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 **EXTENDED HEARING PANEL DECISION** November 6, 2024

For engaging in unethical conduct and acting in bad faith by misusing customer funds and making misrepresentations and omissions in connection with a private placement offering, Respondent is suspended in all capacities for six months, fined $35,000, and ordered to disgorge the commissions he earned in connection with his misconduct. The Hearing Officer dissents from the imposition of a six-month suspension and, instead, would have imposed a one-year suspension.

Appearances

For the Complainant: Robert J. Kennedy, Esq., Roger J. Kiley, Esq., John R. Baraniak, Jr., Esq., and Savvas A. Foukas, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Martin H. Kaplan, Esq., Timothy Feil, Esq., and Robyn D. Paster, Esq.

DECISION

I. Introduction

The Department of Enforcement charged Eugene Kim, a registered representative, with engaging in a course of unethical misconduct and acting in bad faith in connection with a private placement offering sold by his member firm employer, National Securities Corporation ("NSC" or "Firm"). NSC's affiliated investment adviser, National Asset Management ("NAM"), created and managed private placement offerings, which NSC sold to investors. Through these offerings, commonly called pre-initial public offerings (pre-"IPO"), investors would buy an interest in an investment fund that, in turn, would purchase interests in private companies planning to conduct

an IPO. If the private company conducted an IPO, NAM would do one of two things: either (1) sell the offering's shares in the now-public company and distribute the proceeds to investors in proportion to the number of units in the offering they owned; or (2) distribute the shares to the investors, who could then decide whether to hold or sell them.

Kim managed NSC and NAM's offerings of pre-IPO securities, and administered and operated the various NSC-affiliated investment funds. This case involves a private placement offering that Kim proposed NSC initiate through its affiliated investment fund, National Asset Management Special Situations Fund V – Slack Series I, LLC ("NAM V Fund" or "Fund"). Under the terms of the proposed offering, investors would buy interests in NAM V Fund. The Fund would attempt to purchase shares in a private company, Slack Technologies, LLC ("Slack"), at a maximum price of $9.75 per share. The Complaint alleges that at the time Kim submitted the offering to NSC for approval, he had not confirmed a source of Slack shares for the offering at any price. NSC approved the offering, and sales representatives solicited investors and distributed offering documents to prospective investors stating that the sole purpose of the offering was for the Fund to invest in Slack shares at a maximum price of $9.75 per share.

Ultimately, 48 customers invested a total of $4 million in the offering, and their funds were placed in escrow. Afterward, Kim twice initiated the closing of escrow and the release of those funds to NAM V Fund's operating account. The Complaint alleges that before breaking escrow and transferring the investors' funds, Kim had not confirmed a seller of available shares of Slack. The Complaint also alleges that he had not conducted any due diligence for a purchase of Slack at any price, let alone a maximum share price of $9.75. Further, he allegedly knew that another NSC-affiliated investment fund had already purchased all known available shares of Slack. But instead of refunding investors' funds, Kim initiated the closing of escrow for the offering and received a $16,220 commission.

Nearly a year after the offering closed, Kim facilitated the purchase of a small amount of Slack shares for the Fund at an average price of $20.22—over twice the maximum price per share identified in the offering documents. Even then, over $1 million in investor capital remained in cash in the NAM V Fund's operating account, as Kim was unable to find enough shares to purchase with the customers' funds. The NAM V Fund never bought any Slack shares at, or below, $9.75 per share. Kim allegedly facilitated the purchase of Slack shares without telling NSC's principals that the purchases exceeded the maximum price per share permitted by the offering documents. He also allegedly failed to obtain the consent from investors to do so. According to the Complaint, during the months after breaking escrow, through alleged omissions and misrepresentations, Kim repeatedly hid the status of the offering from NSC principals and representatives and actively misled them. Allegedly, he also knowingly caused one NSC representative to falsely inform at least one investor that Slack shares had been acquired at $9.75 per share.

Kim's actions, in their totality, allegedly comprised a months-long continuing course of unethical and bad faith conduct. The object of this alleged misconduct was to obscure from NSC principals, representatives, and investors that the NAM V Fund had not purchased Slack shares at the maximum per share price stated in its offering, but at nearly double that price and left in

the Fund's operating account almost 40 percent of investor funds uninvested as cash. Enforcement charged Kim with violating just and equitable principles of trade, FINRA Rule 2010, in a single cause of action based on several types of alleged misconduct. Enforcement claims that Kim violated FINRA Rule 2010 in three ways by: (1) acting in bad faith and unethically when he twice initiated the closing of escrow for the NAM V Fund; (2) causing the misuse of customer funds in contravention of the NAM V Fund's private placement memorandum ("PPM"); and (3) concealing the true status of the NAM V Fund through omissions and misrepresentations to NSC principals and representatives.

Kim filed an answer to the Complaint, denied any wrongdoing, and requested a hearing. A FINRA Extended Hearing Panel held an eight-day hearing. At the hearing, Kim claimed he did not violate FINRA Rule 2010 and had acted in accordance with good practices. Kim made numerous arguments in his defense, including, primarily, the following: (1) he properly and in good faith exercised his discretionary authority to initiate the escrow closings; (2) he believed there was a likelihood that an identified source would sell Slack shares to the Fund at no higher than $9.75 per share; (3) NSC's written supervisory procedures and other legal restrictions limited the information he was permitted to share about the Fund; (4) nevertheless, he never made misrepresentations or omissions of material information about the Fund's status to NSC's principals or representatives; (5) information reflecting the status of the Fund was available to NSC's principals and representatives and they could have made themselves aware of the Fund's status had they chosen to do so; and (6) Kim reasonably relied on advice of legal counsel when purchasing the Slack shares.

After reviewing the evidence and the parties' arguments, the Hearing Panel concludes that Kim violated FINRA Rule 2010. He did so by misusing customer funds and by making misrepresentations and omissions to NSC's principals and registered representatives and, indirectly, to at least one customer. As a result, Kim is suspended for six months in all capacities from associating with a FINRA member firm, is fined $35,000, and is ordered to disgorge his commissions of $16,220 earned in connection with the misconduct, plus prejudgment interest. Further, the Hearing Panel finds that Enforcement did not prove that Kim violated FINRA Rule 2010 in connection with initiating the escrow closures. Finally, the Hearing Officer dissents from the majority's imposition of a six-month suspension and, instead, would have imposed a one-year suspension.

II. Findings of Fact[1]

A. Respondent, Jurisdiction, and Case Origin

Kim entered the securities industry in December 1996 when he became registered with FINRA as a General Securities Representative ("GSR") through his association with a FINRA member firm.[2] From 1996 to 1998, Kim was registered with FINRA as a GSR and associated

[1] The Hearing Panel makes additional findings of fact in the Conclusions of Law and Sanctions sections, as appropriate, to address certain issues discussed in those sections.

[2] Stipulations ("Stip.") ¶ 1; Answer ("Ans.") ¶ 4; Hearing Transcript ("Tr.") 76.

with three member firms.[3] From December 1998 until June 2015, Kim was not associated with a FINRA member firm.[4] During that time, he worked for a bank in connection with fixed income offerings and structured products. After leaving the bank, he was the chief investment officer of a hedge fund.[5]

In June 2015, Kim returned to the securities industry and became associated with NSC, a broker-dealer member of FINRA and subject to FINRA's jurisdiction.[6][7] While associated with NSC, Kim was registered with FINRA as a GSR; an Investment Banking Representative ("IBR"); a General Securities Principal ("GSP"); and an Investment Banking Principal ("IBP").[8] While registered with FINRA through his association with NSC, Kim was also employed by NAM as a registered investment advisor.[9] He voluntarily ended his association with NSC effective July 22, 2022.[10] Since August 1, 2022, Kim has been registered as a GSR, IBR, GSP, and IBP through his association with another FINRA member firm.[11] He is currently registered with FINRA and is therefore subject to its jurisdiction.[12]

The investigation that led to this disciplinary proceeding originated from a FINRA cause examination, which spun off from a FINRA cycle examination of NSC.[13] A cause examination is an examination focused on a specific transaction or set of transactions, or a specific product or group of individuals.[14] The cause examination here focused on NSC's two fund offerings for Slack.[15]

B. Other Relevant Individuals and Entities

During the period December 2017 and June 2019 ("relevant period"), NSC was a broker-dealer member of FINRA, and NAM was an investment advisor registered with the Securities

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[3] Ans. ¶ 4; *see also* Stip. ¶ 1; Tr. 76–77.

[4] Stip. ¶ 1; Tr. 77.

[5] Tr. 77.

[6] Stip. ¶ 5.

[7] Stip. ¶ 1; Ans. ¶ 4; Tr. 77–78.

[8] Stip. ¶ 1; Ans. ¶ 4; Tr. 77–78.

[9] Tr. 84.

[10] Stip. ¶ 2; Ans. ¶ 4; Tr. 79.

[11] Stip. ¶ 2; Ans. ¶ 5; Tr. 79–80; Complainant's Exhibit ("CX-__") 4, at 4.

[12] Stip. ¶ 3; Ans. ¶ 5.

[13] Tr. 1797–99.

[14] Tr. 1797–98.

[15] Tr. 1799.

and Exchange Commission.[16] National Holdings Corp. ("NHLD"), a publicly traded company, was the parent company of NSC and NAM.[17]

In November 2017, David Levine was the chief executive officer ("CEO") of NSC.[18] Shortly afterward, Levine took a 30-day medical leave.[19] Levine's leave ended by January 19, 2018.[20] When he returned, he assumed the role of national sales manager.[21]

During the relevant period, Glenn Worman was the chief financial officer for NHLD.[22] In the fourth quarter of 2017, Worman was also NHLD's president[23] and served on NSC and NAM's commitment committees—the committees that approved offerings.[24] Although Worman was a board member for NSC and NAM,[25] he was never employed by NSC.[26]

During the relevant period, Michael Mullen was the CEO of NSC and NHLD, and the executive chairman of NAM.[27] He led the National entities, the executive team, and oversaw the day-to-day business of all of the entities, including NSC.[28] Mullen was responsible for determining strategy for the business; overseeing the growth plans for the business; supervising the executive team; and reported to the board of directors of NHLD.[29] He was also Kim's supervisor.[30]

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[16] Stip. ¶¶ 5–6; Tr. 848.

[17] Stip. ¶ 4.

[18] Tr. 1935.

[19] Tr. 1935.

[20] Tr. 1936.

[21] Tr. 1937.

[22] Stip. ¶ 9; Tr. 851, 1114–15.

[23] Tr. 1114.

[24] Tr. 1115–16.

[25] Tr. 1218.

[26] Tr. 1220. *But see* Respondent's Exhibit ("RX-_") 240, at 7.

[27] Stip. ¶ 8; Tr. 847–50, 852, 955–56.

[28] Tr. 849–50.

[29] Tr. 848.

[30] Mullen's supervisory role regarding Kim was the subject of conflicting and confusing testimony. At his on-the-record-testimony ("OTR"), Mullen denied supervising Kim. Tr. 982. But other evidence reflected that Mullen was Kim's supervisor. RX-216, at 5; Tr. 966, 1218–19, 1360, 1363, 1972, 2068. Kim testified he reported to Mullen for regulatory supervisory purposes, but his business line head was Roger Monteforte. Monteforte was a senior broker at the Firm who played a major role in the Firm's pre-IPO offerings, as discussed above. Tr. 2448–49. At his OTR, however, Kim testified that he reported to Levine at some point and then transitioned to Worman. Tr. 2450–51. But at the hearing, he said that during 2018 his manager was Mullen. Kim added that he thought the questions on this subject at the OTR related to the period November/December 2017. Tr. 2470–72. On balance, it appears that Mullen was Kim's supervisor during the relevant period.

C. NSC and NAM's General Practice in Conducting Pre-IPO Private Placement Offerings

1. Background

During the relevant period, NAM created and managed private placement offerings that NSC sold to investors.[31] Through these pre-IPO offerings, investors could purchase interests in funds. Those funds, in turn, bought shares in private companies that purportedly intended to conduct an IPO.[32] NSC's pre-IPO offerings business was pioneered and driven by Roger Monteforte, a senior broker at the Firm who owned his own independent branch office.[33] Monteforte was also the main person who sourced (i.e. located) pre-IPO shares for the various funds to purchase.[34]

NSC and NAM structured private placement offerings through two series of funds: Innovation X funds, sold to qualified purchasers (individuals with at least $5 million in investments), and Special Situations funds, sold to qualified clients (individuals with a net worth of at least $2.1 million).[35] Innovation X was an investment fund created by Monteforte,[36] and exclusive to his branch office, that invested in privately held companies.[37] Innovation X was managed by Innovation X Management LLC,[38] a joint venture between Monteforte and NAM.[39] NAM Special Situations Management LLC, owned by NAM, managed Special Situations funds.[40]

2. Kim's Role in NSC and NAM's Pre-IPO Offerings

During the relevant period, Kim was a senior managing director and head of a group involving special purpose vehicles, private shares, and the Special Situations fund series for NSC.[41] Special purpose vehicles[42] were funds created to purchase pre-IPO shares in a single

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[31] Stip. ¶ 10; Ans. ¶ 6.

[32] Stip. ¶ 10; Ans. ¶ 6; Tr. 85–87. The investors did not directly purchase shares in these private companies; rather, they owned an interest in a fund that bought the shares. Tr. 87, 93.

[33] Tr. 91, 135, 863, 1120, 1436–37, 2044–45.

[34] Tr. 91, 580–81.

[35] Stip. ¶ 11; Ans. ¶ 7; Tr. 87–89.

[36] Tr. 855.

[37] Tr. 2043–45.

[38] Tr. 90–91.

[39] Tr. 91, 2044.

[40] Tr. 90.

[41] Stip. ¶ 14; Ans. ¶ 11; Tr. 91–92, 557. Kim testified that although he served in that role, he did not believe he had that title. Tr. 91–92.

[42] Tr. 92.

private company.[43] Special purpose vehicles referred to the Innovation X series of funds and the Special Situation series of funds, among other funds.[44] Kim was hired to oversee and structure this business line.[45]

As head of special purpose vehicles, Kim oversaw the special purpose vehicles, private shares, and Special Situations funds transactions and was responsible for complying with actions required by the Firm's written supervisory procedures ("WSPs").[46] He managed and administered NSC and NAM's offerings of pre-IPO securities and administered and operated the Innovation X and Special Situations funds on NAM's behalf.[47] He was involved in the structuring, due diligence, and execution of the offerings for special purpose vehicles.[48] More specifically, Kim was responsible for directing, supervising and confirming that appropriate due diligence was undertaken, and that documentation of due diligence was maintained in files for the special purpose vehicles, private shares, and Special Situations funds group.[49] Such due diligence included a mandatory inquiry into the origin and authenticity of assets held by or to be acquired by the special purpose vehicles.[50] The WSPs required Kim, as head of special purpose vehicles, to review PPMs to make sure they were fair and balanced, that they highlighted all relevant risk factors and conflicts of interest, and that they were not misleading.[51]

Under the WSPs, as head of special purpose vehicles, Kim was required to notify committees members of the relevant terms of any transaction being proposed before initiating the transaction.[52] His responsibilities also included, among other things: dealing with the lawyers to create the different special purpose vehicles;[53] engaging third party administrators and auditors; working with the banks; creating the escrow accounts; communicating to the registered representatives who raised capital for the fund; acting as the funnel for the documents that came in from the clients; reviewing documents before sending them to counsel for final review and sign off; tracking escrows; and managing the quarterly statements the administrator sent to

[43] Tr. 93.

[44] Tr. 92–93.

[45] Tr. 555.

[46] CX-12 at 159; Tr. 102.

[47] Stip. ¶ 14; Ans. ¶ 11; CX-12, at 159; Tr. 92–93, 102.

[48] Tr. 557–58.

[49] CX-13, at 33; CX-12, at 160; Tr. 106–07.

[50] CX-13, at 33; Tr. 108.

[51] CX-13, at 33; CX-12, at 160; Tr. 109.

[52] CX-12, at 160; CX-13, at 32–33; Tr. 106.

[53] Tr. 861–62.

clients.[54] Further, Kim served as the point person for NSC and the Fund regarding the escrow agreement between the Fund and the escrow agent.[55]

In addition, the WSPs designated the head of special purpose vehicles (i.e. Kim) as the exclusive source of information about pre-IPO offerings for NSC's selling representatives. The WSPs required representatives to refer all inquiries about the offerings and their status to him.[56] Kim, however, was not authorized to execute documents for the pre-IPO funds on behalf of NSC or NAM. So any contracts or money transfers (including releases from escrow) had to be signed by Mullen or Worman, who had signatory authority for Special Situations funds.[57]

3. Kim's Compensation

Although NSC and NAM jointly employed Kim, he received his compensation from NSC.[58] In 2016, his income was just under a million dollars.[59] Until December 2017, Kim received a salary from NSC and only a portion of the fees and commissions NSC received from its pre-IPO business in lieu of a salary.[60] Then, in December 2017, NSC stopped paying Kim an annual salary of $150,000 per year.[61] Instead, Kim was compensated exclusively through a portion of the fees and commissions that NSC received from its pre-IPO business. This included commissions paid to him as part of the placement fee paid to NSC after the closing of escrow for pre-IPO offerings.[62]

4. Sourcing of Shares and Due Diligence

NSC acted as broker and placement agent to the various NAM funds.[63] It followed a regular practice when initiating pre-IPO private placement offerings.[64] Typically, the process began by Monteforte and Kim searching for a seller of pre-IPO shares for the Innovation X and the Special Situations funds.[65] Monteforte and Kim would source the shares by reaching out to contacts at, for example, law firms and other brokers.[66] Once a potential source of shares was

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[54] Tr. 862.

[55] Tr. 213–14.

[56] CX-12, at 164; CX-13, at 37; Tr. 116–17.

[57] Stip. ¶ 14; Ans. ¶ 11; Tr. 573, 856–57, 862, 875.

[58] Ans. ¶ 16; Tr. 83.

[59] Tr. 2389.

[60] Stip. ¶ 15; Ans. ¶ 16.

[61] Ans. ¶ 16; CX-11; Tr. 83.

[62] Ans. 16; CX-11; Tr. 83–84, 129.

[63] Tr. 1938.

[64] Ans. ¶ 8.

[65] Tr. 91, 135, 855.

