

**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC**

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In the Matter of the Application of  
DreamFunded Marketplace, LLC and Manuel Fernandez  
For Review of FINRA Disciplinary Action  
Administrative Proceeding File No. 3-20639

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**FINRA'S BRIEF IN OPPOSITION TO MOTION FOR STAY**

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**FINRA’S BRIEF IN OPPOSITION TO MOTION FOR STAY**

**I. INTRODUCTION**

FINRA’s National Adjudicatory Council (“NAC”) expelled DreamFunded Marketplace, LLC (“DreamFunded”), from FINRA funding portal membership and barred Manuel Fernandez, DreamFunded’s chief executive officer from associating with any FINRA funding portal member in any capacity.<sup>1</sup> Fernandez and DreamFunded filed an application for review in which they requested a stay of these sanctions. The SEC should deny their request for a stay.

The NAC found that Fernandez and DreamFunded violated a host of SEC crowdfunding rules and FINRA funding portal rules and imposed on Fernandez and DreamFunded, respectively, three independent bars and expulsions. The NAC imposed the first bar and expulsion because Fernandez and DreamFunded failed to respond fully to FINRA’s request for information and documents related to DreamFunded’s source funding and the finances of DreamFunded’s parent company (“Parent Company”).<sup>2</sup> The NAC imposed the second bar and expulsion because Fernandez and DreamFunded made false, exaggerated, unwarranted,

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<sup>1</sup> A copy of the NAC’s decision is attached as Appendix A.

<sup>2</sup> DreamFunded’s Parent Company is DreamFunded, Inc.

promissory, and misleading statements about their investment in an issuer, the due diligence they conducted on issuers, and certain real estate transactions. The NAC imposed the third bar and expulsion as an aggregate sanction for Fernandez's and DreamFunded's numerous violations stemming from their gatekeeper, investor protection, and supervisory failures.

Each of the factors the SEC considers in determining whether to grant a stay weigh against issuing a stay in this case. First, Fernandez and DreamFunded have not demonstrated a strong likelihood that they will prevail on the merits of their appeal. The record in this case overwhelmingly demonstrates that Fernandez and DreamFunded engaged in all of the misconduct found.

Second, Fernandez and DreamFunded have not established that a denial of the stay will cause them irreparable harm. Fernandez's vague references to a future "crowdfunding career" do not meet the heavy burden necessary to show irreparable harm, and DreamFunded has not operated since withdrawing its SEC registration in October 2017 and terminating its FINRA funding portal membership in November 2017. There can be no irreparable harm to a funding portal that has ceased operating.

Denial of Fernandez's and DreamFunded's request for a stay will avoid potential harm to others and serve the public interest. The risks associated with staying Fernandez's bars, and DreamFunded's expulsions, are substantial. Given the seriousness of the misconduct found, allowing Fernandez's bars and DreamFunded's expulsions to take immediate effect will protect the investing public and serve the public interest.

Fernandez and DreamFunded have not demonstrated a strong likelihood that they will prevail on the merits, that denial of the stay will cause them irreparable harm, or that a stay

serves the public interest. The SEC therefore should deny Fernandez's and DreamFunded's stay request.

## **II. FACTUAL BACKGROUND**

In March 2016, Fernandez established DreamFunded to serve as an intermediary for securities-based crowdfunded offerings. Decision at 5. DreamFunded operated as a subsidiary of Parent Company. Decision at 5. DreamFunded applied for FINRA funding portal membership in May 2016. Decision at 5. In July 2016, FINRA approved DreamFunded's application. Decision at 6. DreamFunded operated for about 15 months, withdrawing its SEC registration in October 2017. Decision at 6. In November 2017, FINRA terminated DreamFunded's status as a funding portal member. Decision at 6. For the entirety of its FINRA funding portal membership, Fernandez served as DreamFunded's chief executive officer, chief financial officer, and chief compliance officer. Decision at 6.

