

**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

**AMENDED ORDER DENYING RESPONDENT'S SECOND
REVISED FINRA RULE 9252 MOTION¹**

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 sold by his former broker-dealer employer, National Securities Corporation (“NSC”). The Complaint alleges, among other things, that Kim misled NSC about the conduct of the offering. Kim denies the allegations of wrongdoing. One of his defenses is that he did not mislead his firm because he conducted the offering consistent with NSC’s established policies, procedures, and regular course of business conduct relating to pre-IPO offerings.

On December 1, 2023, Kim moved under FINRA Rule 9252 for an order directing the Department of Enforcement to issue a FINRA Rule 8210 request to NSC for documents relating to three private offerings sold by NSC (“Motion”).² The three offerings are not the subject of this proceeding. Nevertheless, the Motion asserts that the requested documents are critical to Kim’s defense because they will show, among other things, the manner in which NSC conducted offerings similar to the offering at issue.

Enforcement filed an opposition to the Motion on December 15, 2024 (“Opposition”). In its Opposition, Enforcement argues that I should deny the Motion because the requested documents are irrelevant, overbroad, and excessive, and will “add to this proceeding copious

¹ I issue this amended order to correct typographical errors in the original.

² Kim filed an initial motion under FINRA Rule 9252 on December 1, 2023. Later that day, he filed two superseding motions: a revised motion under FINRA Rule 9252 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.”

amounts of irrelevant, extraneous material.”³ Further, according to Enforcement, the Motion failed to show, as required by FINRA Rule 9252, that Kim had made a good faith attempt to obtain the documents and information by other means before filing the motion.⁴

As explained below, while Kim’s requests seek relevant and material documents, they are overly broad, excessive, and oppressive. As a result, they will likely require NSC to also have to produce numerous irrelevant and immaterial documents. Further, I find that Kim failed to comply with the requirement that before filing a FINRA Rule 9252 motion, he must first try to obtain the documents by other means. For these reasons, I deny the motion.⁵

II. Applicable Legal Standards

FINRA Rule 9252 allows a respondent to request that a Hearing Officer order Enforcement to invoke FINRA Rule 8210 to compel the production of documents from third-party entities that are subject to FINRA’s jurisdiction.⁶ A respondent who requests production under FINRA Rule 9252 must (1) describe with specificity the requested documents or the category or type of documents; (2) state why the documents are material; and (3) describe his previous efforts to obtain the documents through other means.⁷

A Hearing Officer shall grant a FINRA Rule 9252 request only upon a showing that (1) the information sought is relevant, material, and non-cumulative; (2) the respondent has previously attempted in good faith to obtain the documents through other means, but has been unsuccessful; and (3) the person or entity from whom documents are sought is subject to FINRA jurisdiction.⁸ “In addition, the Hearing Officer shall consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.”⁹ If the Hearing Officer determines that a FINRA Rule

³ Opposition (“Opp.”) 2.

⁴ Opp. 2.

⁵ The Motion requests oral argument. Motion (“Mot.”) 1. But I find that oral argument is unnecessary for me to resolve the issues raised by the Motion.

⁶ OHO Order 19-25 (2017054405401) (July 8, 2019), at 3, http://www.finra.org/sites/default/files/2019-10/OHO_Order_19-25_2017054405401.pdf; OHO Order 17-11 (2014044985401) (Apr. 11, 2017), at 2, http://www.finra.org/sites/default/files/OHO_Order_17-11_2014044985401.pdf.

⁷ FINRA Rule 9252(a); OHO Order 19-25, at 3.

⁸ FINRA Rule 9252(b); OHO Order 19-25, at 3; OHO Order 16-14 (2015044379701) (Mar. 25, 2016), at 2, http://www.finra.org/sites/default/files/OHO_Order16-14_2015044379701_0_0_0.pdf.

⁹ FINRA Rule 9252(b); *see* OHO Order 19-22 (2016050957901) (June 19, 2019), at 2–3, http://www.finra.org/sites/default/files/2019-10/OHO_Order_19-22_2016050957901.pdf.