[66] Tr. 1946.

located, due diligence was then performed on the proposed offering. The purpose of the due diligence was to determine whether there was a high likelihood the transaction could be completed.[67] The due diligence included focusing on: the seller's identity; whether the seller owned the shares; whether the seller was acting in good faith; and whether the seller had enough shares to complete the transaction.[68]

5. Commitment Committee Review and Approval of a Proposed Offering

Next, the proposed offering would be reviewed by certain NSC and NAM committees. Under NSC's WSPs, all offerings, and any material changes to an approved offering, had to be reviewed and approved by the Firm's commitment committee. Only then could NSC or its registered representatives present the offering to potential investors.[69] Upon review, the commitment committee would either agree and sign off, or reject the proposed investment.[70] During November and December 2017, NSC and NAM each had a commitment committee.[71] Also, beginning in December 2017, NSC created a committee called the pre-commitment committee.[72] The purpose of the pre-commitment committee was to provide an additional review of proposed offerings and make recommendations to the commitment committee regarding the transaction.[73] Among other things, the pre-commitment committee reviewed a memorandum regarding the proposed offering as well as the offering materials to make sure they were fair and balanced and contained appropriate disclosures.[74]

The practice at the Firm for bringing a proposed pre-IPO offering to the commitment committee evolved over time. For example, in connection with an offering before the NAM V Fund offering, the Firm executed a stock purchase agreement before raising the money to satisfy the purchase.[75] NSC then found itself in the position of not having raised sufficient funds from investors to close on the purchase in time, and the seller threatened to sue the Firm.[76] Eventually, the fund was able to raise sufficient funds to close on the stock purchase.[77]

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[67] Tr. 2074–75.

[68] Tr. 2079.

[69] Stip. ¶ 12; Ans. ¶ 8; CX-13, at 32–33; Tr. 902–04, 2047.

[70] Tr. 2047.

[71] Tr. 104.

[72] Tr. 109, 167.

[73] Tr. 2225.

[74] Tr. 109–10, 2225.

[75] Tr. 575–76.

[76] Tr. 577–78.

[77] Tr. 578.

But chastened by that experience, Kim said, Mullen clearly communicated to him that the Firm should not execute a purchase agreement before raising sufficient capital.[78] Afterward, instead of having a stock purchase agreement in place, Kim would proceed to the commitment committee with the transaction only if he had a high degree of confidence that they would be able to have both sufficient demand at the appropriate price and for the appropriate number of shares.[79] Kim added that he could proceed to the commitment committee for permission to do a transaction without having a high likelihood of getting the shares. Even so, they had to have a reasonable basis for moving forward based on their experience, the identity of the counterparties, and whether they were confident they could buy the shares.[80]

According to Mullen, after the above-referenced problematic offering, the Firm would not sign a stock transfer notice until it had the funds in escrow to cover the purchase. Mullen explained that if the Firm signed the notice before sufficient funds were in escrow, the Firm ran the risk of being out of net capital compliance.[81] Likewise, according to Monteforte, the protocol at the Firm was that the funds needed to close the transaction had to be raised before they could execute a stock purchase agreement.[82]

6. Solicitation of Investors, Escrowing of Funds, Executing Other Agreements

Once the commitment committee approved an offering, NSC's selling representatives solicited potential investors. The investors then received an email from NSC attaching the limited liability agreement for the relevant fund, a PPM describing the specific offering, and a subscription booklet of documents to execute for the investment.[83] Those who chose to invest would purchase membership interests in the applicable offering, and their capital would be deposited into an escrow account.[84] The capital they invested would remain in escrow until the offering closed.[85]

Placing the investors' funds in an escrow account served several functions. According to Kim, the main purpose was to enable the collection of subscriptions until the offering was ready

[78] Tr. 578.

[79] Tr. 579–80.

[80] Tr. 579–80.

[81] Tr. 998–99.

[82] Tr. 2074.

[83] Stip. ¶ 12; Ans. ¶ 8.

[84] Tr. 123.

[85] Tr. 123–24.

to close and the funds used to purchase pre-IPO shares.[86] Worman viewed the use of an escrow account as a best practice, ensuring that funds were segregated and protected for proper use.[87]

In addition to an escrow account, it was standard practice for the fund to have a placement agreement with NSC, an advisory agreement with NAM, and an agreement with a service provider to report to the members of the fund.[88] The various funds also hired an accounting firm to act as a third-party administrator.[89] According to Kim, its role was to, among other things, provide quarterly reports and capital account statements to investors.[90]

7. Amending the PPM

Kim testified if there was a change to the terms of the offering before escrow closed—such as a change in price versus what was disclosed in the PPM—he would need to go back to NSC's commitment committee to get approval for the new terms. He would then circulate supplements to investors before he could move ahead to closing.[91] As Kim explained, the important thing about closing escrow is that the disclosures in the PPM needed to remain accurate and that there was nothing material that had to be disclosed and circulated as a supplement to investors.[92]

8. Closing of Escrow, Use of Funds, and Post-Closing Activities

Once NSC and NAM were ready to conduct a closing of the offering, the escrow agent released the funds from escrow and transferred them to the operating account of the relevant investment fund for which the private placement offering had raised capital.[93] The standard for breaking escrow was the subject of considerable testimony. As Kim put it, in his "mind" in order to go to closing, he needed to satisfy three elements: a defined counterparty, an agreed price, and a defined quantity of shares.[94] Kim testified that escrow would close when it was sufficiently funded and an acceptable amount of subscriptions had been obtained.[95] For example, before escrow could close for the NAM V Fund, it needed to receive $100,000 in subscriptions, he said.[96]

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[86] Tr. 124, 2233.

[87] Tr. 1153–54.

[88] Tr. 591; *see, e.g.*, RX-46.

[89] Tr. 592.

[90] Tr. 593.

[91] Tr. 800–01, 2472–75.

[92] Tr. 2252–53.

[93] Stip. ¶ 12; Ans. ¶ 8; Joint Exhibit ("JX-_") 4, at 3; Tr. 124, 127.

[94] Tr. 2254.

[95] Tr. 127.

[96] Tr. 125.

Kim explained that "technically," escrow could close once the minimum amount was raised. [97] He said that the documents in the offering memorandum explicitly provided that the offering manager had complete flexibility and discretion to close escrow when it met the minimum requirement.[98] Even so, he pointed out that there was no reason to close escrow if the fund had not identified shares to purchase.[99] Indeed, according to Kim, the only legitimate purpose of closing escrow is if a purchase of the securities is highly likely.[100] And, regarding the Special Situations funds, if the Firm believed it was highly likely that it could purchase those shares under the terms of the offering memorandum, it would proceed to closing, according to Kim.[101]

While NSC would receive a placement fee when escrow closed,[102] Kim agreed that receiving a placement fee payment was not a sufficient reason to close escrow.[103] He said he would not close just to get himself, the registered representatives, and the Firm paid.[104] Nevertheless, Kim claimed that he had to manage certain "realities" when deciding when to close escrow.[105] He explained that registered representatives wanted to get paid every month and would not want to sell membership interests unless they knew there would be a closing each month.[106] Kim said that because of this dynamic, Mullen, Levine, and Worman told him to conduct a closing, if at all possible, at the end of every month so the registered representatives got paid.[107] An additional reason Kim gave for wanting to try and close each month, even before accumulating enough money in escrow to execute a purchase, was that when customers' money is in escrow, they can withdraw it at any time.[108]

Worman echoed Kim's views, in part. He said escrowed funds would not be released just to pay registered representatives their commissions,[109] nor should funds be released if there was not a share purchase to go forward with.[110] But Worman announced a more exacting standard for going to closing than the one Kim described. Worman testified he believed the fund being

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[97] Tr. 126.

[98] Tr. 126.

[99] Tr. 128.

[100] Tr. 129.

[101] Tr. 128.

[102] Tr. 129.

[103] Tr. 129.

[104] Tr. 245.

[105] Tr. 2260.

[106] Tr. 2261.

[107] Tr. 2261.

[108] Tr. 2261.

[109] Tr. 1155, 1158–59.

[110] Tr. 1156.

offered should have executed a stock purchase agreement before closing escrow.[111] Worman also denied knowing of a process at NAM and NSC under which escrow could close as long as there was a high likelihood of acquiring the shares.[112] Levine, however, disagreed with Worman, and testified that having a fully executed stock purchase agreement prior to closing was not a prerequisite.[113] According to Mullen, when Kim sent him documents to sign to release funds from escrow, he would tell Mullen that there was a transaction (the purchase of shares) that could proceed.[114]

Upon closing, NSC would receive a placement fee, as noted above.[115] The investment fund then later used the funds transferred from escrow to purchase shares for the fund in the private company as well as to pay expenses, such as lawyers' fees and commissions to sales representatives.[116] These shares, along with any investor funds remaining in the investment fund's bank account, were the offering's sole assets.[117] Also upon closing, NAM, through a third party administrator, sent confirmation letters to the investors informing them of the closing, their capital contribution, and the number of units in the series they owned as a result.[118]

If the private company that was the subject of an offering ultimately conducted an IPO, NAM, the offering's manager, would do one of two things: either (1) sell the offering's shares in the now-public company and distribute the proceeds to investors in proportion to the number of units in the offering they owned; or (2) distribute the shares to the investors, who could then decide whether to hold or sell them.[119]

D. Events Leading to Request for Innovation X and NAM V Fund to Sell the Slack Pre-IPO Offering

In November 2017, Slack was a privately held software company.[120] That month, Monteforte identified an entity willing to sell approximately $10 million in Slack shares at a price of $9.75 per share.[121] The seller—an entity—was owned, controlled, or managed by DS, a well-known venture capitalist and billionaire.[122] The seller's representative acted as an

[111] Tr. 1290, 1293, 1762–63.

[112] Tr. 1293.

[113] Tr. 1949.

[114] Tr. 876.

[115] Stip. ¶ 12; Ans. ¶ 8; JX-4, at 3.

[116] Stip. ¶ 12; Ans. ¶ 8; CX-17, at 9–10, 12; Tr. 124, 875–76, 1154–55.

[117] Ans. ¶ 8; CX-17, at 9–10, 12; Tr. 129–31.

[118] CX-25; CX-2; Tr. 131.

[119] Stip. ¶ 13; Ans. ¶ 10; Tr. 93–94, 134.

[120] Tr. 143.

[121] JX-1; CX-17, at 98.

[122] Tr. 144, 585, 2070, 2196.

intermediary in the Slack pre-IPO offering transaction, brokering the Slack shares held by the seller.[123] Kim testified that Monteforte dealt with this representative regarding the transaction.[124] Kim did not speak directly with either DS or his representative.[125]

According to Monteforte, based on NSC's protocol at that time, once learning that the seller had access to shares of Slack and they reached an agreement to proceed with a transaction, he would bring Kim into the process.[126] Kim would then start conducting due diligence on the seller and the underlying shares. [127] He would also communicate directly with the seller's counsel and the fund's counsel.[128] On November 7, 2017, Monteforte introduced Kim by email to the prospective seller's representative.[129] In that email, Monteforte asked Kim to coordinate with that representative on the initial information needed for the proposed purchase of Slack by Innovation X.[130] Kim testified that Monteforte told him the seller would sell Slack shares to Innovation X at $9.75 per share.[131] After the introduction, Kim began his due diligence on that transaction.[132] As part of his due diligence, Kim requested various documents about the seller and its ownership of Slack shares.[133] As a result, he satisfied himself about the provenance of the seller's shares.[134]

E. Request for Permission for Innovation X and NAM V Fund to Sell the Slack Pre-IPO Offering

On November 30, 2017, Kim drafted the "NAM Commitment Committee Memorandum," and sent it to leadership at NSC, NAM, and NHLD. Specifically, Kim sent the memorandum to Levine and Worman, among others.[135] At that time, Levine was the CEO of NSC and NAM, and Worman was executive vice president and chief operating officer and chief financial officer of NHLD.[136] The November 30 memorandum described two proposed

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[123] Tr. 144, 2075.

[124] Tr. 733.

[125] Tr. 144, 2075.

[126] Tr. 2055.

[127] Tr. 2054–55.

[128] Tr. 2054–55.

[129] Stip. ¶ 16; Ans. ¶ 19; Tr. 140–42; JX-1, at 3–4.

[130] Stip. ¶ 16; Ans. ¶ 19; JX-1, at 3–4; Tr. 142–43. Kim testified that the proposed transaction was only for Innovation X because at that time, Monteforte only knew of demand in his office. Tr. 143–44.

[131] Tr. 767.

[132] JX-1, at 2–3; CX-1; Tr. 2046.

[133] Ans. ¶ 19; JX-1, at 2–3; Tr. 586.

[134] Ans. ¶ 19; JX-1, at 2–3; Tr. 586.

[135] JX-3; Tr. 151–52.

[136] Tr. 152–53.

offerings:[137] one by Innovation X and one by NAM V Fund, a Delaware limited liability company managed by NAM Special Situations Management, LLC.[138] The memorandum proposed that these funds invest exclusively in the Series D Preferred Shares of Slack at a price of $9.75 per share.[139]

In early December 2017, Kim continued to conduct due diligence for the Slack shares to be purchased from the seller.[140] On December 7, 2017, the seller entered into a non-disclosure agreement with NAM.[141] The agreement stated that its purpose was to allow the parties to continue to discuss and evaluate the relationship while protecting the seller's confidential information against unauthorized use or disclosure.[142]

On December 11, 2017, several events occurred relating to the NAM V Fund offering. First, NSC entered into a placement agent agreement with the NAM V Fund. The purpose of the agreement was to set the terms of the NAM V Fund offering.[143] Mullen signed the placement agent agreement on behalf of NSC. Mullen and Worman signed the placement agent agreement on behalf of NAM V Fund's manager, the NAM Special Situations Management, LLC.

Second, NAM V Fund and NAM Special Situations Management, LLC entered into an investment advisory agreement.[144]

Third, Kim sent an email to NSC's commitment committee proposing the establishment of two offerings to invest in Slack: Innovation X and NAM V Fund.[145] The email had several attachments, including a "NAM Commitment Committee Memorandum" drafted by Kim. [146] The memorandum communicated the details of the proposed transaction for the Slack shares negotiated by Monteforte.[147] It stated the purchase price was to be $9.75 per share.[148] The commitment committee was required to review the material terms for all offerings before

[137] Tr. 157.

[138] Stip. ¶ 7.

[139] JX-3, at 1.

[140] Tr. 161–62.

[141] CX-15, at 1.

[142] CX-15, at 1.

[143] Tr. 869, 2219–21; JX-4.

[144] Stip. ¶ 18.

[145] Stip. ¶ 17; CX-17.

[146] Stip. ¶ 17; CX-17; JX-3; Tr. 151–53.

[147] Stip. ¶ 17; CX-17; JX-3; Tr. 151–53.

[148] Stip. ¶ 17; CX-17, at 12; JX-3, at 2.

deciding whether to approve them.[149] Afterward, NAM V Fund, NSC, and Signature Bank entered into an escrow agreement as of December 14, 2017.[150]

As head of special purpose vehicles, Kim was required to make sure the PPM was complete and accurate.[151] He helped prepare the PPM for NAM V Fund and sent it to NSC's pre-commitment committee for review in an email dated December 11, 2017.[152] The PPM stated that the maximum price that investment funds in the Slack series would pay for the Slack securities was $9.75 per share.[153]

F. The Offering Documents

Kim explained the role the offering documents (including the PPM) played in the offering process. He said that their purpose was to provide investors with full disclosure of the fund's risks and objectives, including the fees and expenses that would be paid by its members.[154] Kim emphasized that investors should decide to invest in a fund based solely on the offering document and not on any other material or representations.[155] He said that if there was no material change or disclosable item requiring a supplement to the PPM, they would close on escrow and move the money to the fund's operating account.[156]

Kim's explanation was consistent with the WSPs' restrictions on statements that Firm employees could make about an offering. It forbade anyone from providing prospective investors with information besides the PPM without the approval of the head of special purpose vehicles.[157] The WSPs stated that any questions or requests for more information should be referred to the head of special purpose vehicles or that person's designee.[158]

According to the PPM, the manager of the Slack series was NAM Special Situations Management, LLC, a Delaware limited liability company.[159] The PPM stated that the manager retained NAM as the advisor to the Slack series.[160] The advisor retained discretionary authority regarding all investments for the series. This authority included all monitoring and investment

[149] Tr. 171.

[150] JX-9.

[151] Tr. 173.

[152] CX-17, at 9; Tr. 166–77.

[153] Stip.¶ 17; CX-17, at 12; JX-3 at 2; Tr. 156–57.

[154] Tr. 799–800.

[155] Tr. 799–800.

[156] Tr. 799–800.

[157] CX-12, at 164.

[158] CX-12, at 164.

[159] CX-17, at 9.

[160] CX-17, at 21; Tr. 2459.

management activities. The advisor was required to make all investment decisions through its commitment committee, comprised of Levine and Worman, among others.[161]

The PPM also addressed escrow closing. It provided that all subscription funds would be held in an escrow account maintained by an escrow agent until the earlier of: (1) the first closing at which such subscription is accepted by the Series; (2) the rejection of the subscription; or (3) the termination of the offering.[162] The PPM also stated that the Slack series would initially close "at a time determined by the Manager, in its sole and absolute discretion."[163] Kim was the designated point of contact for any questions from anyone receiving or reviewing the PPM.[164]

The Fund's limited liability company operating agreement contained the terms and conditions controlling all aspects of the NAM V Fund.[165] The operating agreement[166] was supplemented as of December 11, 2017.[167] The supplement provided that the maximum price that the series would pay for Slack securities was $9.75 per share.[168]

Under the operating agreement, each company in the Slack series would be managed by the manager, who would be responsible for the day-to-day operations of the company.[169] NAM Special Situations Management LLC was identified as the manager.[170] But as Kim explained, while NAM Special Situations Management LLC was the legal entity defined as the manager, "a legal entity cannot actually function in the role of a manager."[171] In fact, Kim functioned as the manager for the Fund, according to Worman, Mullen, and Kim.[172] Worman viewed Kim as the senior managing director of this business[173] and agreed that Kim was the manager who ran NAM Special Situations Management LLC.[174] Likewise, Mullen testified that Kim managed the affairs of the NAM V Fund.[175] Kim confirmed it was his understanding that Worman and Mullen had

[161] CX-17, at 21; JX-8, at 22.

[162] CX-17, at 13, 46.

[163] CX-17, at 13.

[164] Tr. 174.

[165] CX-17, at 11; Tr. 594, 685–86.

[166] JX-8, at 51.

[167] JX-5.

[168] JX-5; Tr. 127–28.

[169] JX-8, at 64.

[170] JX-8, at 60.