### **A. Fernandez's and DreamFunded's Failure to Respond Fully to FINRA's Information and Document Request**

In August 2016, FINRA's Office of Fraud Detection and Market Intelligence ("OFDMI") began investigating Fernandez and DreamFunded after an investigator, Patrick Devero, saw that an individual associated with DreamFunded was the sole owner of an issuer conducting an offering through DreamFunded's website. Decision at 12. Devero testified that the relationship between the individual and DreamFunded raised concerns about the prohibition on an intermediary's or intermediary's officer's financial interest in an issuer. Decision at 12. Although Devero eventually closed this investigation without any findings of misconduct, he continued his surveillance of Fernandez and DreamFunded. Decision at 12.

In June 2017, Devero noticed that DreamFunded's website had changed significantly. Decision at 13. DreamFunded apparently had transitioned its business from serving as an

intermediary for crowdfunded offerings to promoting and facilitating real estate investments. Decision at 13. Devero testified that DreamFunded’s website no longer showed any crowdfunded offerings; rather, the website contained pictures of single-family homes with captions claiming that deals on the homes had yielded 10 percent returns, and that such returns were favorable when compared to certificates of deposit. Decision at 13.

**1. FINRA’s First, Second, and Third Requests for Information and Documents and Request for Fernandez’s On-the-Record Testimony**

Between July and August 2017, Devero sent Fernandez and DreamFunded three requests for information and documents to ascertain the status of the crowdfunded offerings that DreamFunded had facilitated and to find out why the offerings had been removed from DreamFunded’s website. Decision at 13-17. FINRA staff took Fernandez’s on-the-record testimony on October 20, 2017. Decision at 17-18.<sup>3</sup>

**2. FINRA’s Fourth Request for Information and Documents**

On October 24, 2017, Devero sent Fernandez, DreamFunded, and their then-attorney, J. Martin Tate, a fourth request for information and documents pursuant to FINRA Rule 8210. Decision at 19. FINRA asked Fernandez and DreamFunded to provide information and documents in 11 categories for a specified “review period” between January 2014 and October 2017. Decision at 19. The deadline for Fernandez and DreamFunded to respond was November 7, 2017. Decision at 19. The requested information and documents included:

- **Request No. 3.** Monthly account statements for all bank accounts of DreamFunded, the Parent Company, and Fernandez during the review period.
- **Request No. 8.** All accounting or bookkeeping records maintained by DreamFunded and the Parent Company during the review period.

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<sup>3</sup> None of these information and document requests nor Fernandez’s on-the-record testimony is the subject of FINRA’s liability findings.

Decision at 19. FINRA included Request Nos. 3 and 8 based on Fernandez's responses during his on-the-record testimony. Decision at 17-18.

### **3. Fernandez's Postponements and Failure to Respond Fully**

Fernandez and DreamFunded obtained at least four postponements of the deadline for FINRA's fourth information and document request. Decision at 19-23. Fernandez's and DreamFunded's excuses for the delays ranged from settlement negotiations, to difficulties obtaining documents, to claimed illness. Decision at 19-23. The postponements resulted in a three-month delay in FINRA's investigation.

Even after the repeated postponements, however, Fernandez and DreamFunded still did not respond fully to FINRA's request for information and documents. Decision at 19-23.

Fernandez and DreamFunded produced 40 bank account statements for DreamFunded, the Parent Company, and two entities affiliated with the Parent Company. Decision at 21. The 40 bank account statements represented only 14 percent of the statements FINRA staff had requested for DreamFunded and the Parent Company. Decision at 21. Fernandez and DreamFunded produced no bank account statements for Fernandez, no accounting or bookkeeping records for DreamFunded, and no accounting or bookkeeping records for the Parent Company. Decision at 21, 31-32.

## **B. Fernandez's and DreamFunded's Misrepresentations**

### **1. Fraudulent Misrepresentations About an Investment in KBlock Tools, LLC**

An examiner in FINRA's Membership Application Group ("MAP Group"), Stephanie Volkell, assisted Fernandez and DreamFunded as they navigated the new membership application process and the early stages of DreamFunded's operation. Decision at 11-13. In October 2016, Volkell saw a video clip of Fernandez making an offer to invest in KBlock.