9252 request is unreasonable, oppressive, excessive in scope, or unduly burdensome, the Hearing Officer shall deny the request or grant it only upon such conditions as fairness requires.¹⁰

The formal rules of evidence do not apply in FINRA disciplinary proceedings,¹¹ but FINRA adjudicators may look to the Federal Rules of Evidence for guidance.¹² Rule 401 of the Federal Rules of Evidence defines evidence as relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.¹³ While not referenced specifically, the concept of materiality is embodied in the second part of the relevance test. Although evidence may tend to make a fact more or less probable, that evidence is not relevant unless that fact is also material to the proceeding.¹⁴

III. The Complaint's Allegations

The Complaint alleges that Kim engaged in unethical conduct, acted in bad faith, and misused customer funds in connection with a private offering sold by NSC. According to the Complaint, Kim proposed to NSC that it initiate a private placement offering for shares in a private company, Slack Technologies (“Slack”), through an NSC-affiliated fund.¹⁵ He proposed that the fund purchase the shares at a maximum price-per-share of \$9.75.¹⁶ At the time he made the proposal, Kim allegedly had not confirmed a source of shares for the offering at any price.¹⁷ NSC approved the offering, which it sold through two funds—the Innovation X fund and the Special Situations fund (“SSF”).¹⁸ The firm’s sales representatives then solicited investors and distributed offering documents stating the purpose of the offering was to invest in Slack shares at

¹⁰ OHO Order 15-05 (2012034936005) (Jan. 27, 2015), at 7, http://www.finra.org/sites/default/files/OHO-Order-15-05-ProceedingNo.2012034936005_0_0_0_0.pdf.

¹¹ FINRA Rule 9145.

¹² *Dep't of Enforcement v. North*, No. 2010025087302, 2017 FINRA Discip. LEXIS 7, at *35–36 (NAC Mar. 15, 2017), *aff'd*, Exchange Act Release No. 84500, 2018 SEC LEXIS 3001 (Oct. 29, 2018), *petition for review denied*, 828 F. App'x 729 (D.C. Cir. 2020).

¹³ Fed. R. Evid. 401; *See* OHO Order 22-13 (2019061528001) (July 14, 2022), at 3, <http://www.finra.org/sites/default/files/2022-08/22-13-Order-Denying-the-Parties-Motions-in-Limine.pdf>.

¹⁴ *See, e.g., United States v. Shomo*, 786 F.2d 981, 985 (10th Cir. 1986); OHO Order 19-10 (2016052503101) (Mar. 13, 2019), at 4, http://www.finra.org/sites/default/files/2019-10/OHO_Order_19-10_2016052503101.pdf.

¹⁵ Complaint (“Compl.”) ¶ 1.

¹⁶ Compl. ¶ 1.

¹⁷ Compl. ¶ 1.

¹⁸ Compl. ¶ 1, 7, 23.

a maximum price of \$9.75 a share.¹⁹ Forty-eight customers invested about \$4 million in the offering.²⁰

Further, the Complaint alleges that before closing on escrow, Kim did not source Slack shares for the offering at any price.²¹ Rather than issuing refunds to the investors, however, Kim allegedly initiated the closing of escrow and received a commission of about \$16,000.²² He purportedly did so knowing that the Innovation X fund offering had already bought all known available Slack shares and that he had not confirmed a seller of available Slack shares or conducted any due diligence for the purchase of additional shares.²³ He also allegedly knew that when escrow closed, he would receive a commission.²⁴ Afterward, the Complaint states, Kim actively misled NSC principals, representatives, and, indirectly, customers, into believing that the SSF had purchased Slack shares at the \$9.75 maximum price.²⁵

The Complaint also alleges that nearly a year after the offering closed, Kim purchased a limited number of Slack shares at an average price of \$20.22.²⁶ But over \$1 million in investor capital remained in cash, as Kim could not find enough shares to purchase with the investors' funds.²⁷ Ultimately, NSC uncovered Kim's alleged misconduct and notified investors that they had not purchased shares of Slack at a maximum share price of \$9.75 per share.²⁸ Instead, investors owned Slack shares at a higher price and some of their funds had not been used to purchase any shares in Slack.²⁹

In sum, according to the Complaint, Kim (1) initiated the closing of escrow and release of over \$4 million in investor funds when he knew that the Innovation X fund offering had already purchased all available shares of Slack, and he had not confirmed a seller of available shares of Slack or conducted any due diligence for an additional purchase of Slack shares;³⁰ (2) knew that, upon the closing of escrow, he would receive a share of NSC's commissions;³¹ (3) misused or

¹⁹ Compl. ¶ 1.