[171] Tr. 2458.

[172] Tr. 1310, 1742.

[173] Tr. 1316, 1744.

[174] Tr. 1785–86.

[175] Tr. 1015–16.

designated him manager of NAM Special Situations Management LLC, as well as the various limited liability companies under the broader NAM umbrella.[176]

Finally, the operating agreement provided that the manager, acting together with the advisor, would use reasonable efforts, and act in good faith, in managing the funds' investments. Consistent with the terms of the advisory agreement and subject to the review and approval by the advisor, the manager had the sole discretion to determine the amount, terms, and provisions of the investments to be made by the funds in the Slack series.[177] That said, Kim conceded that he was constrained by the provision regarding the $9.75 per share purchase price.[178]

G. NSC's Approval of Pre-IPO Offerings of Slack by Innovation X and NAM V Fund and the Beginning of the Selling Effort

On December 15, 2017, NSC's commitment committee approved the Innovation X and NAM V Fund offerings.[179] Any changes in the terms of the funds' investment would have to be approved by NAM's commitment committee.[180] After the commitment committee approval, Kim sent the offering materials for both offerings to NSC's sales syndicate for dissemination to NSC's representatives.[181] NSC representatives then began recommending both offerings to customers and sending offering materials to potential investors by email.[182] The offering materials for each offering represented to potential investors that the applicable fund would use their capital to purchase Slack shares at a price not exceeding $9.75 per share.[183] Specifically, the PPM sent to NAM V Fund investors contained the language that that the maximum price that the Slack series would pay for the Slack shares was $9.75 per share.[184]

H. The Innovation X Offering

According to Monteforte, in the early stages of discussions with the seller's representative, he understood that both Innovation X and NAM V Fund were going to buy Slack shares from the seller.[185] Likewise, Kim said that at the time he prepared the commitment committee memorandum, he expected that there would be a closing or closings for both Innovation X and NAM V Fund.[186] Kim testified he expected that both NAM V Fund and

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[176] Tr. 2216–17.

[177] JX-8, at 77.

[178] Tr. 743.

[179] Stip. ¶ 19; Ans. ¶ 23; CX-1; CX-19; Tr. 420.

[180] Tr. 902–04.

[181] CX-18.

[182] Stip. ¶ 20; Ans. ¶ 25; *see also, e.g.,* JX-8, at 13; Tr. 214, 1453–54, 1520–24, 1619–20, 1644–46; CX-22.

[183] CX-18, at 100–01, 114–22.

[184] JX-8, at 13.

[185] Tr. 2061–62.

[186] Tr. 587.

Innovation X would equally purchase the initial block of shares held by the seller. But as it turned out, Kim said, the seller had a tight time frame by which it wanted to consummate the sale.[187] And, at that time, only Innovation X had enough funds to go forward with a purchase.[188] Also, according to Monteforte, at some point, DS's representative made it clear that DS had issues with breaking up the block of Slack shares.[189] He was adamant about keeping it intact and selling to only one buyer.[190]

By December 19, 2017, NAM V Fund had not raised enough funds to participate in the purchase of the available Slack shares.[191] By contrast, NSC had raised a sufficient amount, $9.975 million, for Innovation X from 70 customers.[192] So on that date, Kim initiated the close of escrow for the Innovation X offering.[193] The fund closed escrow and purchased all available Slack shares at $9.75 per share.[194] Kim prepared the relevant documents in connection with closing escrow.[195] He then forwarded an escrow release letter to Mullen and Worman so that funds could be used to purchase all available shares of Slack from the seller.[196] Mullen was one of those who signed the paperwork authorizing the bank to release money from escrow.[197] Innovation X did not directly purchase the Slack shares from the seller. Instead, it acquired the shares by purchasing the seller.[198] Through its ownership of the seller, Innovation X then possessed the Slack shares the seller had available for purchase.[199]

Although Innovation X had purchased all of DS's shares available from the entity he owned, NSC's representatives continued to recommend and sell interests in Innovation X and NAM V Fund to customers.[200] As a result, in January 2018, an additional $1,025,000 from 13

[187] Tr. 587.

[188] Tr. 587.

[189] Tr. 2061–62.

[190] Tr. 2061–62.

[191] Tr. 237, 245–46, 2076–77.

[192] Stip. ¶ 20; Ans. ¶ 25.

[193] Stip. ¶ 20; Ans. ¶ 25; CX-1; CX-23; CX-26; JX-10; Tr. 217, 229, 237, 245–46, 2076–77.

[194] Stip. ¶ 20; Ans. ¶ 25; CX-1; CX-23; Tr. 217, 229, 237, 245–46, 2076–77.

[195] Tr. 220–21.

[196] Ans. ¶ 25; JX-10.

[197] Tr. 877.

[198] Tr. 588–89, 2077–78.

[199] Tr. 229.

[200] CX-2.

investors was wired into the Innovation X escrow account.[201] But Innovation X had no more closings,[202] and it never purchased additional Slack shares.[203]

Kim gave conflicting testimony about why a second closing did not take place. He said that one reason was that they had already closed on almost $4 million in the NAM V Fund. And based on NAM's allocation policy, because that money was in a fund, the next purchase of Slack shares would have to go to NAM V Fund.[204] He denied that the principal reason Innovation X did not close again was because it was becoming less certain that they could buy shares at the $9.75 price point.[205] But at his OTR, he testified differently. He said that the reason Innovation X did not have another closing was because it was becoming "I guess less certain that we were going to be able to buy shares at the price point."[206] Ultimately, from March to October 2018, Innovation X returned the investor funds it collected in January 2018 because there were no more Slack shares available for purchase.[207]

I. The NAM V Fund Offering

As discussed below, NSC customers deposited funds in the escrow account for the NAM V Fund offering. Afterward, Kim twice initiated closings for the Fund, but did not inform Mullen, Worman, or any other principal at NSC that he had not confirmed a source of Slack shares at any price. Nor did he immediately purchase Slack shares. Instead, the escrow agent transferred the investors' funds to the Fund's operating account, where they remained for ten months after NAM V Fund's second closing. Kim then used a portion of the funds to buy some Slack shares, but at more than double the maximum per share price specified in the offering documents. As events unfolded, Kim made misrepresentations and omissions to NSC's principals and two of its registered representatives to hide the status of the Fund.

1. The First Escrow Closing

In December 2017, 38 investors deposited $3.45 million in an escrow account for NAM V Fund and submitted completed subscription documents.[208] On December 26, 2017, Kim sought and obtained permission from NSC to close escrow for NAM V Fund and release the $3.45 million to NAM V Fund's bank account.[209] Kim initiated the process for the Fund's

[201] CX-80, at 179–81; Tr. 296–97.

[202] Tr. 296, 2142.

[203] Tr. 295–96.

[204] Tr. 301.

[205] Tr. 301–02.

[206] Tr. 305–06.

[207] Tr. 309, 2146.

[208] Stip. ¶ 21.

[209] Stip. ¶ 21; CX-1; JX-13; CX-24, at 1; CX-25.

escrow close by emailing documents to Mullen for his signature.[210] That same day, Mullen and Worman signed the letter to the bank directing it to release the funds to NAM V Fund.[211] Escrow closed on December 26, 2017, and the bank released the investor funds from escrow.[212]

According to Mullen, when he signed the document directing the bank to release the escrow funds, he thought they were going forward with a purchase by NAM V Fund to buy Slack shares.[213] Likewise, Worman said that he would not have signed the release of escrow funds if he did not think they were buying shares.[214] According to Worman, if there was no planned purchase, there would have been no reason to sign the release.[215]

When escrow closed, NSC received a placement fee of $345,000, Kim received a $13,800 commission and the escrow agent transferred the investor funds from the escrow account to NAM V Fund's operating bank account.[216] Upon the closing, all 38 investors became members of NAM V Fund and received confirmation letters.[217] These letters notified the investors the Fund had closed on their investments and stated they now possessed an ownership interest in the Slack series offering.[218] But when escrow closed on December 26, 2017, the NAM V Fund did not own any Slack shares, nor had it drafted a purchase contract.[219]

2. The Second Escrow Closing

In January 2018, it became less clear whether more shares of Slack would be available from DS at $9.75. On January 17, 2018, Monteforte wrote to DS's representative asking, "where are we on the additional block of Slack promised in December?"[220] The representative responded a few minutes later. "We've asked the seller to move forward. They asked to wait," he wrote.[221] "We are pushing and looking for other sources. Back to you soon (I hope.)"[222] An exasperated Monteforte emailed the representative the next day. "I hope-doesn't work for me-I was assured this trade was locked in-puts me in a very bad spot."[223] DS's representative, however, was

[210] Tr. 875.

[211] JX-13; Tr. 881–82 (as to Mullen).

[212] Tr. 875.

[213] Tr. 882–83.

[214] Tr. 1167–68.

[215] Tr. 1168.

[216] Ans. ¶ 28; Stip. ¶¶ 21, 23; JX-18, at 2; Tr. 242–43, 875, 1803–04, 2491; *see, e.g.,* CX-25.

[217] Ans. ¶ 28; Stip. ¶¶ 21, 23; JX-18, at 2; CX-2; Tr. 242–43, 875, 1803–04, 2491; *see, e.g.,* CX-25.

[218] Stip. ¶ 21; CX-2.

[219] Tr. 243.

[220] JX-14, at 1.

[221] JX-14, at 1.

[222] JX-14, at 1.

[223] JX-14, at 1.

unsympathetic. "I appreciate the circumstances," he responded a few minutes later. "You and I both know how this business works. It's full of the unexpected, and we did not have a contract to buy more signed in 2017. Will keep working it."[224] Kim was not copied on this exchange of emails, and the record is unclear as to when he first learned about them.

At the hearing, Monteforte explained that DS's representative had consistently assured him that after the sale to Innovation X, DS would sell more shares; that those additional shares were "locked in;" and they were going to begin the second transaction at the very beginning of 2018.[225]

Kim testified about his understanding of the status of the intended purchase of Slack shares from DS. He conceded that there was no agreement to buy more shares.[226] That said, Kim maintained that while as of January 30, 2018, he had not identified a specific block of Slack shares to purchase nor had he come to an agreement to purchase shares, he nevertheless expected to find shares.[227] Kim said he confirmed DS's holdings when he performed his due diligence in connection with the original sale of Slack shares to Innovation X from the seller. Further, Kim testified that he knew exactly how many additional Slack shares DS owned both in his family trust as he well as in an individual retirement account ("IRA"). And since DS already agreed to the $9.75 price, Kim said, he assumed that DS would continue to honor that price for the additional shares.[228] Indeed, Kim said that in January 2018, he had every indication, and believed, there was a high likelihood of being able to purchase shares of Slack from DS for NAM V Fund at $ 9.75 a share.[229] According to Kim, at this time, he believed there was a verbal understanding that the Fund would be able to buy more shares at $9.75.[230] Kim reached his conclusions about whether DS would sell Slack shares to the NAM V Fund based on communications he had with Monteforte.[231]

Against this backdrop, on January 31, 2018, Kim sought and obtained approval from Mullen and Worman to close escrow a second time for the NAM V Fund and release an additional $605,000 raised from 11 investors from the escrow account to the Fund's bank account.[232] When obtaining approval, Kim did not inform Mullen, Worman, or any other principal at NSC that he had not confirmed a source of Slack shares at any price.[233] Mullen and

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[224] JX-14, at 1.

[225] Tr. 2080–82.

[226] Tr. 251.

[227] Tr. 284–85.

[228] Tr. 252–53.

[229] Tr. 252–53, 264.

[230] Tr. 277.

[231] Tr. 239.

[232] Stip. ¶ 22; CX-31; JX-15; Tr. 273–74.

[233] CX-31.

Worman signed the letter to the bank on January 31, 2018, directing it to release funds from the NAM V Fund escrow.[234]

Both Mullen and Worman testified they understood that the only purpose of closing escrow was to release money to close on the purchase of shares,[235] and it was on that basis alone that they signed the escrow release papers.[236] They both said they believed when they signed the first and second escrow closing documents for NAM V Fund, that the Fund had a deal in place to purchase Slack shares at the $9.75 per share promised to investors.[237] And Kim acknowledged at the hearing that this was their understanding.[238] More specifically, according to Mullen, when he directed the release of funds from escrow, he understood that they had a seller, an agreed-upon price, and that they had to get the money out of escrow to pay the seller.[239] Mullen added that he would not have directed the closing of escrow if he had known there was no transaction to close on.[240]

Kim's testimony about when it was appropriate to close on escrow was consistent in certain key respects with Worman and Mullen's testimony on this subject. Kim testified that there would be no reason to close escrow unless Slack shares available for purchase had been identified and the purchase was "highly likely."[241] This testimony was consistent with other witnesses' testimony. According to Monteforte, hoping a transaction will take place was not a sufficient reason to close escrow because of "uncertainties and some unexpected things happen from time to time," including the seller changing its mind.[242] He added that if shares were not available, a fund would not close.[243] And NSC registered representatives Jason Cagwin and Peter Sarner, whose customers invested in the Fund, testified that they understood the purchase of shares would occur shortly after escrow closed.[244]

Upon the closing, the escrow agent transferred the investor funds to the operating bank account for NAM V Fund and the 11 investors received confirmation letters. [245] Of the $605,000 held in escrow, the escrow agent transferred $601,000 to the Fund's operating bank account and

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[234] JX-15; Tr. 884 (as to Mullen).

[235] Tr. 875, 1762–63.

[236] JX-13; Tr. 882–83,1155–56, 1158, 1167–75.

[237] Tr. 885, 1292–93.

[238] Tr. 2310–12.

[239] Tr. 885–86.

[240] Tr. 890.

[241] Tr. 129.

[242] Tr. 2143–45.

[243] Tr. 2086.

[244] Tr. 1462, 1625.

[245] Stip. ¶ 22.

retained $4,000 as an escrow fee.[246] Upon the second closing, NSC received an additional placement fee of $60,500, Kim received a $2,420 commission, and NAM issued additional confirmation letters.[247]

* * *

After the second escrow closing, NAM V Fund did not imminently purchase Slack shares. In fact, the Fund did not purchase any Slack shares until November 2018.[248] In total, NSC paid Kim $16,220 in connection with the closings in December 2017 and January 2018.[249] After those closings, there were no Slack offering-related funds remaining in the escrow account.[250]

3. The Search for Slack Shares After the Second Escrow Closing

By February 2018, according to Monteforte, he learned that DS was not going to sell additional Slack shares.[251] Similarly, Kim said that by sometime in February 2018, it was clear he would not be able to transact with DS to buy Slack shares at $9.75 per share.[252] According to Kim, until then, every indication he had received was that DS was going to do so.[253] More specifically, he said that by February 15, 2018, he had definitely realized that DS was not going to go through with the transaction.[254] At that point, according to Kim, he and Monteforte started looking for other sources of Slack.[255] Kim said that although the expected second purchase from DS had fallen through, he still thought in February 2018 that he could find shares at $9.75 from someone else.[256] His basis was that Slack had not yet done a new primary round to set a new price point.[257] Monteforte continued to communicate with DS's representative, who told Monteforte on April 25, 2018, that he was "[s]earching for Slack every day. Unfortunately, have not been able to find any supply."[258] In a similar vein, months later, on October 8, 2018,

[246] Tr. 274–75; JX-15, at 1.

[247] Stip. ¶ 22; Ans. ¶ 32; JX-15; JX-18, at 5; CX-2; Tr. 779–81.

[248] Stip. ¶ 24; Tr. 280.

[249] Stip. ¶ 23; Ans. ¶ 32.

[250] Tr. 1889.

[251] Tr. 2082.

[252] RX-95, at 1; Tr. 286, 2282.

[253] Tr. 671.

[254] Tr. 710–11.

[255] Tr. 782–83, 2086–92, 2278–79; RX-89; RX-115.

[256] Tr. 2286–87.

[257] Tr. 2286–87.

[258] Tr. 2149; RX-95.

Monteforte wrote to a venture capital firm, "can't find anything at a reasonable price and availability is very scarce."[259]

Efforts to obtain Slack shares at no higher than $9.75 per share were permanently derailed around August/September 2018. At that time, according to Kim, Slack announced it had just completed a new series of preferred shares establishing a new price point for Slack at around $11. This made it clear that finding shares at $9.75 would be difficult.[260]

4. Kim's Actions Enabling Purchases of Slack Shares at Above $9.75 Per Share While Omitting Information to NSC Principals

During October and November 2018, ten months after NAM V Fund's second closing, Kim finally identified potential sellers of Slack shares, but at prices approximately twice the maximum per share price required by the offering documents.[261] Nevertheless, on November 15, 2018, Kim forwarded to Mullen for signature two contracts to purchase Slack shares.[262] The two contracts were stock transfer agreements that did not include the price per share in the body of the agreements.[263] The prices appeared only in an attachment after the signature page.[264] One contract was for the purchase of 75,000 shares at $22 per share, for a total of $1.65 million.[265] The other was for 45,000 shares of Slack at $17.25 per share, for a total of $776,250.[266] The transmittal email to Mullen's assistant contained a subject line: "Signatures (affix)."[267] Kim, however, did not inform Mullen or his assistant that the purchase contracts were for a price per share representing a material change to the terms presented to NAM V Fund investors.[268] Instead, the email from Kim stated only, "[e]ither Mike or Glenn is fine" and attached a third, unrelated document for execution.[269] Kim did not ask Mullen or Worman to review the attachments or point out the purchase prices contained in the attachments.[270]

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[259] RX-115, at 2.

[260] Tr. 782–83, 2287–88.

[261] Stip. ¶ 25; Ans. ¶ 36; *see also* Tr. 326–27.

[262] Stip. ¶ 26; CX-58.

[263] Tr. 329; CX-58, at 22–48.

[264] Tr. 329; CX-58, at 22–48.

[265] Stip. ¶ 26; CX-58, at 4–21.

[266] Stip. ¶ 26; CX-58, at 22–48.

[267] CX-58; Tr. 327.

[268] Stip. ¶ 26; CX-58, at 22–48.

[269] CX-58; Tr. 327.

[270] Tr. 329.