Decision at 45. The seven-minute video clip is from a television show that connects inventors and potential investors. Decision at 46. In January 2016, Fernandez participated in the filming of the show with the chief executive officer of KBlock. Decision at 46. During the show, the host introduced Fernandez as the chief executive officer of “a crowdfunding platform that’s invested over \$100 million in startups.” Decision at 46. The video clip showed Fernandez making a \$1 million offer to the chief executive officer of KBlock, and the chief executive officer accepting Fernandez’s offer. Decision at 46. Fernandez and DreamFunded, however, had not invested \$100 million in startups, nor did they invest any funds in KBlock. Decision at 50.

Volkell testified that she saw the video clip multiple times in multiple locations, including on DreamFunded’s website and on at least two of its social media platforms. Decision at 48. The video clip remained on DreamFunded’s website and social media through at least May 2018. Decision at 48.

## **2. Fraudulent Misrepresentations About Issuer Due Diligence**

Fernandez and DreamFunded made a number of representations on DreamFunded’s website to potential investors concerning DreamFunded’s issuer due diligence. Decision at 52. They represented that DreamFunded conducted a “detailed and time consuming” screening process for issuers and “thoroughly vet[ted] startups prior to featuring them on [the] platform.” Decision at 52. They claimed that DreamFunded’s due diligence consisted of “interviews and background checks on all company team members, validation of market size and customer acceptance, evaluation of product and technology, analysis of the competitive environment, and assurance that [the] terms of investments meet exacting standards.” Decision at 52-53. They also claimed that the funding portal had a “due diligence and deal flow screening team,” and a

“world-class investment committee” that “screen[ed] each company that is applying to be featured on the [ ] platform.” Decision at 53. There is no evidence DreamFunded actually conducted due diligence on issuers or had a due diligence and deal flow screening team or an investment committee. Decision at 53.

### **3. Negligent Misrepresentations About Real Estate Transactions**

Fernandez and DreamFunded also made misrepresentations on DreamFunded’s website about real estate transactions. Fernandez removed the last of the crowdfunded offerings from DreamFunded’s website at the end of April 2017. Fernandez testified that he ended the crowdfunded offerings and was no longer “in business” at that point, and that the real estate advertisements were placeholders while he revamped DreamFunded’s business model and determined whether FINRA would “green light” a different line of business. Decision at 55.

The real estate advertisements related to investments from an earlier period, before DreamFunded became a FINRA funding portal member. Decision at 55. Each advertisement included a photograph of a single-family house and the purported profits earned in connection with the investment in that house. Decision at 55. The advertisements stated that investors in the real estate transactions earned 10 percent interest annually, and compared those profits to those earned on certificates of deposit. Decision at 55-56. The advertisements were misleading because they made it appear that the real estate investments were part of DreamFunded’s crowdfunding business, made it appear that investors could expect a high rate of return, and made it appear that investing in real estate was comparable to purchasing certificates of deposit. Decision at 55-56.

### **C. Fernandez's and DreamFunded's Numerous Other Regulatory Failures**

Fernandez and DreamFunded were responsible for several other regulatory failures relating to DreamFunded's gatekeeper, investor protection, and supervisory obligations. Decision at 70, 78-81. Specifically, Fernandez and DreamFunded: (1) failed to deny an issuer's access to the funding portal even though the issuer's offering raised investor protection concerns; (2) failed to check issuers' backgrounds and securities enforcement regulatory histories; (3) failed to provide investors with a material change notice for an offering; (4) failed to provide investors with early closing notices for two offerings; (5) failed to provide investors with investment cancellation notices; (6) failed to provide investors with investment confirmation notices; and (7) failed to implement policies and procedures reasonably designed to supervise the funding portal's activities and its associated persons. Decision at 70, 78-81.

### **III. PROCEDURAL HISTORY**

FINRA's Department of Enforcement ("Enforcement") filed a 10-count complaint against Fernandez and DreamFunded. After a hearing, the Hearing Panel barred Fernandez and expelled DreamFunded for: (1) failing to respond fully and completely to FINRA's request for information and documents; and (2) making false, exaggerated, unwarranted, promissory, and misleading statements about Fernandez's investment in KBlock and DreamFunded's due diligence on issuers. Decision at 1, 8, 70. The Hearing Panel also assessed, but declined to impose, a variety of other sanctions on Fernandez and DreamFunded for their gatekeeper, investor protection, and supervisory failures. Decision at 1, 8, 70. In making its findings of liability, the Hearing Panel found Fernandez not credible in several respects. Decision at 8-9. The Hearing Panel found that "much of Fernandez's . . . testimony was not truthful." Decision at 8. The Hearing Panel described Fernandez's testimony as "evasive," "vague," and

“inconsistent.” Decision at 8. The Hearing Panel explained that Fernandez’s testimony “was not credible, lacked corroboration, or was contradicted by other more credible [documentary] evidence.” Decision at 8. The Hearing Panel noted that “Fernandez was vague and evasive to the point of absurdity.” Decision at 8.

