

**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 JUDICIAL NOTICE

I. Introduction

On May 8, 2024, Respondent Eugene H. Kim filed a motion in limine requesting that the Hearing Panel take judicial notice of Public Company Accounting Oversight Board (“PCAOB”) AS 2805: Management Representations.¹ According to the motion, “[t]his PCAOB rule sets forth the basis and requirements upon which an auditor can rely upon representations from management as part of an annual PCAOB compliant audit.”² The motion further states that this provision is relevant to demonstrate that Mullen and Worman were fully informed that the NAM V Fund had not purchased Slack shares “at the time of the initial closing on December 26, 2017 and periodically remained informed of same until the purchase in November 2018.”³

In support of his request, Kim relies on the provision authorizing official notice in Securities and Exchange Commission (“Commission”) administrative proceedings of “any matter which is peculiarly within the knowledge of the Commission as an expert body.”⁴ He argues that “the same theory can be applied to a FINRA Disciplinary Proceeding which is empowered by the authority delegated by the commission.”⁵ Continuing, he argues,

¹ The motion did not contain a meet-and-confer certification, as required by the Case Management and Scheduling Order 10, § V.E. Kim is reminded of this obligation and that failure to comply may result in my striking any non-compliant filing.

² Mot. 2.

³ Mot. 2.

⁴ 17 C.F.R. § 201.323.

⁵ Mot. 3.

[i]t is appropriate for the Hearing Panel to take judicial notice of PCAOB AS 2805 because the Hearing Officer previously denied Respondent's Motion for Expert Testimony relating to PCAOB Rules. Therefore, it appears that the Hearing Officer determined that the Hearing Panel possesses the knowledge as an expert body relating to the application of PCAOB AS 2805. Therefore, it is appropriate for the Hearing Panel to take judicial notice of PCAOB AS 2805.⁶

Finally, Kim requests that if I deny the motion because the Hearing Panel lacks the required expertise, then I should reconsider my earlier ruling denying Kim's expert witness motion.

On May 15, 2024, the Department of Enforcement opposed the motion on the grounds that (1) "Respondent has not laid any foundation for the rule, including its source, when it was operative, or its applicability to any of the individuals or events involved in the case";⁷ (2) "Respondent has not established that the PCAOB rule concerns matters that might be judicially noticed by a court. Nor has he established that PCAOB standards fall within the scope of specialized knowledge of FINRA as an expert body;"⁸ and (3) the PCAOB rules are irrelevant to this proceeding, based on Enforcement's interpretation of my ruling denying Kim's request to offer expert testimony.⁹

II. Discussion

As a threshold matter, Kim's reliance on the provision governing official notice in Commission administrative proceedings is misplaced. FINRA has its own rule addressing official notice in FINRA disciplinary proceedings—FINRA Rule 9145. That rule is similar to the Commission's counterpart. It states, in part, that "an Adjudicator may take official notice of such matters as might be judicially noticed by a court, or of other matters within the specialized knowledge of FINRA as an expert body."

Neither party cited any authority on the subject of whether courts have taken judicial notice of PCAOB auditing standards. But at least one court has addressed this issue. In *Avanguard Fin. Group, Inc. v. Raich Ender Malter*, an action in the federal court for the Eastern District of Pennsylvania, the plaintiff brought an action arising out of the failure of the defendant to complete an audit. In connection with a motion for partial summary judgment, the plaintiff requested that the court take judicial notice of 11 PCAOB auditing standards. The court, however, found it "unnecessary to separately take judicial notice of those standards," explaining that it would "consider all relevant standards in addressing the issues raised in plaintiff's

⁶ Mot. 3.

⁷ Opp. 1.

⁸ Mot. 2.

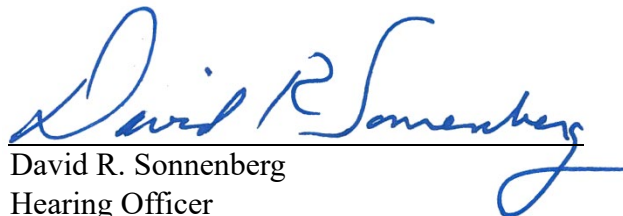
⁹ Mot. 2.

Motion.”¹⁰ Likewise, I find it unnecessary to take official notice of AS 2805; I will consider all relevant standards in this proceeding. In light of this ruling, I need not address whether the auditing standard is a matter within the specialized knowledge of the Hearing Panel.

Finally, both parties draw unwarranted inferences from my order denying Kim’s request to offer expert testimony. Enforcement states that in denying Kim’s request, I ruled that the PCAOB auditing standards are irrelevant to this proceeding. My ruling was much narrower. I concluded that the wide-ranging proposed expert testimony interpreting PCAOB auditing standings would not help the Hearing Panel understand the evidence or determine a material fact. I found that the expert’s “proposed testimony . . . has nothing to do with whether Respondent misled NSC representatives and customers or misused, or caused to be misused, customer funds as alleged.”¹¹ I did not go further and find that the PCAOB audit standards cannot be relevant under any circumstances. I will decide the relevance of any particular use of those standards in context at the hearing, if and when a party refers to them and an objection, if any, is made at that time. And contrary to Kim’s inference, in denying his expert witness motion, I did not find—explicitly or implicitly—“that the Hearing Panel possesses the knowledge as an expert body relating to the application of PCAOB AS 2805.”¹²

Accordingly, the motion is **DENIED**.

SO ORDERED.


David R. Sonnenberg
Hearing Officer

Dated: May 17, 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)

¹⁰ *Avangard Fin. Group, Inc. v. Raich Ende Malter & Co, LLP*, Civil Action No. 12-6497, 2015 U.S. Dist. LEXIS 52034, at *6 (E.D. Pa. Apr. 17, 2015).

¹¹ Order Denying Respondent’s Motion for Leave to Permit Expert Testimony 4 (Feb. 7, 2024).

¹² Mot. 3.