Mullen signed the contracts (by having his assistant affix his signature) without reviewing them, seeing the task as merely attending to a routine housekeeping item.[271] Before signing the contracts, Mullen had no conversation with Kim or anyone else that the price per share was above the maximum price specified in the NAM V Fund offering documents.[272] According to Mullen, if he had known that the price paid was above the amount in the offering documents, he would not have allowed his signature to be affixed, as this would have been a material change to the offering and would have needed commitment committee approval.[273] The purchases were finalized on November 30 and December 27, 2018.[274] The Fund bought a total of 120,000 shares of Slack with these two purchases—75,000 at $22 per share, and 45,000 shares at $17.25 per share.[275] On December 21, 2018, a week before the second purchase was finalized, Mullen and Worman executed a funds transfer request to Signature Bank.[276] Worman said he would not have signed that transfer request if he knew that it was to release funds for a transaction to buy shares for the Fund at a price above what was in the offering documents.[277]

Kim did not notify anyone at NSC that the Fund was planning to purchase Slack shares at more than double the price promised to investors in the PPM, or, later, that it had done so.[278] Nor did Kim seek approval from NSC's commitment committee before initiating these purchases at prices materially different than the price the commitment committee had previously approved.[279] Further, Kim did not send a second memorandum to the commitment committee to extend the authorization originally granted.[280] And neither NAM's nor NSC's commitment committee approved a change in the originally approved terms of purchasing Slack shares at a maximum $9.75 per share price.[281]

* * *

NAM V Fund made no further purchases of Slack shares.[282] In sum, the Fund bought all shares at prices above $9.75 per share.[283] As of December 31, 2018, the average price of Slack shares purchased for the Fund was $20.22 per share—more than double the per-share maximum

[271] Stip. ¶ 27; Ans. ¶¶ 41–42; CX-3, at 1; CX-66, at 15; CX-69, at 16; Tr. 895–97, 899–900, 904–05.

[272] Tr. 901–02, 906.

[273] Tr. 902, 906–08.

[274] Stip. ¶ 27; Ans. ¶¶ 41–42; CX-3, at 1; CX-66, at 15; CX-69, at 16; Tr. 895–97, 899–900, 904–05.

[275] CX-1; CX-3, at 1; CX-69.

[276] RX-186; Tr. 1183.

[277] Tr. 1182, 1185.

[278] Tr. 519–21.

[279] Ans. ¶ 38; Tr. 421, 431.

[280] Tr. 1771–72.

[281] Tr. 1148–49, 1185, 1304, 1784–85.

[282] Stip. ¶ 27; Ans. ¶ 42.

[283] Tr. 2482–83.

price promised in the offering documents.[284] After these transactions, $1,144,122.50 of investor funds remained as cash in the bank account for the offering.[285]

When Slack went public in June 2019, the investors in NAM V Fund received a profit of approximately 40 percent on their investments.[286] By contrast, investors in Innovation X who held shares purchased at the promised maximum price of $9.75 per share received a profit exceeding 200 percent.[287]

5. Kim's Misrepresentations and Omissions About the Status of the NAM V Fund

a. Misrepresentations and Omissions to Cagwin

In January 2018, Jason Cagwin was an NSC registered representative and independent owner of an NSC branch office who sold interests in NAM V Fund to 10 or 11 customers.[288] On January 5, 2018, between NAM V Fund's first and second closings, Cagwin wrote to Kim after receiving a customer's inquiry regarding the Fund.[289] "What was the valuation paid for Slack Series I (QC Fund) in the last close," Cagwin asked. "Also, what was the price per share?"[290] Kim understood that Cagwin was asking about NAM V Fund.[291] Less than an hour later, he replied, "9.75/share for a 5.3bn valuation."[292] This price, however, was simply the price included in the PPM and not an actual purchase price.[293] In fact, as of that date, the Fund had not purchased any Slack shares.[294] Also as of that date, there were no audited financial statements for the NAM V Fund, so Kim was Cagwin's source of information about the Fund.[295] After receiving Kim's response, Cagwin wrote back to the customer, "The Fund purchased Slack at $9.75/Share for approx. $5.3 Billion valuation pre-fee."[296] Up through the end of January 2018,

[284] See CX-3, at 1.

[285] Stip. ¶ 27; Ans. ¶¶ 41–42; CX-3, at 1; CX-1; CX-69.

[286] Stip. ¶ 28; CX-3.

[287] Stip. ¶ 28; CX-3.

[288] Tr. 255–56, 456–57, 1454, 1517, 1532.

[289] Tr. 254–55, 1468; CX-44.

[290] CX-29, at 1; CX-44, at 1; Tr. 256.

[291] Tr. 739–40.

[292] CX-44 at 1; Tr. 256.

[293] Tr. 256–57.

[294] Tr. 256.

[295] Tr. 740–41.

[296] CX-29, at 1; Tr. 1464–71.

Kim did not tell Cagwin that the Fund had not purchased any Slack shares.[297] As discussed above, the first of the two purchases of Slack shares would not occur until ten months later.

Cagwin testified he interpreted Kim's response as meaning that the Fund had actually purchased Slack shares, and had done so at the $9.75 maximum price in the PPM.[298] We find Cagwin's interpretation credible. It is consistent with the plain meaning of Kim's email, and there was no showing that Cagwin knew at the time that the NAM V Fund had not bought any Slack shares.

In early 2019, after the purchase of the Slack shares, Kim saw Cagwin at an NSC national sales conference. At the conference, he told Cagwin that NSC was considering a new offering for the purchase of pre-IPO Slack shares.[299] This conversation was unrelated to the NAM V Fund, according to Cagwin.[300] On February 5, 2019, Cagwin emailed Kim about the status of that potential new offering. "Still moving forward," Kim replied.[301] At the hearing, Kim explained that in early February 2019, he was looking forward to doing another Slack offering.[302] He testified he believed Monteforte had executed a letter of intent or was negotiating one in January 2019 with a potential seller.[303] According to Kim, on that basis, he understood that the new Slack transaction was moving forward.[304] Kim's response to Cagwin, however, failed to disclose any information about NAM V Fund's true status. Kim also failed to tell Cagwin that the Fund purchased Slack shares at an average price double the per share price promised to investors or that over $1 million in investor's money was uninvested cash in the Fund's operating account.

b. Misrepresentations to Sarner and Levine

Peter Sarner was a registered representative and investment advisor representative at NSC and had his own branch office.[305] Seven or eight of his customers invested in the Fund in 2018 and 2019.[306] In May 2018, Kim knew that Sarner's clients had invested in the Fund.[307] On May 7, 2018, Sarner emailed Kim asking, "[w]hat were the valuation/prices for the last time . . .

[297] Tr. 1474.

[298] Tr. 1471.

[299] Tr. 457, 1478.

[300] Tr. 1478.

[301] CX-51, at 2–3.

[302] Tr. 459–60; *see also* CX-51.

[303] Tr. 459–60.

[304] Tr. 459–60.

[305] Tr. 1611.

[306] Tr. 321, 461, 1620.

[307] Tr. 321.

Slack raised money? How does that compare to the prices/valuations we paid?"[308] Kim responded, "Slack's last raise was $9.31/share @5.1 b vs our last purchase of $9.75/share."[309]

Sarner testified he understood Kim's response to mean that the NAM V Fund had purchased Slack at $9.75 per share.[310] We find that Sarner's interpretation was reasonable, as it comports with the email's plain reading and there was no evidence that Sarner knew otherwise. The portion of Kim's response regarding the "last purchase" was false. At that point, the NAM V Fund had not purchased any Slack shares.[311] In fact, it would not do so for another six months. Kim never told Sarner the Fund had not yet purchased any Slack shares or that he could not answer his questions.[312]

About a year later, on April 25, 2019, Sarner requested that Kim provide him with the price per share, before fees, that "we got into" Slack, among other deals.[313] When Kim did not respond, Sarner followed up with a second request on May 3, 2019.[314] Because he had not received a response from Kim by then,[315] Sarner asked Kim to provide him "ASAP" with the price per share (before fees) that was paid for Slack, among other stocks.[316] Kim still did not respond. So Sarner sent a third request on May 7, 2019.[317] When Sarner did not receive a response to his third request, he wrote two days later, on May 9, 2019,[318] to Levine, then the National Sales Manager for NSC, asking for help in getting the requested information.[319]

On May 16, 2019, Levine forwarded Kim the third request for information.[320] And that day, Kim responded to Levine.[321] As for Slack, he falsely wrote, "Slack – 9.75."[322] The next day, Levine forwarded Sarner the response Kim had sent him.[323] Kim testified he knew Sarner

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[308] RX-107, at 1; Tr. 323–24.

[309] RX-107, at 1.

[310] Tr. 1631.

[311] Tr. 324.

[312] Tr. 1630–31.

[313] RX-146, at 2.

[314] RX-146, at 3.

[315] Tr. 1637.

[316] RX-146, at 3–4; Tr. 464–66, 1637–38.

[317] RX-146, at 3; Tr. 466–47.

[318] RX-146, at 2.

[319] RX-146, at 2; Tr. 1638–39.

[320] CX-55, at 1–2.

[321] CX-55, at 1.

[322] CX-55, at 1.

[323] CX-55, at 1.

requested this information for a customer.[324] Sarner stated he interpreted Kim's response to mean that $9.75 was the price the Fund had paid for the Slack shares.[325] We find Sarner's interpretation of the response reasonable and consistent with its plain meaning. Also, there was no evidence Sarner knew the response was false.

c. Omissions to Worman

Ten months after the second closing, on November 13, 2018, Worman emailed Kim asking him to provide a monthly report that included "all our private share investments, positions at cost, current market value based on verifiable metrics (e.g. last price known/last round)" and Kim agreed to do so.[326] On November 16, 2018, Kim emailed Worman a spreadsheet entitled "NAM Holdings 9/30/18."[327] The spreadsheet included NAM holdings in various funds, including Innovation X. Slack was one of the companies whose shares were listed as being held by a NAM fund, but Kim did not include the NAM V Fund on the list.[328] According to Kim, his failure to include NAM V Fund on the spreadsheet was appropriate because as of September 30, the Fund held no Slack shares.[329]

On January 30, 2019, Worman requested another status report.[330] That day, Kim emailed him another spreadsheet titled "NAM Holdings" as of December 31, 2018,[331] and a report summarizing private investments but omitting NAM V Fund's Slack share purchase information.[332] The email informed Worman there was "[n]ot much change" from the prior month.[333] Like the earlier spreadsheet, this one listed entries for Slack and reflected the holdings for Innovation X, including the quantity and cost/share.[334] At that point, although NAM V Fund owned 120,000 shares of Slack, Kim failed to include that information in his report.[335] A week later, on February 8, 2019, Worman requested another status update.[336] And on that date, Kim

[324] Tr. 471–72.

[325] Tr. 1631.

[326] Tr. 441–42; CX-47, at 2–3.

[327] CX-47, at 2–3.

[328] CX-47, at 3; Tr. 447.

[329] Tr. 447–48.

[330] CX-49, at 1.

[331] CX-49, at 4; CX-52.

[332] CX-1; CX-49.

[333] CX-49, at 1.

[334] CX-49, at 4.

[335] Tr. 452–53.

[336] CX-52, at 1.

sent him a spreadsheet claiming that it contained all holdings as of December 31, 2018.[337] Kim included the Slack holdings for Innovation X, but again omitted them for NAM V Fund.[338]

Worman testified he had requested this information from Kim to report to National Holdings' board of directors and expected the information to be accurate. But it was not accurate, because Kim failed to list NAM V Fund's Slack holdings.[339]

6. NSC's Discovery of Kim's Misconduct

In spring 2019, Cagwin reviewed financial statements he received from a client who invested in NAM V Fund (Audited 2018 Year-End Financial Statement for the Slack).[340] Cagwin noticed that the statements showed that the Fund held only 120,000 shares of Slack and reflected a substantial amount of unused cash in the account.[341] Cagwin saw that if you took the cash that was used to buy the shares and divided that amount by the number of shares, it indicated that the price paid for the shares was more than that allowable by the PPM.[342] Based on this, Cagwin became concerned the statement did not accurately reflect the interest in Slack shares the investor had acquired, and requested that Kim clarify whether the statement was accurate.[343] On May 10, 2019, after looking at the Fund's financial statements the client had sent him,[344] Cagwin wrote Kim expressing his concerns. "Something has to be wrong here, it's only showing a total investment of 120K Shares of Slack in the Fund," he said. "This doesn't make any sense at all. Need to speak with you on this as soon as possible."[345]

Three days later, on May 13, 2019, Kim wrote back to Cagwin assuring him the "[f]inancial statements are correct. The fund at 12/31/18 only holds 120k shares of Slack. I will give you a call later this afternoon to provide a detailed explanation of the fund's status."[346] Kim's response only heightened Cagwin's concerns. "Assuming that's the case, the unit cost of $20.22/sh. (which I may be misreading) is still more than 2x the stated max purchase price per share listed in the PPM," he wrote back a few minutes later.[347] Kim did not call Cagwin to give him the detailed explanation later that afternoon.[348] On May 13 and 14, Cagwin brought his

[337] CX-52, at 1.

[338] Tr. 455; CX-52, at 1.

[339] Tr. 449–55.

[340] CX-72, at 3.

[341] CX-72, at 3.

[342] Tr. 1489.

[343] CX-71.

[344] Tr. 488.

[345] CX-71, at 2; Tr. 1489.

[346] CX-71, at 1.

[347] CX-71, at 1.

[348] Tr. 1500.

concerns to the attention of Levine and Mullen, among others at NSC.[349] And on May 15, Kim told Cagwin that NSC would have to make up the difference to the clients between what was allowable by the PPM price and the price actually paid for the shares.[350]

7. NSC's Rescission Offers to NAM V Fund Investors

Not long afterward, Kim and NSC's principals had a series of meetings.[351] The evidence is conflicting as to whether Cagwin's communications to NSC's principals triggered these meetings, or whether Kim brought the situation to the Firm's attention on his own. According to Kim, by early May 2019, after Slack had filed a Form S-1 with the SEC,[352] he realized that he was not going to be able to get all the shares he wanted, even at a weighted average price of $9.75.[353] Therefore, Kim said, he concluded they would need to go back to investors to get their consent to paying a higher price for the shares or refund their money.[354] He claims he then brought the situation to the attention of others at the Firm.[355] Worman and Levine testified they were surprised to learn at that time that DS had backed out and that the Fund had bought shares at prices far exceeding the maximum permitted by the offering documents; Levine said Mullen was also surprised to learn this.[356] Levine added that Kim should have told them about it.[357]

On June 6, 2019, on behalf of NAM V Fund, NAM sent investors a letter informing them of a "change in material investment terms" of the Fund. The letter explained that the Fund purchased Slack shares at an average price of $20.22 per share rather than at a maximum price of $9.75 per share, and that approximately 40 percent of their capital contributions had not been invested but remained in cash. The letter also gave investors the choice to either withdraw from the investment or accept the change in material terms. [358] Two of the 48 investors opted for a refund.[359]

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[349] CX-72.

[350] Tr. 1507–08.

[351] Tr. 1974–75.

[352] Form S-1 is the basic form for registration statements filed with the SEC. *See* https://www.sec.gov/resources-small-businesses/going-public/what-registration-statement; *see also* https://www.investopedia.com/terms/s/sec-form-s-1.asp ("SEC Form S-1 is the initial registration form for new security . . . SEC Form S-1 is also known as the registration statement under the Securities Act of 1933.").

[353] Tr. 784. *See also* Tr. 814–15.

[354] Tr. 784.

[355] Tr. 491–92, 816–17, 819.

[356] Tr. 1787–88, 1991, 1996–98, 2004–05.

[357] Tr. 2008.

[358] Stip. ¶ 29; CX-1; CX-74; Tr. 516–17, 796.

[359] JX-18, at 13; Tr. 516, 1893.

That month, June 2019, Slack became publicly traded.[360] When Slack went public, both Innovation X and NAM V Fund sold their shares into the public market. Innovation X investors received approximately a 200 percent profit on their investment, while NAM V Fund investors received approximately a 40 percent profit.[361]

III. Conclusions of Law

A. Burden and Standard of Proof Requirements

In a FINRA disciplinary proceeding, Enforcement has the burden of proof,[362] which consists of two components: the burden of production and the burden of persuasion. The burden of production means that Enforcement must go forward with proof of its claims. The burden of persuasion is the burden of persuading the Hearing Panel.[363] The standard of proof in a FINRA disciplinary proceeding is preponderance of the evidence. This is equivalent to a "more likely than not" standard.[364] Put another way, "[t]he preponderance of the evidence standard requires the party with the burden of proof to support its position with the greater weight of the evidence."[365] Thus, "[i]f the evidence is evenly balanced, Enforcement has not met its burden under the preponderance of the evidence standard."[366] We do not, however, "simply weigh mechanically the probative evidence offered by Enforcement against" Kim.[367] "Instead, we must make a judgment about the persuasiveness of the evidence presented and decide whether it is more likely than not" that Kim engaged in the violations charged.[368]

B. General Principles Regarding FINRA Rule 2010

FINRA Rule 2010 requires "[a] member, in the conduct of its business," to "observe high standards of commercial honor and just and equitable principles of trade." FINRA Rule 2010, which also applies to associated persons,[369] "prohibits conduct that may operate as an injustice to

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[360] Stip. ¶ 28.

[361] Stip. ¶ 28.

[362] *Dep't of Enforcement v. Morton*, No. 2016052347901, 2019 FINRA Discip. LEXIS 19, at *32 (NAC May 15, 2019).

[363] *Id.* (citing *Lew v. Moss*, 797 F.2d 747, 751 (9th Cir. 1986)).

[364] *Id.* at *33 (citing *Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011)).

[365] *Id.* (citing *Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033, 1040 (10th Cir. 2006)).

[366] *Id.* at n.44 (citing *Lightning Lube v. Witco Corp*., 802 F. Supp. 1180, 1186 (D.N.J. 1992) ("If the evidence is in equipoise, the burden has not been met.")).

[367] *Id.* at *33 (citing *Almerfedi v. Obama*, 654 F.3d 1, 5 (D.C. Cir. 2011)).

[368] *Id.* at *34 (citing *Almerfedi*, 654 F.3d at 5).