Fernandez and DreamFunded appealed the Hearing Panel’s decision to the NAC, and Enforcement cross-appealed. Decision at 8. The NAC generally affirmed the Hearing Panel’s findings of liability against Fernandez and DreamFunded, affirmed the Hearing Panel’s decision to dismiss parts of Enforcement’s allegations, and affirmed the bars and expulsions that the Hearing Panel imposed on Fernandez and DreamFunded, respectively, for their failure to respond fully to the information and document request and their fraudulent misrepresentations concerning the investment in KBlock and issuer due diligence and negligent misrepresentations in the real estate advertisements. Decision at 8. The NAC imposed a separate bar and expulsion as an aggregate sanction for Fernandez’s and DreamFunded’s various gatekeeper, investor protection, and supervisory failures.

#### **IV. ARGUMENT**

“[T]he imposition of a stay is an extraordinary and drastic remedy,” and Fernandez and DreamFunded have the burden of establishing that a stay is appropriate. *William Timpinaro*, Exchange Act Release No. 29927, 1991 SEC LEXIS 2544, at \*6 (Nov. 12, 1991). To do so, Fernandez and DreamFunded must show: (1) a strong likelihood that they will prevail on the merits; (2) that, without a stay, they will suffer irreparable harm; (3) there would not be substantial harm to other parties if a stay were granted; and (4) the issuance of a stay would be likely to serve the public interest. *The Dratel Grp., Inc.*, Exchange Act Release No. 72293, 2014 SEC LEXIS 1875, at \*7-8 & n.6 (June 2, 2014) (order denying stay). “The first two factors are

the most critical, but a stay decision rests on the balancing of all four factors.” *Scottsdale Cap. Advisors Corp.*, Exchange Act Release No. 83783, 2018 SEC LEXIS 1946, at \*4 (Aug. 6, 2018) (Order Granting Stay with Conditions). Fernandez and DreamFunded have not demonstrated that the SEC should grant the extraordinary relief that they seek.<sup>4</sup>

**A. Fernandez and DreamFunded Have Not Shown a Strong Likelihood of Success on the Merits and Have Not Raised a Serious Legal Question**

The documentary and testimonial evidence in the record establishes that Fernandez flouted a host of SEC crowdfunding rules and FINRA funding portal rules.

**1. Fernandez and DreamFunded Failed to Respond Fully to FINRA’s Information and Document Request**

FINRA Funding Portal Rule 800 covers investigations and sanctions for funding portals. Subsection (a) of Funding Portal Rule 800 incorporates FINRA Rule 8210 to funding portals. A violation of FINRA Rule 8210 occurs when a funding portal member or its associated person fails to provide full and prompt cooperation to FINRA in response to a request for information and documents. *See Brian L. Gibbons*, 52 S.E.C. 791, 794 n.11 (1996), *aff’d*, 112 F.3d 516 (9th Cir. 1997) (table)(“[A]ssociated persons may not ignore [FINRA] inquiries; nor take it upon themselves to determine whether information is material to an . . . investigation of their conduct.”). FINRA funding portal members and their associated persons have an unequivocal and unqualified obligation to respond fully to FINRA’s inquiries. *See Dep’t of Enf’t v. Asensio*

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<sup>4</sup> The SEC has observed that certain courts utilize an alternate standard in considering whether to grant a stay. If a movant does not establish a likelihood of success on the merits of an appeal, the alternate standard requires the movant to raise “a serious legal question on the merits” and to demonstrate that the other three factors weigh heavily in his favor. *See Scottsdale*, 2018 SEC LEXIS 1946, at \*5; *see also Bruce Zipper*, Exchange Act Release No. 82158, 2017 SEC LEXIS 3706, at \*19-21 (Nov. 27, 2017). The Commission emphasized that the overall burden on a movant under the alternate standard “is no lighter than the one it bears under the ‘likelihood of success’ standard.” *Zipper*, 2017 SEC LEXIS 3706, at \*21.

