I remind Kim of this requirement and that I may strike any non-compliant filings.

² Mot. 1.

³ Joint Stipulations (“Stip.”) ¶ 8.

⁴ Stip. ¶ 9.

B. Riley Financial and/or its affiliates and subsidiaries,”⁵ and the motion describes him as Mullen and Worman’s in-house counsel.⁶

According to the motion, the three witnesses should be categorized as adverse witnesses because they purportedly “have an obvious interest in furthering Enforcement’s position.”⁷ Kim asserts that during FINRA’s investigation, Knopf represented all NSC associated persons including Mullen and Worman, both of whom gave on-the-record (“OTR”) testimony. Later, Mullen executed an Acceptance, Waiver and Consent with FINRA on behalf of NSC (the “AWC”). Under the AWC, NSC accepted and consented to findings of violations relating to the private offering sold by NSC that is the subject of this proceeding—the private offering for interests in the NAM Special Situations Fund V (“NAM V”) which would purchase pre-IPO shares of Slack (“Offering”). The motion asserts that the three witnesses’ “strategic presentation of facts during the investigation” enabled them to craft the AWC in such a way that “Mullen and Worman avoided personal liability for their activity and supervisory failures in connection with the Offering.”⁸ In other words, according to the motion, the three witnesses “prepared a strategy to insulate and protect Mullen and Worman from regulatory liability by casting Respondent as a scapegoat for the concocted violations relating to the Offering, falsely claiming that Respondent misled management.”⁹ Additionally, the motion states that Worman declined to participate in a conversation with Kim’s counsel about his upcoming testimony.

Based on these circumstances, Kim anticipates: (1) “Worman and Mullen will be unwilling to tell all of the information relating to their ongoing knowledge relating to the status of the purchase of pre-IPO Slack shares by the NAM V Fund” because doing so “risks contradicting their prior OTR testimony and exposing themselves to personal liability for their patent failures;”¹⁰ and (2) “Knopf will be unwilling to tell all of the information relating to the crafting of the presentation in the underlying investigation to protect Mullen and Worman from regulatory liability” because doing so “risks contradicting Worman and Mullen’s OTR testimony and exposing their personal failures.”¹¹

Enforcement filed its opposition to the motion on May 15, 2024. Enforcement characterizes the motion as “baseless” and “supported by neither facts nor legal authority, but rather on his mere speculation that these witnesses will not testify truthfully, which is no basis at all.”¹²

⁵ Respondent’s Updated Proposed Witness List 4.

⁶ Mot. 2.

⁷ Mot. 3.

⁸ Mot. 3–4.

⁹ Mot. 3.

¹⁰ Mot. 5.

¹¹ Mot. 5.

¹² Opp’n. 1.

II. Discussion

While the motion does not explicitly say so, Kim seeks to have the three witnesses designated as adverse witnesses presumably so he can question them in his case using leading questions.¹³ The formal rules of evidence do not apply in FINRA proceedings.¹⁴ Nevertheless, Hearing Officers may look to those rules for guidance,¹⁵ which I do here. Federal Rule of Evidence 611(c) instructs federal courts to generally “allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.” “The precise meaning of ‘identified with an adverse party’ has not been clearly defined.”¹⁶ Still, it “has come to mean, in general, an employee, agent, friend, or relative of an adverse party.”¹⁷

Kim, however, does not claim that any of the three witnesses are hostile, an adverse party, an Enforcement employee or agent, or a friend or relative of anyone in Enforcement. Instead, he asserts that they should be deemed adverse witnesses because they “will be unwilling to tell all of the information” they know about certain subjects. This is sufficient to have them deemed adverse witnesses, according to Kim, based on a portion of a passage from Wigmore’s evidence treatise quoted in *Scott v. United States*, a District of Columbia Court of Appeals decision: “This situation includes not only the case of witnesses hostile, biased, or interested, by their sympathies, with the opponent’s cause, but also of witnesses unwilling for any other reason to tell all they may know . . . ”¹⁸

Kim’s argument misses the mark. His prediction that the three witnesses will not be completely forthcoming during their testimony is supposition, based on inferences drawn from limited facts. And, as a result, I find that, at this point, Kim has not shown that they should be deemed adverse witnesses. “Courts often wait until trial to make a determination concerning hostility in order to observe whether a particular witness shows hostility or seems uncooperative.”¹⁹

¹³ Mullen and Woman are on both parties’ witness lists. I will permit Kim to use leading questions during his cross-examination of them should Enforcement call them to testify.

¹⁴ FINRA Rule 9145(a).

¹⁵ Dep’t of Enforcement v. Brookfield, No. 2012030527503, 2017 FINRA Discip. LEXIS 28, at *9 n.5 (NAC Aug. 3, 2017).

¹⁶ *Doe v. Russell Cty Sch. Bd.*, Case No. 1:16CV00045, 2018 U.S. Dist. LEXIS 32085, at *1 (W.D. Va., Feb. 28, 2018).

¹⁷ *Id.*, at 2; see also *Pryor v. Corrigan*, Case No. 17-cv-1968, 2023 U.S. Dist. LEXIS 15122, at *58 (N.D. Ill., Jan. 30, 2023) (explaining that “[a] witness is ‘identified with an adverse party’ when the witness is an employee, agent, friend, or relative of an adverse party.”).

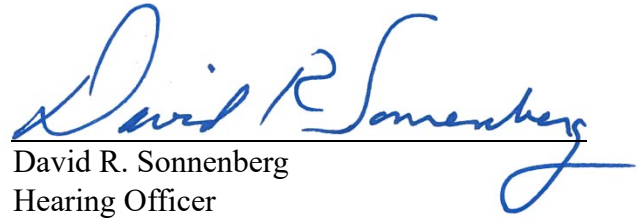
¹⁸ *Scott v. United States*, 953 A.2d 1082, 1094 (D.C. 2008) (quoting 3 J. Wigmore, *Evidence in Trials at Common Law* § 774 (Chadbourne rev. ed. 1970)).

¹⁹ *Russell Cty Sch. Bd.*, 2018 U.S. Dist. LEXIS 32085, at *3.

I will follow that course here with the three witnesses. If Kim calls any of the three witnesses to testify in his case, and they show hostility or seem uncooperative, then he can request that I deem them hostile witnesses so he can question them with leading questions, should he choose to do so.

Accordingly, the motion is **DENIED**.

SO ORDERED.


David R. Sonnenberg
Hearing Officer

Dated: May 21, 2024

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