[369] *Dep't of Enforcement v. Saliba*, No. 2013037522501, 2019 FINRA Discip. LEXIS 1, at *45 n.11 (NAC Jan. 8, 2019) (holding that FINRA Rule 2010 applies to associated persons through FINRA Rule 0140(a), which provides that the rules "shall apply to all members and persons associated with a member" and that "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules.").

investors or other participants in the securities markets."[370] It "applies 'when the misconduct reflects on the associated person's ability to comply with the regulatory requirements of the securities business and to fulfill [their] fiduciary duties in handling other people's money.'"[371]

To establish a violation of FINRA Rule 2010, Enforcement must prove that the respondent engaged in either unethical conduct or acted in bad faith.[372] Unethical conduct is that which is "not in conformity with moral norms or standards of professional conduct, while bad faith means dishonesty of belief or purpose."[373] "Unethical behavior, even if not undertaken in bad faith, is sufficient to establish liability under FINRA Rule 2010."[374] Accordingly, "[a]pplication of the rule . . . focuses on a person's conduct, and the ethical implications of that conduct, rather than on the person's subjective intent or state of mind."[375] "Neither a showing of scienter nor harm is required to establish a violation of Rule 2010."[376]

C. Kim's Violations of FINRA Rule 2010

Enforcement charged Kim with violations of FINRA Rule 2010 in a single cause of action based on several types of alleged misconduct. Enforcement claims that Kim violated FINRA Rule 2010 in three ways by: (1) acting in bad faith and unethically when he twice initiated the closing of escrow for the NAM V Fund; (2) causing the misuse of customer funds in contravention of the NAM V Fund's PPM; and (3) concealing the true status of the NAM V Fund through omissions and misrepresentations to NSC principals and representatives.

1. Enforcement Failed to Prove that Kim Violated FINRA Rule 2010 by Acting Unethically or in Bad Faith When He Twice Initiated Escrow

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[370] *Dep't of Enforcement v. Mellon*, No. 2017052760001, 2022 FINRA Discip. LEXIS 11, at *17 (NAC May 15, 2019); *see also Thomas W. Heath III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *15 (Jan. 9, 2009) (finding that the rule proscribes "a wide variety of conduct that operate as an injustice to investors or other participants in the marketplace."), *aff'd*, 586 F.3d 122 (2d Cir. 2009).

[371] *Kimberly Springsteen-Abbott*, Exchange Act Release No. 88156, 2020 SEC LEXIS 2684, at *31 (Feb. 7, 2020) (quoting *Daniel D. Manoff*, Exchange Act Release No. 46708, 2002 SEC LEXIS 2684 at *12 (Oct. 23, 2002)), *petition for review dismissed in part and denied in part*, 989 F.3d 4 (D.C. Cir. 2021).

[372] *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 SEC LEXIS 3583, at *21 (Nov. 15, 2013) (discussing NASD Rule 2110, FINRA Rule 2010's predecessor).

[373] *Dep't of Enforcement v. NYPPEX*, No. 2019064813801, 2024 FINRA Discip. LEXIS 6, at *87 (NAC Apr. 8, 2024), *appeal docketed*, No. 3-21933 (SEC May 7, 2024); *Dep't of Enforcement v. Felix*, No. 2018058286901, 2021 FINRA Discip. LEXIS 7, at *22 (NAC May 26, 2021), *appeal docketed*, No. 3-20380 (SEC July 1, 2021) (citing *Springsteen-Abbott*, 2020 SEC LEXIS 2684, at *28 (internal quotations omitted)).

[374] *Dep't of Enforcement v. Orlando*, No. 2014043863001, 2020 FINRA Discip. LEXIS 26, at *32 (NAC Mar. 16, 2020) (quotations and citations omitted).

[375] *Id.*

[376] *Felix*, 2021 FINRA Discip. LEXIS 7, at *23 (citing *Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *50 (May 27, 2015) (stating that scienter is not required)), *aff'd,* Exchange Act Release No. 79018, 2016 SEC LEXIS 3773 (Sept. 30, 2016); *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4908, at *22 (Dec. 11, 2014) (stating that harm is not an element).

Closings for NAM V Fund

Enforcement argues that the two escrow closings served no legitimate purpose. Enforcement contends there was no contract in place to purchase Slack shares for the NAM V Fund and no share purchase was imminent or planned. Further, according to Enforcement, Kim initiated the process for closing knowing that Innovation X had purchased all available Slack shares and had not identified, or was even aware of, any source for additional shares. Nor, Enforcement contends, had Kim even conducted any due diligence for NAM V Fund's purchase of Slack shares. Enforcement also accuses Kim of initiating the two closings without disclosing these facts to Mullen and Worman in connection with seeking their approval of the closings, and for the dishonest purpose of prematurely paying himself and NSC's registered representatives.

a. Kim's Defenses

i. Blame-Shifting

Kim argues in his post-hearing brief that Mullen, Worman, and Levine did not properly discharge their responsibilities; therefore, and to the extent escrow closed prematurely, it was their fault, not his. To this end, he made the following points:

- Kim was not authorized to sign any binding documents for the NAM V Fund and was never an authorized signatory or verifier on the escrow account. Rather, Worman and Mullen were the only ones authorized to sign documents on behalf of the NAM V Fund. They executed the escrow agreement with Signature Bank on behalf of NSC, as placement agent, and the NAM V Fund, as the issuer. Mullen and Worman were the only signatories to the escrow account both for NSC and NAM and were required to act jointly as escrow fiduciaries. As a signatory to the escrow account, Worman had a fiduciary duty to the escrow fund and its money but did not affirm that he read each of the relevant documents, the private placement agreement, placement agency agreement, or escrow agreement with respect to each fund that he signed off on as an escrow signatory.[377]

- Mullen and Worman also executed the investment advisory agreement on behalf of NAM and the NAM V Fund. As principals of NSC, Mullen and Worman executed the placement agent agreement on behalf of NSC to act as placement agent for the NAM V Fund offering, and on behalf of the NAM V Fund as the issuer.

- When Mullen signed the escrow release authorization on behalf of NAM and NSC on January 31, 2018, he did not ask Kim if a transaction had closed in December. Mullen acknowledged he should have done so. Mullen further

[377] *See also* Tr. 1295–96.

acknowledged he was wrong when he made an inaccurate assumption that shares had been purchased in December 2017.[378]

- Mullen and Worman failed to function competently and engage in the most basic standard of conduct, namely, reading documents sent to them for review and execution. This departure from ordinary and expected conduct was an unreasonable failure by Mullen and Worman to carefully execute their responsibilities as escrow fiduciaries and the senior most executives of NSC and NAM. Worman and Mullen's failures cannot be imputed to Kim. The failure by Mullen and Worman's to review material documents is particularly egregious as they failed to conduct themselves as was reasonably expected from them as senior executives.

- Neither Mullen nor Worman ever told Kim that they did not read and review documents, nor conduct themselves competently as senior executives of a broker dealer, investment advisor, and escrow fiduciaries.

- NSC, Mullen, and Worman were obligated to understand and verify that NSC, NAM and the NAM V Fund's activities and the NAM V Fund capital formation and operations were consistent with all governing rules and regulations.

- Worman did not read NSC's WSPs while he was associated with NSC.[379]

- Mullen and Worman failed to perform in accordance with the investment advisory agreement, placement agent agreement, and escrow agreement.

These points, in sum, are an attempt by Kim to deflect attention away from himself and to shift blame to NSC's principals for any alleged misconduct. This is no defense. As the SEC has held, "a registered person 'has responsibility for his own or her own actions and cannot blame others for [his or her] own failings.'" A respondent "cannot pass the blame to others for his own unethical behavior."[380] Stated another way, "[t]he fact that others also might have been remiss in their duties does not mitigate [the respondent's] responsibility."[381] Accordingly, we reject those arguments. We focus instead on Kim's conduct. Based on Kim's good faith defense, and for other reasons, Enforcement failed to show that Kim's escrow-related conduct violated FINRA Rule 2010.

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[378] *See also* Tr. 889.

[379] *See also* Tr. 1228.

[380] *Brokaw*, 2013 SEC LEXIS 3583, at *32–33; *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *32 (Feb. 10, 2012) (announcing that "it is well established that an associated person cannot excuse his own misconduct by shifting the onus of compliance to his managers or to his firm.").

[381] *Edward Beyn*, Exchange Act Release No. 97325, 2023 SEC LEXIS 980, at *19–20 (Apr. 19, 2023), *appeal docketed*, No. 23-6526 (2nd Cir. May 19, 2023).

ii. Good Faith

Kim maintains that he acted in good faith when making the business decisions to close escrow for the NAM V Fund on December 26, 2017, and January 31, 2018. He disputes the allegation that when he submitted the offering for approval, he had not confirmed a source of shares for the offering at any price.[382] And he denies that before closing escrow, he did not source Slack shares for the offering at any price, let alone the maximum share price.[383]

Kim conceded that DS had no obligation to sell the shares to the Fund as there was no executed agreement,[384] or even a draft agreement.[385] Still, he said he believed it was appropriate for him to initiate closing because he had identified three separate holdings of Slack shares: the shares held by DS's entity sold to Innovation X; shares held by DS's family trust; and shares held in DS's Roth IRA.[386] He further testified he met the required elements for closing for two reasons: (1) the sale of DS's entity to Innovation X had closed; and (2) the next block of shares he anticipated were the Slack shares held by DS in his family trust.[387] According to Kim, he had identified Slack shares and believed that DS was going to sell Slack shares to the Fund at $9.75 per share.[388] And once DS completed the sale of his entity to Innovation X, Kim had further confidence that DS would honor that price again because of his fiduciary obligations to his customers.[389]

In short, Kim maintained that based on the information provided to him, he believed DS would have additional shares to close on after the holidays.[390] In fact, he concluded there was a verbal understanding that DS was going to sell additional shares.[391] Later, when escrow closed for the first time (December 26, 2017), according to Kim, he was still under the impression that DS was going to imminently sell Slack shares to NAM V Fund based on statements made through DS's representatives to Monteforte.[392] Enforcement did not prove otherwise.

The emails in January 2018 between Monteforte and DS's representative did cast doubt about whether DS was still willing to sell Slack shares at $9.75 per share. But Kim was not included on those emails. And Enforcement failed to show he was aware of them, or of the information contained in them, before the second escrow closing. Kim testified he did not know

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[382] Tr. 697.

[383] Tr. 698.

[384] Tr. 239–40, 745–46.

[385] Tr. 746.

[386] Tr. 680, 734.

[387] Tr. 680, 2254–55.

[388] Tr. 680, 698.

[389] Tr. 680, 698.

[390] Tr. 747.

[391] Tr. 746.

[392] Tr. 239–39, 245.

until February 2018, after the second escrow closing, that DS was unlikely to go forward with a sale of Slack shares at $9.75.[393] Again, Enforcement failed to prove otherwise. In any event, while those emails indicated that DS was not willing to immediately go forward on another sale of Slack shares, they did not foreclose him doing so later.

Further supporting Kim's defense is that Enforcement failed to prove he initiated the closing of escrow for any reason other than to pay for shares of Slack and to pay expenses and commissions. The evidence did not show he initiated closing solely to earn a commission for himself and NSC's representatives or fees for the Firm.

b. Additional Defenses

The view among several persons at NSC, including Kim, about when it was appropriate to go to closing does not set a benchmark for whether Kim violated FINRA Rule 2010. These views were not memorialized in a directive to Kim or included in NSC's WSPs or written policies.[394] Nor were these views set forth as a requirement in the escrow agreement or in other NAM V Fund documents. The evidence did not show that Kim violated the escrow agreement or any of the offering documents when he initiated the escrow breaks. Also, there was no evidence that a likelihood-of-a-sale standard was the securities industry's general custom and practice for when escrow should close.

Additionally, Kim had considerable leeway in deciding when to initiate escrow closings. The PPM stated that the manager had "sole and absolute" discretion to decide when the initial closing of the Slack series should occur.[395] Further, the Fund was a Delaware limited liability company,[396] and its operating agreement stated that "the rights, obligations and remedies of the parties as specified under this contract shall be interpreted and governed in all respects by" Delaware law.[397] So we found it instructive to look to that state's law to interpret the meaning of the phrase "sole and absolute discretion."

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[393] Tr. 265, 271, 277, 670–71; RX-81; JX-14.

[394] The SEC and FINRA "have looked to internal firm compliance policies to help determine whether a respondent's conduct violated just and equitable principles of trade and have found violations." *Dep't of Enforcement v. Mantei*, No. 2015045257501, 2021 FINRA Discip. LEXIS 4, at *50 (OHO Feb. 18, 2021) (citing *Heath*, 2009 SEC LEXIS 14, at *18 & n.21 ("[W]e have looked to internal firm compliance policies to inform our determination of whether applicants' conduct, like [respondent's], violated the professional standards of ethics covered by the J&E Rule."), *aff'd*, 2023 FINRA Discip. LEXIS 10 (May 30, 2023), *appeal docketed*, No. 3-21516 (SEC June 27, 2023). That said, the mere violation of a firm's policies and procedures does not automatically constitute a violation of FINRA Rule 2010. *See Dep't of Mkt. Regulation v. Dotson*, No. 2009020803102, 2015 FINRA Discip. LEXIS 47, at *83 (OHO Aug. 7, 2015) (respondent's "violation of his Firm's policies and procedures is not automatically a violation of the ethical conduct Rule"); *Dep't of Enforcement v. Maheshwari*, No. 2017055608101, 2019 FINRA Discip. LEXIS 60, at *19 (OHO Dec. 19, 2019) (same) (quoting *Dotson*), *aff'd*, 2020 FINRA Discip. LEXIS 46 (NAC Dec. 17, 2020).

[395] JX-8, at 14; Tr. 2254.

[396] Stip. ¶ 7.

[397] CX-17, at 167.

Under Delaware law, when a contract grants a party "sole discretion" regarding a material aspect of the contract, that language does not give the party "carte blanch to exercise discretion however it might wish."[398] Even when an agreement purports to grant one party "sole discretion," the implied covenant of good faith and fair dealing restrains the exercise of that discretion under the contract.[399] In particular, the implied covenant requires that discretion be exercised "reasonably, in good faith, and not in an unreasonable or arbitrary way that would destroy the counterparty's right to receive the fruits and benefits which they reasonably expected to receive under the contract."[400]

Under this standard, we find that Enforcement failed to prove that Kim abused the discretion granted to the manager when he initiated the two closings. The evidence does not support a finding that Kim acted unreasonably, in bad faith, or arbitrarily. At most, Kim may have relied too much on what Monteforte relayed to him about DS's intentions. Arguably, he should have required something in writing from DS—such as a letter of intent—before concluding that DS would likely sell Slack shares to the Fund at $9.75. Also, to reduce the risk of a miscommunication about DS's intentions, it may have been preferable for Kim to have dealt directly with DS or his representative, rather than rely on Monteforte to transmit information to him. Indeed, Kim testified that among the lessons learned from the Slack deal was that he over-relied on brokers and intermediaries for representations regarding the seller's intentions.[401] In retrospect, according to Kim, he should have communicated directly with the seller.[402] Thus, Kim said, going forward, unless he can speak directly with a seller, he no longer relies on such representations from intermediaries.[403]

But even if Kim breached the provision in the PPM governing escrow closing, that alone is not dispositive of whether he violated FINRA Rule 2010. FINRA's National Adjudicatory Council ("NAC") held that a failure to honor an obligation imposed by a private contract violates just and equitable principles of trade "only if the surrounding facts and circumstances indicate that the conduct was unethical. The concepts of excuse, justification, and 'bad faith' may be employed to determine whether conduct is unethical in these cases."[404] "The touchstone, in other words, is good faith," and only a bad faith breach of contract is unethical conduct that violates

[398] *Am. Healthcare Admin. Servs. v. Aizen*, C.A. No. 2019-0793-JTL, 2022 Del. Ch. 332, at *28 (Del. Ch. Nov. 18, 2022).

[399] *Id.* (citing *Miller v. HCP Trumpet Invs., LLC*, No. 107, 2018 Del. LEXIS 429, at *2 (Del. Sept. 20, 2018) ("the mere vesting of 'sole discretion' did not relieve the [holder] of its obligation to use that discretion consistently with the implied covenant of good faith and fair dealing")).

[400] *Menn v. ConMed Corp.*, C.A. No. 2017-0137-KSJM, 2022 Del. Ch. LEXIS 160, at *83 (Del. Ch. June 30, 2022).

[401] Tr. 788–89.

[402] Tr. 789–90.

[403] Tr. 788–90.

[404] *Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *13 (NAC June 2, 2000).

FINRA 2010.[405] For the reasons explained above, Enforcement failed to show that Kim acted without equitable excuse or justification or in bad faith in initiating the two escrow closings.

c. Conclusion

Kim's failure to obtain more solid assurance that a purchase of Slack shares at $9.75 per share was likely does not constitute unethical or bad faith misconduct. In looking at the totality of the circumstances, the Hearing Panel does not find that Kim's conduct in initiating the breaking of escrow and his related communications with NSC's principals reflects negatively on his ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money. Nor did the evidence show that Kim failed to act in conformity with moral norms or standards of professional conduct or with a dishonesty of belief or purpose. Therefore, we find that Enforcement failed to prove that Kim violated FINRA Rule 2010 in connection with initiating the escrow closings.

2. Kim Violated FINRA Rule 2010 by Causing the Misuse of Customer Funds in Contravention of the NAM V Fund Offering Documents

Misuse of investor funds is a violation FINRA Rule 2010[406] and occurs when "[a] registered person . . . fails to apply the funds or securities, or uses them for some purpose other than as directed by the customer."[407] Misuse of funds violates FINRA Rule 2010 because it is "patently antithetical to the high standards of commercial honor and just and equitable principles of trade" that FINRA seeks to promote.[408]

The NAM V Fund offering documents provided that the Fund would purchase Slack shares at a maximum price per share of $9.75. Kim, however, twice arranged for the Fund to purchase Slack shares at an average price per share of twice the promised maximum amount. He did so without taking steps to amend the offering documents to provide for a higher per share maximum price. And he arranged for the purchases without disclosing to customers his intention to do so or obtaining their consent.

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[405] *Id.* at 15 (quoting *Buchman v. SEC*, 553 F.2d 816, 821 (2d Cir. 1977).

[406] *Springsteen-Abbott*, 2020 SEC LEXIS 2684, at *28–31; *Dep't of Enforcement v. West*, 2014 FINRA Discip. LEXIS 1, at *22 (NAC Feb. 20, 2014) ("An associated person's misuse of customer funds violates FINRA Rule 2010.").

[407] *Dep't of Enforcement v. Taboada*, No. 2012034719701, 2017 FINRA Discip. LEXIS 29, at *35–36, (NAC July 24, 2017); *see also Dep't of Enforcement v. Braeger*, No. 2015045456401, 2019 FINRA Discip. LEXIS 55, at *25 (NAC Dec. 16, 2019) (finding misuse of customer funds through a failure to invest them "in the manner in which they were intended to be applied."); *Dep't of Enforcement v. Patel*, No. C02990052, 2001 NASD Discip. LEXIS 42, at *24–25 (NAC May 23, 2001).