*Brokerage Servs., Inc.*, Complaint No. CAF030067, 2006 NASD Discip. LEXIS 20, at \*44 (NASD NAC July 28, 2006), *aff'd*, Exchange Act Release No. 62315, 2010 SEC LEXIS 2014 (June 17, 2010).

The record establishes that Fernandez and DreamFunded failed to respond fully to FINRA's request for information and documents, and, in so doing, violated FINRA Funding Portal Rules 800(a) and 200(a) and FINRA Rule 8210.<sup>5</sup> In October 2017, FINRA staff sent Fernandez and DreamFunded a request for information and documents. Decision at 19. Among the 11 categories of information and documents sought, FINRA staff requested Fernandez's, DreamFunded's, and the Parent Company's monthly bank account statements between January 2014 and October 2017, and they asked for DreamFunded's and the Parent Company's accounting and bookkeeping records for that same period. Decision at 19. Despite four extensions of time over a three-month period, Fernandez and DreamFunded failed to respond fully to FINRA's request for information and documents. Decision at 19-23. Fernandez and DreamFunded produced 40 bank account statements for DreamFunded, the Parent Company, and two entities affiliated with the Parent Company. Decision at 21. The 40 bank account statements represent only 14 percent of the bank account statements that FINRA staff requested for DreamFunded and the Parent Company. Decision at 21. Fernandez and DreamFunded produced no bank account statements for Fernandez, no accounting or bookkeeping records for

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<sup>5</sup> In each instance that Fernandez and DreamFunded violated a SEC crowdfunding rule, or FINRA funding portal rule, they also violated FINRA Funding 200(a).

DreamFunded, and no accounting or bookkeeping records for the Parent Company. Decision at 21.

On appeal to the SEC, as they did below, Fernandez and DreamFunded assert that they provided FINRA staff with “an email with a Drop[B]ox link . . . with the full documents.” Application at 2.<sup>6</sup> The record does not support this claim. The only document in the record relating to the DropBox is an email from Fernandez to his then-attorney, Scott Andersen. Decision at 33-34. The email contains links to two files in DropBox. Decision at 33-34. Assuming that the links contain what the email purports,<sup>7</sup> the links contain files with 18 bank account statements for the Parent Company for the period between June 2014 and November 2015. Decision at 33-34. The DropBox did not contain any responsive documents for Fernandez or DreamFunded and was not a full response to FINRA’s request. Decision at 33-34. The Hearing Panel considered Fernandez’s representations concerning the production of documents via DropBox and found that Fernandez’s testimony on this issue was not credible. *See William H. Murphy & Co.*, Exchange Act Release No. 90759, 2020 SEC LEXIS 5218, at \*28-29 (Dec. 21, 2020).

Fernandez and DreamFunded also assert that “FINRA staff . . . was NEVER specific on what documents they were specifically asking for.” Application at 2. This argument is baseless. Fernandez and DreamFunded never told FINRA staff that they had questions about the request or the documents that FINRA sought. Decision at 33. When Fernandez requested additional time to respond to the request, he did not ask questions about the categories of documents; rather, he

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<sup>6</sup> “Application” refers to the two-page document that Fernandez and DreamFunded filed with the SEC on October 29, 2021. Application at 1.