²⁰ Compl. ¶ 1.

²¹ Compl. ¶ 2.

²² Compl. ¶ 2.

²³ Compl. ¶ 61.

²⁴ Compl. ¶ 61.

²⁵ Compl. ¶¶ 2, 63.

²⁶ Compl. ¶ 3.

²⁷ Compl. ¶ 3.

²⁸ Compl. ¶ 3.

²⁹ Compl. ¶ 3.

³⁰ Compl. ¶ 61.

³¹ Compl. ¶ 61.

caused the misuse of investor funds from the SSF offering;³² and (4) made omissions and misrepresentations that hid the status of the SSF offering from NSC, which knowingly led to an NSC representative falsely informing at least one investor that Slack shares had been acquired at \$9.75 per share.³³

Based on the above alleged conduct, the Complaint charges Kim with violating FINRA Rule 2010.³⁴

IV. Respondent's Defenses

In his Answer, Kim denies any wrongdoing and asserts five affirmative defenses. Besides a Constitutional challenge to this proceeding, Kim asserts that (1) his violations, if any, resulted from NSC's, or its employees', acts or omissions; (2) he "acted in accordance with industry rules and standards in connection with his responsibilities;" (3) he lacked "knowledge of NSC's misconduct relating to the securities at issue;" and (4) he "carried out his responsibilities in good faith."³⁵

V. The Requests and Respondent's Arguments

A. All documents and information relating to NSC's creation of special purpose vehicles and/or funds for the purchase of pre-IPO shares for all NSC/National Asset Management Inc. ("NAM"), and Innovation X funds to acquire pre-IPO shares of Lyft, Palantir and FlipKart ("Pre-IPO SPVs").³⁶

Kim explains that this request includes:

all offering documents, commitment committee memoranda, drafts/revisions to any commitment committee memoranda, notes from any commitment committee meeting, all pre-IPO shares purchase agreements, all records reflecting the creation of an escrow account and all records reflecting the release of escrow for the Pre-IPO SPVs, communications including, without limitation emails amongst associated persons of NSC relating to setting up the special purpose vehicle, the sourcing of pre-IPO shares, agreements with the sellers of the pre-IPO shares, transfer of pre-IPO shares from the seller to the special purpose vehicle, and all

³² Compl. ¶ 62.

³³ Compl. ¶ 63.

³⁴ Compl. ¶¶ 3, 64.

³⁵ Answer 10.

³⁶ Mot. 5.

communications including, without limitation emails to NSC's retail sales staff relating to the sale of any of the Pre-IPO SPVs.³⁷

Kim represents that these documents contain material information to rebut the allegations that he (1) had “not confirmed a source of shares for the [Slack offering] at any price”; (2) “did not source [Slack] shares for the offering at any price”; and 3) “actively misled NSC principals.”³⁸ Kim asserts that NSC's offering of special purpose vehicle interests for the Pre-IPO SPVs followed a structure similar to the Slack offering.³⁹ According to Kim, the requested documents will provide evidence that in connection with NSC's offering of pre-IPO shares, it routinely closed on an offering without having identified and purchased the subject pre-IPO shares.⁴⁰ Further, he claims that these documents will show that NSC's senior management routinely authorized the release of escrow funds without the purchase of pre-IPO shares, and that senior management knew and authorized purchases of pre-IPO shares after the Pre-IPO SPVs closed and escrow funds had been transferred to the relevant fund's control.⁴¹

In short, Kim maintains that these documents will show that he “acted in accordance with well-established procedures and business conduct for NSC's offering of pre-IPO [shares]” and will refute “the allegations that [he] engaged in wrongful conduct.”⁴²

- B. Records relating to (a) all audited financial statements relating to the Pre-IPO SPVs; (b) all management representation letters relating to the financials of the Pre-IPO SPVs; (c) all accounting records for accrual and calculations of carried interest valuation reflecting the contingent value of the carried interest in filings for National Holdings Corp. (“National Holdings”)⁴³ relating to the Pre-IPO SPVs; and (d) all managerial reviews and sign offs on accrual and calculation of carried interest valuations reflecting the contingent value of the carried interests including without limitation, such computations used in filings for National Holdings relating to the Pre-IPO SPVs.⁴⁴**

The Motion represents that these records will demonstrate that while verifying the accuracy of the Pre-IPO SPVs' financials, NSC's senior management, as part of its regular business practice, learned that the Pre-IPO SPVs closed and transferred escrow funds without

³⁷ Mot. 5.