[408] *See Patel*, 2001 NASD Discip. LEXIS 42, at *25 (quoting *Joel E. Shaw*, Exchange Act Release No. 34509, 1994 SEC LEXIS 2493, at *4–6 (Aug. 10, 1994)); *see also Springsteen-Abbott*, 2020 SEC LEXIS 2684, at *29 (finding that respondent's "behavior undermined her duty to investors.").

Kim denies he misused customer funds and proffered several defenses, which he addressed in his post-hearing brief. His defenses are baseless.

a. Kim's Defenses

i. Expenditures Made for Permitted Purposes

Kim asserts that he did not misuse customer funds because those funds were used to purchase NAM V Fund interests, and all money held by the Fund was used to buy Slack shares and pay permitted expenses. This is no defense. That investor funds were used to pay for shares, expenses, and commissions does not automatically render their use proper. It was improper for the NAM V Fund to pay above $9.75 per share for Slack shares, and that is what Kim facilitated.

ii. Jurisdiction

Kim argues that the operating agreement governed the NAM V Fund's purchase of the Slack shares, which, he maintains, is explicitly outside Enforcement's regulatory purview. He claims that the purchase of the shares comes under the exclusive jurisdiction of the SEC through the Investment Advisers Act of 1940. The SEC has rejected Kim's jurisdiction argument. In *Louis Ottimo,*[409] the respondent argued that FINRA lacked jurisdiction to bring an enforcement action based on his conduct as a principal of a private fund adviser. Rejecting that argument, the SEC held, "FINRA had the authority to discipline Ottimo for violating the antifraud provisions of the Exchange Act and FINRA rules—regardless of whether he was acting in his role as a registered representative at the time of the misconduct." The SEC pointed out it had previously "held that FINRA has the authority to discipline associated persons who engage in misconduct in connection with their management of an investment fund where the misconduct is 'business-related . . . , even if that management was not of a FINRA member firm.'"[410] Because Kim's misuse of customer funds occurred while he was associated with a FINRA member firm, FINRA has jurisdiction over Kim regarding that conduct, irrespective of whether the SEC also has jurisdiction.

iii. Average Weighted Price

Kim's weighted average price argument offers no defense to his misuse of funds. Kim testified at length about this pricing strategy. Kim maintained that in connection with the Slack

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[409] *Louis Ottimo*, Exchange Act Release No. 83555, 2018 SEC LEXIS 1588, at *49–50 (June 28, 2018).

[410] *Id.* at 49–50; *see also Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173 (Mar. 29, 2016) (affirming finding that respondent violated FINRA Rule 2010 by taking funds from an investment fund he managed and transferring that money to the broker-dealer with which he was associated to cure the broker-dealer's net capital deficiency, and rejecting respondent's argument that FINRA had no jurisdiction over the alleged misconduct because it was not "in the conduct of his business" as an associated person of a broker-dealer); *Taboada*, 2017 FINRA Discip. LEXIS 29 (finding that FINRA had jurisdiction over a registered representative's misuse of investor funds in a private offering for pre-IPO shares that he managed, and rejecting the argument that FINRA lacks subject matter jurisdiction to regulate the internal affairs of a non-member fund).

purchases for the Fund, he used a weighted average price approach,[411] which he claimed, is a well-established approach in the industry.[412] Under this strategy, according to Kim, "you would take the purchase price times the number of shares for each purchase, add them together and then divide that by the number of purchases to come up with a weighted average price for all of the purchases."[413] Further, he said, "if we were not able to find prices low enough to average a weighted average price, we would establish a new series, which again is allowed under the LLC agreement, to do a deal at a higher price and use a portion of the proceeds or a portion of the shares at a lower price to satisfy the weighted average price."[414]

Kim went on to say, "mathematically if we buy a block at a given price and we allocate a portion of that block at the lower price to the NAM V, we could achieve the 9.75 price."[415] In other words, according to Kim, if he bought a large block at, e.g. $15, he would try to allocate a portion of that to the NAM V Fund at $9.75.[416] He testified that he satisfied the $9.75 requirement as long as the weighted average for the purchases was $9.75.[417] But, as it turned out, Kim testified, he was unsuccessful because "we weren't able to find a big enough lot sufficient to allow us to execute that strategy."[418]

Kim claimed he understood that he had the authority to use a weighted average price approach, while conceding that the Fund's documents do not explicitly mention the use of that approach.[419] For his authorization, Kim purportedly relied on a provision in the operating agreement that stated "[c]onsistent with the terms of the Advisory Agreement and subject to the review and approval by the Advisor, the Manager shall have the sole discretion to determine the amount, terms and provisions of the Investments to be made by a Series."[420] Kim said although he was constrained by the requirement that the Fund not pay more for Slack than $9.75 per share, he had complete discretion as to how that is achieved.[421] As he saw it, there was not "a hard cap on purchases at [$]9.75."[422]

In an attempt to show there was precedent at NSC for using the weighted average price approach, Kim testified that, through July 2022, he had been involved in about 40 pre-IPO

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[411] Tr. 802–03.

[412] Tr. 809.

[413] Tr. 802.

[414] Tr. 415–16.

[415] Tr. 334.

[416] Tr. 2487.

[417] Tr. 429.

[418] Tr. 417–18.

[419] Tr. 803–05, 809; JX-8.

[420] JX-8, at 77; Tr. 411, 808–09.

[421] Tr. 744.

[422] Tr. 414–15.

transactions[423] and had used the strategy in three of them.[424] He said that around October/November 2018, he discussed this strategy with Monteforte, Mullen, Worman, and Levine regarding the NAM V Fund because it was a pricing approach he had used previously at NSC; thus they were familiar with it.[425]

Kim's weighted average price argument fails for several reasons. There is no corroboration for his claim that he used this strategy. There were no documents that referenced using a weighted average price approach.[426] Nor was a communication ever made to investors that such an approach might be used when purchasing Slack shares.[427] He also said he never sent any emails or memoranda to anyone reflecting the approach.[428] Further, there was no testimonial support for his argument. Mullen, Worman, Levine, Monteforte, and Cagwin all testified they were unaware Kim was supposedly doing this.[429] We found these witnesses credible.[430] Kim also undermined this defense, as he could not specifically recall if prior to the November purchase it was his intention to use a weighted average price approach.[431]

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[423] Tr. 766.

[424] Tr. 766–67, 793.

[425] Tr. 432–34, 811–12, 817.

[426] Tr. 2498–2500.

[427] Tr. 2498–2500.

[428] Tr. 433.

[429] Tr. 907–10, 1188, 1587, 1995, 2165.

[430] We found these witnesses generally credible in their testimony. For the most part, their testimony was plausible, consistent with other evidence, and not undermined by cross-examination. That said, the credibility of Worman, Monteforte, and Mullen was undercut in certain respects. At times, Worman was evasive and appeared less than totally forthcoming. *See, e.g.,* Tr. 1746–48, 1756–58. Regarding Monteforte, we considered that he may have had a motive to slant certain testimony in Kim's favor, given that: (1) when he was associated with NSC, he and Kim worked closely, Tr. 136; (2) they remain colleagues, work at the same firm, talk regularly, and have a good personal and close business relationship, Tr. 136–37, 2175; (3) Kim is a shareholder at Innovation X Advisors LLC, which was founded by Monteforte, Tr. 138–39; and (4) Monteforte testified that he makes money from Kim's activities. Tr. 2176–77. As for Mullen, his overall credibility was diminished somewhat because he was evasive about whether he supervised Kim. Further, he testified at his OTR that he was not Kim's supervisor, *see, e.g*., Tr. 966–70, 982–87, and as discussed above, this testimony was contradicted by other credible evidence. We also considered that when his OTR was taken during the investigation, he may have had a motive to deny he had supervised Kim. At the hearing, Mullen admitted that he "was concerned generally going into the OTR," but claims he "was not specifically thinking about individual type charges." Tr. 955. We do not find that last portion of his answer credible. FINRA staff was investigating, among other things, the supervision of the Firm's pre-IPO offerings business. Finally, Enforcement argued that "Mullen is not a man who is afraid to acknowledge his own mistakes or accept responsibility." Tr. 2557. And, indeed, Mullen acknowledged making mistakes in connection with the Slack offering, Tr. 888, 906. But we do not find that this testimony enhanced his credibility. By the time he testified at the hearing, he likely concluded that the risk of FINRA bringing a disciplinary action against him had passed. By then, Enforcement had resolved potential supervision charges through an Acceptance, Waiver and Consent ("AWC") with the Firm (*see* n.479, below), and the instant disciplinary action did not name him as a respondent.

[431] Tr. 2497–98.

Additionally, we did not find Kim's testimony on this subject credible, and not just because his story lacked corroboration. There is no indication that Kim ever mentioned this strategy in this proceeding until his hearing testimony. He did not address it in his pre-hearing brief, in which he was required to address his legal theories.[432] Further, Kim's counsel did not discuss it in his opening statement. Also, when asked at his OTR to recall his conversations with Mullen and Worman regarding the process of getting the purchase approved in November 2018, he said nothing about having discussed with them that he would be using a weighted average price approach.[433] Nor could he recall having a discussion with Mullen about the terms of the stock transfer agreement around the end of November 2018.[434] In short, Kim's testimony that he used a weighted average price strategy appears to be an after-the-fact, concocted justification for buying Slack shares at above the per share maximum permissible price.[435]

Even if Kim utilized this strategy, the only purchases he initiated were inconsistent with the terms of the offering documents; they exceeded the maximum permitted per share price, and the Fund's operating agreement was never amended and circulated to authorize purchases at above $9.75 per share.[436]

iv. Reliance on Advice of Counsel

Kim's reliance on an advice-of-counsel argument is of no avail. Kim testified that in October 2018 he consulted with counsel for the Fund about employing a weighted average strategy to satisfy the $9.75 requirement.[437] Kim claims he got advice from counsel that as long as the weighted average per share price of all purchases for the Fund did not exceed $9.75, it satisfied the requirements of the PPM and the operating agreement.[438] Kim testified he also consulted with his wife, an attorney employed by a law firm, about the weighted average price approach.[439] According to Kim, he sought legal advice from her after the purchases of Slack and the implications of his being unlikely to achieve the weighted average price of $9.75. Kim claimed that his wife suggested the purchases could be treated as trade errors and the Fund manager would make up the losses or get consents from the investors to adjust the Fund's investment objective.[440]

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[432] Case Management and Scheduling Order ("CMSO") §VII.A.

[433] Tr. 502–03.

[434] Tr. 504.

[435] Kim's lack of credibility on this issue undermined his overall credibility. Likewise, his general credibility suffered because he was evasive at times during his testimony and was impeached by portions of his OTR testimony that were inconsistent with his hearing testimony. *See, e.g.,* Tr. 300–08, 498–508, 2410–15, 2448–55.

[436] Tr. 804–07.

[437] Tr. 334–37.

[438] Tr. 333, 2326.

[439] Tr. 2397–98.

[440] Tr. 2399–2400.

This purported defense fails. The assertion of reliance upon advice of counsel can only serve as a defense to liability for a cause of action where scienter is an element.[441] A showing of scienter is not required to establish a violation of FINRA Rule 2010,[442] the sole charge in this case. Thus, reliance on advice of counsel is "not relevant to liability" here.[443] That said, it can be relevant to sanctions, so we discuss Kim's claim of reliance on advice of counsel in the Sanctions section, below, and find that he did not meet the elements of that claim.

b. Conclusion

Because he misused customer funds by inducing the purchase of Slack shares at above the maximum per share price of $9.75, we conclude that Kim violated FINRA Rule 2010.

3. Kim Violated FINRA Rule 2010 by Concealing the True Status of the NAM V Fund Through Omissions and Misrepresentations to NSC Principals and Two Registered Representatives

Making misstatements or omissions of material fact is unethical conduct that violates FINRA Rule 2010.[444] With respect to omissions, a registered person generally has a duty to speak, or a duty to disclose material information, when (1) he is in a fiduciary or similar relationship of trust and confidence with another, or (2) he has made an affirmative statement of material fact that would be misleading without disclosure of the omitted information.[445] Once a person begins speaking, they are required "to tell the truth about material facts."[446] Whether information is material "depends on the significance the reasonable investor would place on the withheld or misrepresented information."[447] More specifically, information is material if it is substantially likely "that a reasonable [investor] would consider it important in deciding how to [invest] . . . [and] the disclosure of the omitted fact would have been viewed by the reasonable

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[441] *See Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *40 (Nov. 14, 2008), *petition for review denied*, 347 F. App'x 692 (2d Cir. 2009) (citing *SEC v. McNamee*, 481 F.3d 451, 456 (7th Cir. 2007)).

[442] *Felix*, 2021 FINRA Discip. LEXIS 7, at *23 (citing *Fillet*, 2015 SEC LEXIS 2142, at *50).

[443] *Id.* at 39.

[444] *See Dep't of Enforcement v. Meyers*, No. C3A040023, 2007 NASD Discip. LEXIS 4, at *18 n.6 (NAC Jan. 23, 2007) ("Misrepresentations and omissions . . . are inconsistent with just and equitable principles of trade and therefore are a violation of NASD Conduct Rule 2110.").

[445] *See Dep't of Mkt. Reg. v. Leighton*, No. CLG050021, 2010 FINRA Discip. LEXIS 3, at *108 (NAC Mar. 3, 2010) ("Silence may constitute a violation . . . when a duty to speak arises from a relationship of trust and confidence between the parties to a securities transaction."); *Dep't of Enforcement v. Brookstone Sec. Inc.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *70 (NAC Apr. 16, 2015) (stating that a person has "a duty to disclose material facts that are necessary to make disclosed statements, whether mandatory or volunteered, not misleading.").

[446] *Brookstone Sec. Inc.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *70 (NAC Apr. 16, 2015) (citing *Ackerman v. Schwartz*, 947 F.2d 841, 846 (7th Cir. 1991)).

[447] *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988).

investor as having significantly altered the total mix of information made available."[448] For example, "[a] reasonable investor would want to know that her money was not being used as represented."[449]

A misrepresentation or omission can be negligent and violate FINRA Rule 2010 even if there is no evidence of intent to mislead.[450] "Negligence is the failure to use 'ordinary care' . . . , [which is the] degree of care that a reasonably careful person would use under like circumstances."[451] Recklessness, by contrast, is an extreme departure from the standards of ordinary care that presents a danger that is either known to the actor or is so obvious that the actor must have been aware of it.[452]

Kim made misrepresentations to Cagwin and Sarner. He falsely wrote to them that the NAM V Fund purchased shares at $9.75 per share when the Fund, at that time, had not purchased any Slack shares. He also later told Sarner and Levine that the Fund paid $9.75 per share at a time when the Fund had bought shares at above that price. These misrepresentations by Kim were material because the price per share paid for an investment is something that a reasonable investor would consider important and would alter the "total mix" of information available to them about their investment.[453]

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[448] *Id.* at 231–32 (citing *TSC Indus., Inc. v. Northway,* 426 U.S. 438, 449 (1976)); *see also Dep't of Enforcement v. C.L. King & Assoc., Inc.*, No. 2014040476901, 2019 FINRA Discip. LEXIS 43, at *30 (NAC Oct. 2, 2019) ("Whether information is material depends on the significance the reasonable investor would place on the . . . information.") (internal quotation marks omitted).

[449] *Dep't of Enforcement v. Akindemowo*, No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *32 (NAC Dec. 29, 2015) (citing *SEC v. Smart*, 678 F.3d 850, 857 (10th Cir. 2012)), *aff'd*, Exchange Act. Release No. 79007, 2016 SEC LEXIS 3769 (Sep. 30, 2016).

[450] *See Dep't of Enforcement v. Cantone*, No. 2013035130101, 2019 FINRA Discip. LEXIS 5, at *60 (NAC Jan. 16, 2019), *rev'd in part and remanded on other grounds,* Exchange Act Release No. 100553, 2024 SEC LEXIS 1656 (July 18, 2024) ("Negligent misrepresentations violate FINRA Rule 2010.") (citing *Dep't of Enforcement v. Pellegrino*, No. C3B050012, 2008 FINRA Discip. LEXIS 10, at *13–14 n.13 (NAC Jan. 4, 2008), *aff'd*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843 (Dec. 19, 2008)).

[451] *Dep't of Enforcement v. McNamara*, No. 2016049085401, 2019 FINRA Discip. LEXIS 29, at *23 (NAC July 30, 2019).

[452] *See Lek Sec. Corp*., Exchange Act Release No. 82981, 2018 SEC LEXIS 830, at *38 (Apr. 2, 2018); *see also Dep't of Enforcement v. Titan Sec.*, No. 2013035345701, 2021 FINRA Discip. LEXIS 5, at *79 (NAC June 2, 2021), *appeal docketed*, No. 3-20387, (SEC June 29, 2021).

[453] *See Basic Inc.*, 485 U.S. at 231–32 (citing *TSC Indus., Inc.,* 426 U.S. at 449); *C.L. King*, 2019 FINRA Discip. LEXIS 43, at *30. Enforcement also claims that in the February communications Kim had with Cagwin and Sarner, Kim failed to disclose any information about the NAM V Fund's true status. CX-51, at 2–3; CX-53; *see also* CX-54. While Enforcement is correct that Kim did not disclose this information, we do not find that the communications by Cagwin and Sarner about another offering, unrelated to the NAM V Fund, triggered a duty by Kim to discuss the status of NAM V Fund, its failures to purchase Slack shares at $9.75 per share, and the fact that it purchased shares at far above that price.

Kim also made omissions to NSC's principals. He emailed two contracts for Mullen or Worman to sign for the purchase of Slack shares.[454] But Kim failed to disclose that the purchases he had arranged for the Fund represented a material change to the terms that had been presented to the Fund investors and were for prices far exceeding $9.75 per share.

Kim had a duty to disclose that information.[455] First, he asked Mullen or Worman to sign the contracts.[456] Kim managed the operations of the Fund and NSC's principals expected accurate information from him. Thus, when he presented the contracts for signature, he was implicitly representing that the purchase documents were in order and ready to be signed. This representation was false; the contracts were for purchases above the maximum permitted per share price. Second, he needed to disclose the omitted information because it was material. In the PPM, the Fund represented it would use the proceeds of the capital raise to buy Slack shares at a maximum price of $9.75 per share. Instead, the Fund purchased the shares at well over that price point. As this was a material change to the terms of the offering, Kim should have informed Mullen and the Firm's commitment committee of the price difference.[457]

Kim also made material omissions to Worman by omitting the Fund's Slack holdings from a spreadsheet that Worman had requested for the purpose of informing National Holding's board of directors. Because Kim provided information to Worman about the NAM funds, he had a duty to speak truthfully and completely and not omit material information. This omission was material because it was information that a reasonable person in Worman's position would want to know, given the purpose of the spreadsheet. The information would have been responsive to precisely what Worman had requested: information "that includes all our private share investments, position at cost, current market value based on verifiable metrics (e.g. last price known/last round)."[458] Kim repeated these material omissions twice to Worman, in January and February 2019, emailing him spreadsheets that included all private share purchases for all offerings except NAM V Fund.[459]

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[454] Stip. ¶ 26; CX-58.

[455] Enforcement argued that as an employee of NSC, Kim had a duty to disclose the omitted information under New York law. Enforcement, however, failed to show that New York law governs this issue in this proceeding. So, we do not rest our conclusions on that argument.

[456] *See Brookstone,* 2015 FINRA Discip. LEXIS 3, at *70.

[457] *See Dep't of Enforcement v. Reyes*, No. 2016051493704**,** 2021 FINRA Discip. LEXIS 29, *24–25 (NAC Oct. 7, 2021) (finding that details about use of an investor's funds are material) (citing *Fuad Ahmed*, Exchange Act Release. No. 81759, 2017 SEC LEXIS 3078, *32–33 (SEC Sept. 28, 2017) ("[A] reasonable investor would have considered important the misrepresentations regarding the use of Note proceeds. These misrepresentations 'would undoubtedly have been material to investors in deciding whether to invest . . . because the information relates directly to the use of the investor's money.'")).

[458] CX-47, at 2.

[459] CX-52.

a. Kim's Defenses

Kim raises defenses that fall into three categories: (1) the status of the Fund was openly available; (2) the WSPs and his differing roles pre- and post-closing restricted the information he could provide; and (3) he had no motive to conceal the Fund's status. We reject these defenses.

i. Availability of Information About the Fund

For his defense to these allegations, Kim argues he did not mislead anyone because what he "did was 'hidden' in plain sight."[460] As to the charge that he misled Worman and Mullen, Kim maintains that to the extent they were misled, it is their own fault. He accuses them of functioning incompetently by not reading documents sent to them for review and execution. Kim argues they would have known the status of the Fund had they reviewed the documents and other material Kim sent them, as well as other documents readily available and part of the business conduct of the NAM V Fund.[461] Kim testified that in hindsight, it is apparent Mullen and Worman did not know that Slack shares had not been obtained for a long period. But, Kim claims, he assumed that Mullen and Worman were aware of this because he thought they were reading what he sent to them, and that they knew there was not an executed purchase agreement for NAM V Fund at escrow closing.[462] "I was just as surprised at their surprise," he said.[463]

In his testimony, Kim detailed the information available to NSC's principals, representatives, and Fund investors. According to Kim, the Fund's financials were available to everyone in the Firm through the third-party administrator, as well as on the NAM computer drive.[464] Kim kept all fund-related folders, documents, and financials on this shared drive.[465] It was accessible across the National companies so that various groups and senior management could see and review information regarding any funds.[466] Included on the drive, Kim said, were all entries he made on spreadsheets relating to the NAM V Fund.[467] Kim recalls that in particular, the information on the drive was available to all members of management, compliance, supervision, accounting and finance,[468] including Mullen, Worman, and Levine.[469]

As for the investors, according to Kim, they too received information showing them the status of the Fund. Kim said they also received quarterly capital account statements, financial

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[460] Resp. Post Hr'g Br. 10.

[461] Resp. Post Hr'g Br. 10–11.

[462] Tr. 2311.

[463] Tr. 2310–11.

[464] Tr. 699–700.

[465] Tr. 651, 2268.

[466] Tr. 2268–69.

[467] *See* RX 96-1; Tr. 650, 654–55.

[468] Tr. 700–03.

[469] Tr. 651–52.

statements, and audit reports,[470] which gave transparency regarding the status of the Fund.[471] For example, the quarterly financial statements reflected the cash balance.[472] Kim also pointed out that the operating agreement required an audited financial statement be sent to the members for the year ending December 31, 2017.[473] On April 30, 2018, the Fund's auditors issued the financial statement for the period December 26, 2017, through December 31, 2017.[474] This statement showed that all of Fund's assets were in cash and that the Fund held no securities.[475]

Also, according to Kim, several of the individual capital account statements sent to investors did not show any holdings.[476] He explained that a purchase of Slack shares was not reflected nor the price at which the Fund purchased the shares until the December 31, 2018 statement, which showed the Slack purchase in the fourth quarter of 2018.[477] On a related note, Kim blames Sarner and Cagwin as well, asserting they knew the quarterly financial reports sent directly to investors existed and could have reviewed them because Kim saved the reports on the NAM computer drive and they were available to registered representatives upon request.[478]

Kim's arguments that information reflecting the true status of the Fund was available to Mullen, Worman, Sarner, and Cagwin, if they had looked for it, miss the mark. The evidence does raise serious questions about NSC's supervision of the NAM V Fund offering and of Kim in particular.[479] But Kim's defense amounts to blame shifting, and we rejected that approach, above, in connection with the escrow-related alleged violation. As we noted, registered representatives are responsible for their own conduct; thus, Kim cannot exculpate himself for making misrepresentations and omissions by accusing others of negligence in discharging their responsibilities. His argument is also flawed because justifiable reliance is not an element of a misrepresentations and omissions case brought by FINRA.[480] So, even if the Firm's principals

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[470] Tr. 705.

[471] Tr. 699–700.

[472] Tr. 520–21.

[473] Tr. 595, 628.

[474] RX-199.

[475] RX-199, at 4; Tr. 627–28.

[476] RX-177; RX-196; RX-200; Tr. 614, 617–20.

[477] RX-178; Tr. 623–24, 699.

[478] Tr. 702.

[479] To that point, on April 6, 2022, the Firm executed an AWC in which it accepted and consented to findings by FINRA, without admitting or denying, that, among other things, it "failed to reasonably enforce its written procedures concerning the offering of pre-IPO shares and failed to reasonably supervise the head of its private share business. As a result, the firm violated FINRA Rules 3110 and 2010." JX-20, at 4.

[480] *See Fillet*, 2013 FINRA Discip. LEXIS 26, at *19 n.7 ("Unlike a private litigant . . . FINRA need not show justifiable reliance upon the alleged misrepresentation, omission or fraudulent device, nor damages resulting from such reliance."); *SEC v. Feminella*, 947 F. Supp 722, 728 n.2 (S.D.N.Y. 1996) (holding that the Commission need not show justifiable reliance upon a misrepresentation or other fraudulent device to prove fraud).

and the two registered representatives unreasonably relied on Kim's misrepresentations and omissions, this is no defense to liability.

ii. Disclosure Restrictions Based on the WSPs and Kim's Changing Role

Besides blaming Cagwin and Sarner for not learning the true status of the Fund, Kim justifies what he termed his "rigid responses to" their inquiries by claiming that the Firm's WSPs prohibited him from providing NAM V Fund information to the NSC registered representatives. One section in the WSPs dealt with PPMs and statements regarding an offering.[481] Kim described this section as limiting the amount of information that could be given to a registered representative selling the Special Situations funds.[482] According to Kim, this section prohibited the registered representatives from providing information beyond what is contained in the PPM.[483] The reason for this limitation, according to Kim, was to ensure confidentiality regarding counterparties who dealt with the special purpose vehicles and "also the overarching issue of the separation between broker dealer and the investment advisor."[484] Kim viewed this provision as separating what he could do prior to the closing of the capital formation for a fund compared to afterward.[485] According to Kim, during the capital formation (offering) period, he oversaw the execution of Fund sales. But once that phase ended, his duties as an investment advisor to the Fund started.[486] And from then on, not only did he have no obligation to provide information to the representatives, but the WSPs prohibited him from doing so, he said.[487] Kim further claimed that after the final escrow closing, no duty existed between him and the NSC registered representatives. Kim testified that once the capital formation was completed for the second closing on January 31, 2018, NSC had no further relationship or active involvement with the NAM V Fund because the PPM makes it clear the placement agent's only role is to raise funds for the Fund.[488]

Kim also relied on a section in the WSPs titled "Information Barrier/Chinese Wall and Security Procedures."[489] According to Kim, "[t]he primary purpose of the Chinese Wall or the information barrier was to maintain the integrity between both the fund operations and NSC and NAM."[490] He said the provision recognized the "concern that reps could be considered as . . .

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[481] CX-13, at 37.

[482] Tr. 562.

[483] Tr. 562; CX-13, at 37.

[484] Tr. 562.

[485] Tr. 566–67.

[486] Tr. 96.

[487] Tr. 117–18.

[488] Tr. 674.

[489] CX-12, at 46–47.

[490] Tr. 556.

providing investment advice unlicensed through NSC, which wasn't a registered investment advisor." Kim said that the Firm created "an extremely strict barrier to prevent any representation or misinterpretation that reps were involved in any manner with the operations of the fund or providing investment advice in any form."[491]

iii. Justification Specific to Cagwin

Further justifying his statement to Cagwin about the price at which the Fund purchased Slack shares, Kim testified that what he wrote simply affirmed the price contained in the PPM;[492] therefore, it was a truthful statement that represented the extent of his disclosure obligation.[493] Kim said that since the December escrow closing, his obligation at that point was to the Fund, not to the Firm's registered representatives.[494] Additionally, he asserted that under the WSPs, the only information the registered representatives were supposed to have is the information in the PPM.[495] He admitted he did not tell Cagwin, by email or otherwise, that the Fund had not yet purchased any shares or that he had not confirmed a seller for shares at $9.75 per share.[496] "[N]one of that would have been beneficial to the Fund," he said. "My fiduciary obligation is to the fund at that point . . . I have an ethical obligation to tell the rep what he is supposed to know, yes, and what he is allowed to know."[497] Enforcement pressed Kim on this: "So your ethical obligation to this representative, who is also a representative of the same broker dealer as you, is not to tell him the truth but tell him only what he is supposed to know?" Kim agreed and gave the following explanation:

> the [F]und at that time is still subject to confidentiality agreements with the seller. So any disclosure regarding anything regarding the purchase, regarding the counterparties is a breach of that confidentiality agreement, and more importantly aside from the WSPs and my fiduciary obligation is if a rep were to be involved in knowing that the Fund is still looking for shares, the first thing they are going to do is go out and try to buy shares and muddy the entire situation of us trying to buy shares for the firm.[498]

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[491] Tr. 556.

[492] Tr. 256.

[493] Tr. 257.

[494] Tr. 256–57.

[495] Tr. 256–57.

[496] Tr. 257–58.

[497] Tr. 257–58.

[498] Tr. 258–59.

But he never told any of this this to Cagwin.[499] Kim justified this nondisclosure on the grounds that Cagwin should have known that the WSPs prohibited Cagwin from answering questions about the Fund and required him, instead, to refer any questions to Kim.[500]

iv. Justification Specific to Sarner

Regarding the alleged misrepresentations and omissions to Sarner, Kim testified that before responding to Levine about Sarner's inquiry, he talked to Levine and provided him with the prices contained in the supplements for the respective deals.[501] Kim said he felt he could provide this information, but not more.[502] Kim recalled that before responding, he told Levine about the limitations in the WSPs regarding the information that could be provided to registered representatives and that there were ongoing discussions and negotiations to try and achieve the $9.75 weighted average price with another deal.[503] Kim said he told Levine that he was operating under constraints imposed by the WSPs and could not share the information that Sarner requested because if Sarner shared it with a customer, it would violate the WSPs.[504] Kim concedes, however, he never told Sarner he could not provide him with more information, and "in hindsight," he "probably should have explained that more clearly to him."[505]

* * *

Kim's defense based on purported constraints stemming from the WSPs and his differing roles pre- and post-closing is meritless. Even if Kim was prohibited from answering Cagwin and Sarner's questions about the status of the Fund—and we make no finding in that regard—he was not authorized to make material misrepresentations and omissions to them. As Levine testified, Kim was the point person for the offerings, and the registered representatives that he oversaw relied on Kim to give accurate and complete answers to their questions.[506] Kim never told Cagwin or Sarner that he was limited, for various reasons, in what he could say to them about the Fund. Instead, he answered their questions, but did so falsely.

v. Lack of Motive

Finally, Kim argued he had no motive to commit the violations, because his total commissions in connection with the NAM V Fund was only $16,220 and his income in 2017 and

[499] Tr. 259–60.

[500] Tr. 260–61.

[501] Tr. 469.

[502] Tr. 469–70.

[503] Tr. 470–71; *see also* Tr. 473–74.

[504] Tr. 481.

[505] Tr. 471, 480.

[506] Tr. 1989–90.

2018 was around a million dollars.[507] But his motive, if any, to engage in the alleged misconduct is irrelevant, as Enforcement is not required to prove intent or motive.[508]

b. Conclusion

We find that Kim acted in bad faith and engaged in a course of unethical conduct after investors deposited funds for the NAM V Fund offering by engaging in misrepresentations and omissions aimed at concealing the true status of the Fund. This conduct did not conform to the moral norms or standards of professional conduct; it therefore violates FINRA Rule 2010.[509] We also find that his misrepresentations and omissions were so blatant as to be intentional, or, at a minimum, reckless.

IV. Sanctions

A. Overview

In considering the appropriate sanctions to impose on Kim, we begin our analysis with FINRA's Sanction Guidelines ("Guidelines") as a benchmark.[510] In the Overview, the Guidelines explain that they "do not prescribe fixed sanctions to particular violations. Rather, they provide direction for Adjudicators in imposing sanctions consistently and fairly."[511] The Guidelines include "recommend[ed] ranges for sanctions and suggest[ed] factors that Adjudicators may consider in determining for each case, where within the range the sanctions should fall or whether sanctions should be above or below the recommended range."[512] But, the Overview

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[507] Tr. 2389.

[508] *Dante J. DiFrancesco,* Exchange Act Release No. 66113, 2012 SEC LEXIS 54, at *18 (Jan. 6, 2012) (finding that establishing a violation of FINRA Rule 2010 does not require proof of motive or scienter); *see also Dep't of Enforcement v. Merrimac*, No. 2011027666902, 2017 FINRA Discip. LEXIS 16, at *19 n.11 (NAC May 26, 2017) (finding that respondent violated FINRA Rules 8210 and 2010 and writing that respondent's "argument that he had no 'motive' to submit falsified evidence to FINRA is not relevant. There is no requirement that intent or motive be proven.").

[509] Kim asserted as an affirmative defense that "[t]his proceeding violates the Constitution's separation-of-powers, Appointments, non-delegation, associational, due process, and jury trial protections. Accordingly, this forum lacks competent jurisdiction to pursue this proceeding." Ans. 10. The CMSO directed the parties to file pre-hearing briefs that included a narrative summary of the facts and the legal theories upon which the party relies, as well as a discussion of sanctions. CMSO § VII.A. Kim's pre-hearing brief did not address this defense. Similarly, the Order Governing Post-Hearing Briefing required the parties to address "each defense separately" in their post-hearing briefs. Again, Kim failed to do so. Finally, at no time during the hearing did Kim mention the defense. Accordingly, we deem it abandoned. *See Dep't of Enforcement v. Bullock*, No. 2005003437102, 2009 FINRA Discip. LEXIS 18, at *5 (OHO Apr. 17, 2009), *aff'd in relevant part*, 2011 FINRA Discip. LEXIS 14 (NAC May 6, 2011) (finding that respondent abandoned an affirmative defense when he failed to pursue it since he filed his answer).

[510] Guidelines (Mar. 2024), https://www.finra.org/sanctionguidelines. *See, e.g.*, *Ahmed*, 2017 SEC LEXIS 3078, at *56 (finding that a sanctions analysis should begin with the Guidelines as a benchmark).

[511] Guidelines at 1 (Overview).

[512] *Id.*

emphasizes, the Guidelines "are not intended to be absolute."[513] Instead, "[b]ased on the facts and circumstances presented in each case, Adjudicators may impose sanctions that fall outside the ranges recommended."[514] Adjudicators may also "consider aggravating and mitigating factors in addition to those" in the Guidelines.[515]

The Guidelines contain: (1) General Principles Applicable to All Sanction Determinations "that should be considered in connection with the imposition of sanctions in all cases"; (2) a list of Principal Considerations in Determining Sanctions "which enumerates generic factors for consideration in all cases"; and (3) Guidelines applicable to specific violations, which "identify potential principal considerations that are specific to the described violation."[516]

The General Principles explain that "sanctions should be designed to protect the investing public by deterring misconduct and upholding high standards of business conduct."[517] Adjudicators are therefore instructed to "design sanctions that are meaningful and significant enough to prevent and discourage future misconduct by a respondent and deter others from engaging in similar misconduct."[518] Further, sanctions should "reflect the seriousness of the misconduct at issue,"[519] and should be "tailored to address the misconduct involved in each particular case."[520] It is paramount that adjudicators . . . "always exercise judgment and discretion and consider appropriate aggravating and mitigating factors in determining remedial sanctions in each case."[521]

B. Applicable Sanction Guidelines

The Hearing Panel finds that Kim violated FINA Rule 2010 by engaging in unethical and bad faith conduct because he caused the misuse of customer funds and made misrepresentations and omissions. There is a Guideline for each of these two types of misconduct, so we look to them for guidance.

The Guideline for violations of FINRA Rules 2150 and 2010 for improperly using funds or securities recommends (1) a fine of $5,000 to $40,000 and (2) consideration of a bar, or, in a case where the improper use resulted from the respondent's misunderstanding of the intended use of the funds, or other mitigation exists, consideration of a suspension in any or all

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[513] *Id.*

[514] *Id.*

[515] *Id.*

[516] *Id.*

[517] *Id.* at 2 (General Principle No. 1).

[518] *Id.*

[519] *Id.*

[520] *Id.*

[521] *Id.* at 4.

capacities for a period of three months to two years and thereafter until the respondent pays restitution.[522] The Guideline contains no considerations specific to these violations.

The Guideline for violations of FINRA Rules 2020 and 2010 involving fraud, misrepresentations, or omissions of material fact has been applied by the NAC and hearing panels even absent a violation of FINRA Rule 2020.[523] That Guideline recommends for (1) negligent misconduct, a suspension in any or all capacities for one month to two years and a fine of $5,000 to $50,000, or (2) intentional or reckless misconduct, strong consideration of a bar, and where mitigating factors predominate, a suspension in any or all capacities for six months to two years and a fine of $10,000 to $100,000.[524] That Guideline contains no considerations specific to these violations.