³⁸ Mot. 6.

³⁹ Mot. 2; *see also* Mot. Exhibit A (purporting to summarize Kim's on-the-record testimony that NSC engaged in similar offerings for the Pre-IPO SPVs).

⁴⁰ Mot. 6.

⁴¹ Mot. 6.

⁴² Mot. 7.

⁴³ According to Kim, National Holdings is NSC's parent company. Mot. 4.

⁴⁴ Mot. 7.

having identified a seller of the pre-IPO shares. Moreover, Kim claims that the records will show that “it was common business practice to acquire the relevant pre-IPO shares *after* the closing of the Pre-IPO SPVs and monies had been wired from escrow.” Thus, he continues, “these records will demonstrate that NSC’s senior management could not have been ‘misled’ by Kim relating to the purchase of pre-IPO shares for the [Slack offering].”⁴⁵

C. Records relating to all communications, agreements or material dealing with NSC interfacing and interaction with EAS Accounting Services (“EAS”), contracts, etc.

According to the Motion, the NAM funds hired EAS to act as the administrator on behalf of the Slack offering and the Pre-IPO SPVs.⁴⁶ Kim maintains that the requested records will show, among other things, “that it was not unusual that a Pre-IPO fund would not have identified nor contracted for actual shares of a Pre-IPO security prior to the closing of a Pre-IPO fund.”⁴⁷ They will also “confirm that all information about the status of Pre-IPO shares for a fund were fully disclosed and that the allegation that Kim mislead [sic] senior management of NSC is false,” according to Kim.⁴⁸

VI. Enforcement’s Arguments

Enforcement opposes each request on the same three grounds. First, Enforcement argues that the requests seek irrelevant and immaterial documents and information. It points out that the requested documents and information relate “to the purported conduct of other people (or of NSC itself) in unrelated offerings of pre-IPO shares in entirely different companies.”⁴⁹ Continuing, Enforcement asserts that even if “these offerings may have been conducted in a similar manner to the offering at issue involving Slack . . . that would prove nothing” because a registered representative is obligated to comply with the rules and “cannot shift responsibility for compliance requirements to his firm or supervisor.”⁵⁰ Kim’s argument is also flawed, Enforcement states, because “it is no defense that others in the industry may have been operating in a similarly illegal or improper manner.”⁵¹ In any event, according to Enforcement, Kim does

⁴⁵ Mot. 8.

⁴⁶ Mot. 9

⁴⁷ Mot. 9–10.

⁴⁸ Mot. 10.

⁴⁹ Opp. 4.

⁵⁰ Opp. 4 (quoting *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *40 (May 27, 2011), *aff’d*, 693 F.3d 251 (1st Cir. 2012) and citing OHO Order 22-01 (2018057235801) (Jan. 12, 2022), at 4, <https://www.finra.org/sites/default/files/2022-05/22-01-Order-Omnibus-Order-on-Pre-Hearing-Motions-and-Objections.pdf>).

⁵¹ Opp. 5 (quoting OHO Order 16-34 (2014042690502) (Dec. 28, 2016), at 4, https://www.finra.org/sites/default/files/OHO_Order%2016-34_2014042690502.pdf (citing to SEC, OHO, and NAC decisions)).

not argue that “these other offerings were comparable to the Slack offering at issue.”⁵² Specifically, “[h]e does not argue that, in those unrelated offerings, the pre-IPO shares of Lyft, Palantir, and Flipkart were bought months after the offering’s closing and,” Enforcement adds, “at a price far exceeding the maximum price per share promised in the offering documents, as alleged in the case against Respondent with respect to Slack.”⁵³

Second, Enforcement objects that the requests are excessive in scope because they are “not limited by any timeframe or other topical limitation. Instead, Respondent’s requests repeatedly seek ‘all’ documents within broad categories.”⁵⁴ Also, according to Enforcement, the “volume of documents sought from NSC by Respondent will likely quadruple the material Enforcement has already produced to Respondent pursuant to Rule 9251.”⁵⁵