C. Discussion

1. Aggravating and Mitigating Factors

Because neither Guideline contain specific considerations, we look to the General Principles Applicable to All Sanction Determinations in assessing sanctions for Kim's misconduct. We begin by examining whether aggravating factors exist and find the presence of many such factors. Over an extended period of time, Kim engaged in a pattern of misconduct, through misrepresentations and omissions to NSC's principals and two registered representatives, aimed at concealing the true status of the NAM V Fund, including his misuse of customer funds.[525] We find that his conduct was intentional, or at least reckless.[526] We conclude that Kim's misconduct did not result from a misunderstanding on his part of the proper use of the funds. Kim's misconduct also resulted in financial gain to him in the form of commissions.[527]

Additionally, Kim failed to acknowledge or accept responsibility for his misconduct, and this is aggravating.[528] It is also aggravating that Kim attempted to blame others for his wrongdoing. Registered representatives are responsible for their actions and cannot shift

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[522] *Id.* at 96.

[523] *See, e.g.*, *Dep't of Enforcement v. Pierce*, No. 2007010902501, 2013 FINRA Discip. LEXIS 25, at *94 (NAC Oct. 1, 2013) (applying guideline to a registered representative's FINRA Rule 2010 violation for providing false and misleading information to his firm about customers and their investments); *Dep't of Enforcement v. Paul E. Taboada*, No. 2012034719701, 2016 FINRA Discip. LEXIS 7, at *71 (OHO Mar. 18, 2016) (applying guideline to a FINRA Rule 2010 violation for providing false and misleading information and failing to disclose information to investors), *aff'd*, 2017 FINRA Discip. LEXIS 29 (NAC July 24, 2017), *appeal dismissed*, Exchange Act Release No. 82970, 2018 SEC LEXIS 823 (Mar. 30, 2018).

[524] Guidelines at 116.

[525] *Id.* at 7 (Principal Considerations 8, 9, 10).

[526] *Id.* at 8 (Principal Consideration 13).

[527] *Id.* at 8 (Principal Consideration 16).

[528] *Id.* at 7 (Principal Consideration 2); *see also Dep't of Enforcement v. Gomez*, No. 2011030293503, 2018 FINRA Discip. LEXIS 10, at *60 (NAC Mar. 28, 2018).

responsibility to their firm.[529] Kim's refusal to acknowledge his misconduct and his attempt to deflect blame increases the likelihood that he will engage in similar misconduct in the future.[530] Also, a firm's failure to detect the respondent's misconduct is not mitigating.[531]

Enforcement argues that Kim's misconduct resulted in substantial harm to NAM V Fund investors and that this is an aggravating factor. According to Enforcement, when Slack went public, the investors received approximately 160 percent less profit on their investment compared to investors in Innovation X who purchased shares at the promised maximum price.[532] This argument is not persuasive. Kim's purchase of shares above the maximum price resulted in a 40 percent profit for Fund investors, only two of whom decided to forgo that profit and accept the Firm's rescission offer. Comparing the profit earned by one group of investors—those who invested in Innovation X—with a group that invested in the NAM V Fund does not provide a basis for concluding that Kim's misconduct harmed the Fund investors.

To the contrary, shares of Slack were not available for purchase by the NAM V Fund at the maximum price of $9.75. Kim misused customer funds by facilitating the purchase of shares at above that price. But in doing so, he helped generate profits for those investors that they would not otherwise have reaped. We recognize that it is well-established that the absence of customer harm is not mitigating,[533] and even exposing customers or the firm to harm can be considered aggravating.[534] But here, Kim's misconduct not only failed to harm customers, it actually

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[529] *Reyes*, 2021 FINRA Discip. LEXIS 29, at *60–61; *Maheshwari*, 2020 FINRA Discip. LEXIS 46, at *33; *Trevor Michael Saliba*, Exchange Act Release No. 91527, 2021 SEC LEXIS 865, at *56 (SEC Apr. 9, 2021).

[530] *Fillet*, 2016 SEC LEXIS 3773, at *18 n.16 ("[Respondent's] refusal to acknowledge his misconduct and attempts to deflect blame increase the likelihood that he would engage in similar misconduct in the future."); *Reyes*, 2021 FINRA Discip. LEXIS 29, at *61; *Dep't of Enforcement v. Casas*, No. 2013036799501, 2017 FINRA Discip. LEXIS 1, at *45 (NAC Jan. 13, 2017) (explaining that respondent's "refusal to admit wrongdoing and his continued finger-pointing only heightens our concern that he may engage in similar misconduct in the future.").

[531] *Dep't of Enforcement v. Springsteen-Abbott*, No. 2011025675501r, 2017 FINRA Discip. LEXIS 23, at *71 (NAC July 20, 2017) (rejecting respondent's suggestion that she should not be sanctioned because no one previously detected her wrongdoing), *aff'd*, Exchange Act Release No. 88156, 2020 SEC LEXIS 2684 (Feb. 7, 2020); *Leonard John Ialeggio*, Exchange Act Release No 37910, 1996 SEC LEXIS 3057, at *9 (Oct. 31, 1996) ("[R]egistered persons are expected to adhere to a standard higher than 'what they can get away with.'"), *aff'd*, No. 98-70854, 1999 U.S. App. LEXIS 10362 (9th Cir. 1999).

[532] Enforcement's Post Hr'g Br. 52 (citing Guidelines at 7 (Principal Consideration 11)).

[533] *Ahmed Gadelkareem*, Exchange Act Release No. 82879, 2018 SEC LEXIS 729, at *28–29 (Mar. 14, 2018) ("[W]e have held consistently that the lack of customer harm is not mitigating."); *Taboada*, 2017 FINRA Discip LEXIS 29, at *49; *Dep't of Enforcement v. Noard*, No. 2012034936101, 2017 FINRA Discip. LEXIS 15, at *28–29 (NAC May 12, 2017); *but see Dep't of Enforcement v. Bukovcik*, C8A050055, 2007 NASD Discip. LEXIS 21, at *15 (NAC July 25, 2007) (reducing sanctions imposed by the Hearing Panel based on "a number of mitigating factors – including, the lack of any customer harm").

[534] *Dep't of Enforcement v. Geary*, No. 20090204658, 2016 FINRA Discip. LEXIS 31, at *36 (NAC July 20, 2016) (finding that lack of customer harm is not mitigating where the respondent "exposed the Firm's customers to potential harm and undue risks"), *aff'd*, Exchange Act Release No. 80322, 2017 SEC LEXIS 995 (Mar. 28, 2017), *petition for review denied*, No. 17-9522, 2018 U.S. App. LEXIS 5944 (10th Cir. 2018); *Bullock*, 2011 FINRA Discip. LEXIS 14, at *63 ("Even though the record before us does not demonstrate that [the respondent's]

benefitted them substantially. The majority considered this unique circumstance mitigating in deciding the appropriately remedial sanction to impose on Kim.[535]

2. Reliance on Advice of Counsel

Under the Guidelines, reasonable reliance on competent legal advice is mitigative.[536] Kim claimed that in connection with his purported weighted average price strategy, he relied on advice from two attorneys: the Fund's counsel and his wife.

a. Advice of Counsel From the Fund's Attorney

Kim argued that the $22 per share purchase was permissible because the Fund's counsel told him that buying some shares at above $9.75 per share met the requirements of the PPM and the operating agreement if the weighted per share average price of all shares did not exceed $9.75.[537] Kim testified he had conversations with Fund counsel by phone and email. He said he contacted counsel because he was concerned he would not be able to achieve the $9.75 price target.[538] Kim explained that after Slack announced that they did a new offering in late August/early September, offer prices became higher and supply more limited.[539] According to Kim, he told Fund counsel in October 2018 that he had not been able to buy shares for the Fund at $9.75 and would likely have to pay higher than that, probably somewhere around $22 per share.[540] He said they discussed raising the price target and what was necessary to do so. [541]

To demonstrate that he talked with Fund counsel in October 2018 about getting consents from customers to buy shares at $22 per share or returning their capital contributions, Kim

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misconduct harmed the investing public, the fact that it potentially could have resulted in harm or in any way threatened the firm or its customers suggests that lack of customer harm should not be considered mitigating.").

[535] *Cf. Dep't of Enforcement v. Leopold*, No. 2007011489301, 2012 FINRA Discip. LEXIS 2, at *22 (NAC Feb. 24, 2012) (reducing sanctions imposed by hearing panel and noting that the lack of customer harm and absence of other aggravating factors "colors our evaluation and further supports a reduction of [the respondent's] sanctions."); *but see Dept. of Enforcement v. Olson*, No. 2010023349601, 2014 FINRA Discip. LEXIS 7, n.14 (Bd. of Governors May 9, 2014) ("FINRA's decisions in McCartney and Leopold were highly fact specific and did not rest on the presence or absence of any one aggravating or mitigating factor . . . . We caution adjudicators that relying on discrete statements from McCartney and Leopold to support a claim of mitigation in another case is unsound."), *aff'd*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629 (Sept. 3, 2015).

[536] Guidelines at 7 (Principal Consideration 7); *see also Berger*, 2008 SEC LEXIS 3141, at *38 (stating that a valid claim of reliance on advice of counsel could mitigate sanctions); *Dep't of Enforcement v. Tysk*, No. 2010022977801r, 2019 FINRA Discip. LEXIS 10, at *39–40 (NAC Mar. 11, 2019) ("[R]easonable reliance on competent legal advice can be mitigating for purposes of assessing sanctions."), *aff'd*, Exchange Act Release No. 91268, 2021 SEC LEXIS 534 (Mar. 5, 2021).

[537] Tr. 332–35, 338.

[538] Tr. 2401–02.

[539] Tr. 2401–02.

[540] Tr. 335–36.

[541] Tr. 2402–03.

produced a draft letter dated October 22, 2018, making that offer to customers.[542] At that point, NAM V Fund had not purchased any shares of Slack.[543] Kim testified he found the document in his personal files in May 2024 as he was preparing for the hearing.[544] He claimed this draft letter was a product of his discussions with Fund counsel in October 2018.[545] The draft was never finalized[546] or sent to customers because, Kim recalled, he and others got focused on another deal.[547]

b. Advice of Counsel from Kim's Wife

Besides purportedly receiving advice from Fund counsel about the NAM V Fund, Kim testified that during the period 2017 through 2019, he regularly consulted with his wife regarding questions he had as to best practices and regulatory requirements related to the funds he was managing.[548] Kim's wife is currently employed by a law firm in the investment advisors group.[549] Kim said he consulted with his wife in her capacity as a lawyer,[550] but not as a lawyer from the firm that employed her.[551] Kim testified about certain conversations he said specifically related to the Fund that occurred in approximately October/November 2018.[552] These conversations concerned three topics: (1) how to go about changing the investment objectives of the Fund regarding the $9.75 price; (2) the concept of maximum price disclosure versus weighted average price; and (3) in the event he could not achieve a weighted average price and had violated the Fund's investment objectives, what were the remedies and repercussions.[553]

Kim recalled that his wife advised him about changing the investment objective of the Fund. She purportedly told him that: (1) doing so would require a consensus from investors (which is what Fund counsel purportedly also told him);[554] (2) investors who did not consent would have to receive a right to redeem (Fund counsel purportedly told him that as well);[555] (3) the concept of the maximum price disclosure versus weighted average price was not material, in

[542] RX- 281.

[543] Tr. 2424–25, 2427.

[544] Tr. 2327, 2416.

[545] Tr. 2325.

[546] Tr. 2432.

[547] Tr. 2329–30, 2424.

[548] Tr. 2397.

[549] Tr. 2396.

[550] Tr. 384.

[551] Tr. 2443–45.

[552] Tr. 2397.

[553] Tr. 2506–07.

[554] Tr, 2509.

[555] Tr. 2509.

her opinion;[556] and, finally, (4) the manager would be responsible for making up losses if the weighted average price was not achieved.[557] As to this last point, Kim said she told him that he could treat the situation as a trade error. [558] If viewed that way, she purportedly advised, he would have to unwind the trades. And if there were any losses, the manager would be responsible or he could get consents from the investors to change the investment objective of the Fund.[559] Kim said that when his wife gave him the advice, she qualified it by saying that she was a registered investment company specialist and that private funds were not her field of specialty.[560]

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Kim's reliance on an advice-of-counsel claim fails. First, as discussed above, we did not find credible Kim's claim that he actually used an average weighted pricing approach when purchasing Slack shares for the Fund. Second, he met none of the requirements for establishing reliance on advice of counsel for mitigation of sanctions. To prove this mitigative factor, the "claim must have sufficient content and sufficient supporting evidence."[561] "Respondents must show that they consulted with and made full disclosure to counsel; asked for advice on the legality of the proposed course of action; received advice that it was legal; and relied on the advice in good faith."[562] The claim fails when it rests on nothing more than the respondent's "say-so."[563] Instead, "the respondent asserting reliance must produce 'actual advice from an actual lawyer,'"[564] in the form, for example, "of an opinion letter or the attorney's live

[556] Tr. 2509–10.

[557] Tr. 2510–11.

[558] Tr. 2399–2400.

[559] Tr. 2399–2400.

[560] Tr. 2514.

[561] *Dep't of Enforcement v. Reifler*, No. 2016050924601r, 2023 FINRA Discip. LEXIS 1, at *25 (NAC Jan. 17, 2023) (quoting *Berger*, 2008 SEC LEXIS 3141, at *38).

[562] *Dep't of Enforcement v. DiPaola*, No. 2018057274302, 2023 FINRA Discip. LEXIS 4, at *59 n.43 (NAC Mar. 23, 2023) (citing *Berger*, 2008 SEC LEXIS 3141, at *40–41); *see also Dep't of Enforcement v. Escobio*, No. 2018059545201, 2021 FINRA Discip. LEXIS 3, at *26 n.27 (NAC Mar. 10, 2021) (finding that reliance on advice of counsel is not mitigative "unless a respondent develops the record to show that he made complete disclosure to counsel, sought advice on the legality of the intended conduct, received advice that the intended conduct was legal, and relied in good faith on counsel's advice.") (citations omitted) (quoting *Berger*, 2008 SEC LEXIS 3141, at *38), *aff'd*, Exchange Act Release No. 97701, 2023 SEC LEXIS 1532 (June 12, 2023).

[563] *McNamee*, 481 F.3d at 456 (rejecting defendant's argument that reliance on advice of counsel exculpates his conduct because the defendant "offered nothing other than his say-so").

[564] *Leslie A. Arouh*, Exchange Act Release No. 62898, 2010 SEC LEXIS 2977, at *52 (Sept. 13, 2010) (citation omitted); *see also Cantone,* 2019 FINRA Discip. LEXIS 5, at *103–04 ("[I]t isn't possible to make out an advice-of-counsel claim without producing the actual advice from an actual lawyer.") (quoting *Berger,* 2008 SEC LEXIS 3141, at *40–41).

testimony."[565] A respondent does "not satisfy any elements of" reasonable reliance on advice of counsel without proof of the actual advice, "either through testimony or written documentation of the advice."[566] Here, neither of the two attorneys whose advice Kim purportedly relied on testified, and he produced no opinion letter from either of them setting forth their purported advice. In short, his claim rested solely on his "say so," which is insufficient and we gave it no mitigative weight.

D. Conclusion

Based on the foregoing, and after considering the relevant considerations, including aggravating and mitigating factors, the Hearing Panel imposes the following appropriately remedial sanction: a fine of $35,000 and an order directing Kim to disgorge to FINRA the commissions he earned in connection with his misconduct,[567] $16,220, plus pre-judgment interest. Additionally, the Panel majority imposes a six-month all-capacities suspension on Kim.

Finally, given the seriousness of the misconduct and the numerous aggravating factors, and, in the Hearing Officer's view, the lack of mitigation, the Hearing Officer respectfully dissents from the Panel majority's imposition of a six-month suspension and would have imposed an all-capacities suspension of one year, in addition to the other sanctions imposed.

V. Order

For violating FINRA Rule 2010 by engaging in unethical conduct and acting in bad faith by misusing customer funds and making misrepresentations and omissions, Kim is suspended for six months from associating with any FINRA member firm in all capacities, fined $35,000, and ordered to disgorge his commissions totaling $16,220, plus pre-judgment interest calculated from the dates he received the commissions until the date disgorgement is paid.[568]

If this decision becomes FINRA's final disciplinary action, Kim's suspension will begin with the opening of business on Monday, January 20, 2025. He is ordered to pay costs in the

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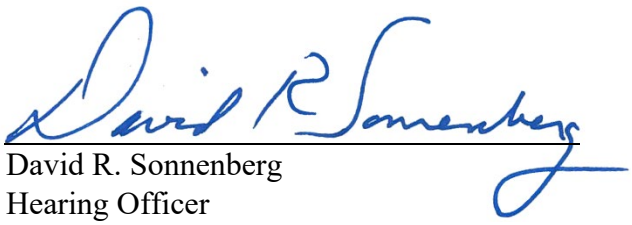
[565] *R.E. Bassie,* Accounting and Auditing Enforcement Release No. 3354, 2012 SEC LEXIS 89, at *34 n.28 (Jan. 10, 2012) (citing *Berger*, 2008 SEC LEXIS 3141, at *40–41).

[566] *Cantone*, 2019 FINRA Discip. LEXIS 5, at *107 (affirming hearing panel's rejection of advice-of-counsel defense and agreeing that "absent proof of the actual advice given, either through testimony or written documentation of the advice, Respondents did not satisfy any of the elements of their defense of advice of counsel").

[567] Under the Guidelines, if a "respondent obtained a financial benefit from his or her misconduct, then, where appropriate to remediate misconduct, Adjudicators may require the disgorgement of such ill-gotten gain by ordering disgorgement of some or all of the financial benefit derived, directed or indirectly." Guidelines at 5. We find that ordering Kim to disgorge the commissions he earned in connection with his misconduct is appropriate to remediate his misconduct.

[568] Prejudgment interest shall accrue at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a). *See Dep't of Enforcement v. Megurditch*, No. 2018057235801, 2023 FINRA Discip. LEXIS 13, at *77, 80 n.52 (NAC Sept. 27, 2023) (ordering prejudgment interest on disgorgement to be calculated from the dates respondent earned his ill-gotten commissions until the date disgorgement is paid and calculated at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code,

amount of $21,110.99 which includes a $750 administrative fee and $20,360.99 for the cost of the transcript. The fine and costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final action.



David R. Sonnenberg
Hearing Officer

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