Third, Enforcement argues that Kim has not made the required showing that before filing the Motion, he made a good faith attempt to obtain the desired documents through other means. Instead, Kim only said he “has no way of obtaining the requested information from any other source other than NSC”⁵⁶

VII. Discussion

The Motion meets several of FINRA Rule 9252’s requirements. It described with specificity the requested documents. The Motion also demonstrated that the requests seek relevant and material documents. Enforcement argues that the documents are irrelevant because Kim cannot justify wrongful conduct by claiming that others did the same thing. This argument, however, misses the mark because Kim seeks the requested documents, in part, for a different reason. He maintains that the Slack offering was conducted similarly to how NSC sold other pre-IPO offerings, such as the Pre-IPO SPVs. Thus, according to Kim, he did not mislead NSC—indeed the firm could not have been misled by him. Kim claims that the requested documents are relevant and material because they will help establish the similarities between the Slack and other pre-IPO offerings. Kim’s relevance argument is persuasive; documents showing that certain aspects of the Slack offering were consistent with how the firm conducted other pre-IPO offerings may lessen the likelihood that NSC was deceived by some of Kim’s alleged misconduct. I therefore find that Kim has demonstrated that at least some of the requested documents—those relating to the subjects on which he allegedly misled NSC—are relevant and material.⁵⁷

⁵² Opp. 5.

⁵³ Opp. 5.

⁵⁴ Opp. 6.

⁵⁵ Opp. 6.

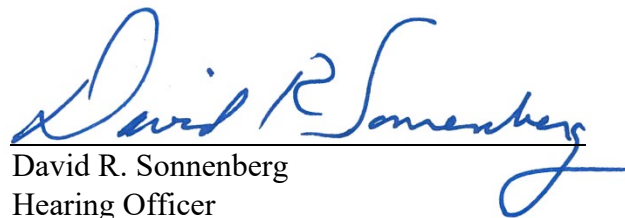
⁵⁶ Opp. 6–7.

⁵⁷ It does not appear from this limited record that the requested documents would be cumulative, and Enforcement does not contend otherwise.

But these determinations do not compel me to grant the Motion. To comply with the requirements of FINRA Rule 9252, it is not sufficient that the requests seek relevant and material information. Requests must also not be unreasonable, oppressive, or excessive in scope. And therein lies the problem with these requests. They “lack a narrow focus tailored to the [requests’] stated purpose or a time-period limitation.”⁵⁸ The Complaint alleges that Kim misled NSC about certain aspects of the Slack offering. The requests, however, do not seek documents relating only to similar aspects of the Pre-IPO SPVs. Instead, they are so broad as to seek virtually all—if not all—of the documents concerning those other offerings. While the requests might yield relevant and material documents, they will also likely require NSC to make a substantial production of irrelevant and immaterial ones. Given their broad, sweeping nature, the requests appear to be a fishing expedition for helpful documents. This is impermissible; “[a] respondent may not invoke Rule 8210’s authority for that purpose.”⁵⁹ As a result, I find that the requests are unreasonable, oppressive, and excessive in scope. Under FINRA Rule 9252(b), I am authorized to limit or modify them. But because the requests are overbroad in many respects, it is not practicable for me to do so. Accordingly, I **DENY** the Motion.

Further, Kim has not shown that he attempted in good faith to obtain the documents through other means but has been unsuccessful. Specifically, Kim did not show that he contacted NSC to request that it produce any of the documents he now seeks by the Motion. Failure to meet this requirement is a basis for denying a FINRA Rule 9252 motion.⁶⁰ I therefore also **DENY** the Motion for this reason.

SO ORDERED.


David R. Sonnenberg
Hearing Officer

Dated: January 2, 2024

⁵⁸ OHO Order 16-14, at 4.

⁵⁹ OHO Order 17-04 (2015044921601) (Mar. 6, 2017) at 5, https://www.finra.org/sites/default/files/OHO_Order-17-04_2015044921601.pdf; OHO Order 16-14, at 6.

⁶⁰ See OHO Order 20-15 (2019063790901) (Aug. 12, 2020), at 3, https://www.finra.org/sites/default/files/2020-12/OHO_Order_20-15_2019063790901.pdf; OHO Order 19-23 (2016051493704) (Jun. 25, 2019), at 3, https://www.finra.org/sites/default/files/2019-10/OHO_Order_19_23_2016051493704.pdf; OHO Order 16-14, at 6.

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