<sup>7</sup> The copy of the email in the record does not include the attachments, such as copies of the documents contained in the links to the cloud-based storage. Decision at 33.

explained that he needed additional time because the “banking records and bookkeeping data [was] with [his accountant] and bookkeeper.” Decision at 33. At the hearing, when Enforcement asked Fernandez whether he “ever [told] FINRA staff that [he] did not understand the language of any of the[] requests . . . ,” he responded, “I don’t believe so.” Decision at 33. Fernandez and DreamFunded cannot blame FINRA staff for their own failure to respond fully to the information and document request. See *Joseph J. Fox*, Exchange Act Release No. 80308, 2017 SEC LEXIS 969, at \*17 (Mar. 24, 2017) (rejecting applicant’s attempt to blame FINRA for misconduct). The record establishes that Fernandez and DreamFunded violated FINRA Funding Portal Rules 800(a) and 200(a) and FINRA Rule 8210. Cf. *Kent M. Houston*, Exchange Act Release No. 71589A, 2014 SEC LEXIS 4611, at \*5, 10-11 (Feb. 20, 2014) (failing to respond fully and completely to FINRA’s request violated the predecessor to FINRA’s ethical standards rule and FINRA Rule 8210).

The bar that the NAC imposed on Fernandez, and the expulsion that it imposed on DreamFunded, for this violation are warranted and likely to be affirmed. The NAC properly applied the Sanction Guideline for a partial, but incomplete, response to a FINRA information and document request, and it determined that Fernandez and DreamFunded did not substantially comply with the request.<sup>8</sup> Decision at 73-74. The NAC considered the importance of the information and documents sought, noting that Fernandez’s on-the-record testimony raised concerns about his use of DreamFunded’s source funding and the Parent Company’s finances. Decision at 74. The NAC examined the extraordinary amount of time and regulatory pressure needed from FINRA staff to obtain even a partial response from Fernandez and DreamFunded.

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<sup>8</sup> The NAC thoroughly explained the considerations for applying FINRA’s Sanction Guidelines to disciplinary cases involving funding portals and their associated persons. Decision at 70-72.

Decision at 74. The NAC also considered Fernandez's and DreamFunded's claimed excuses for the deficient response, and the de minimis amount of compensation that DreamFunded earned from its operations, but found that these factors did not sufficiently mitigate the misconduct to warrant lesser sanctions. Decision at 74-75. The NAC properly barred Fernandez and expelled DreamFunded for the misconduct. Decision at 74-75.

## **2. Fernandez's and DreamFunded's Misrepresentations**

### **a. Fraudulent Misrepresentations About an Investment in KBlock and Issuer Due Diligence**

FINRA Funding Portal Rule 200(b) prohibits a funding portal's "use of manipulative, deceptive, or other fraudulent devices" and states that "[n]o funding portal member shall effect any transaction in, or induce the purchase or sale of, any security by means of, or by aiding or abetting, any manipulative, deceptive or other fraudulent device or contrivance." FINRA Funding Portal Rule 200(b) is modeled after Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and FINRA Rule 2020, and, like those rules, requires a showing of scienter to prove a violation. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976).

Fernandez and DreamFunded made fraudulent misrepresentations about investing in KBlock, in violation of FINRA funding Portal Rules 200(b) and 200(a). The video clip Fernandez posted to DreamFunded's website and social media misrepresented two facts. First, the video clip gave the impression that Fernandez and DreamFunded had "invested over \$100 million in startups," and second, that they intended to invest \$1 million in KBlock Tools. Both

assertions were false. Fernandez and DreamFunded did not invest over \$100 million in new companies, and they did not invest any funds whatsoever in KBlock.

These two misrepresentations were material because a reasonable investor would consider important Fernandez's investment savvy and the quality of KBlock as an investment when deciding whether to participate in a crowdfunded offering facilitated through Fernandez and DreamFunded. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (misstated or omitted facts are "material" if there is a substantial likelihood that a reasonable investor would have considered the misrepresentation or omission important in making an investment decision, and if disclosure of the misstated or omitted fact "would have been viewed by the reasonable investor as having significantly altered the total mix of information made available").

Fernandez and DreamFunded acted with scienter in posting the misleading video clip. *See Hochfelder*, 425 U.S. at 193 n.12 (scienter is defined as "a mental state embracing an intent to deceive, manipulate, or defraud"); *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 319 n.3 (2007) (scienter is also established through a heightened showing of recklessness). Fernandez and DreamFunded "either knew that . . . [the] statements . . . were materially misleading or . . . [were] reckless in not recognizing that investors would likely be misled about material information."<sup>9</sup> *Louis Ottimo*, Exchange Act Release No. 83555, 2018 SEC LEXIS 1588, at \*41 (June 28, 2018) (finding that respondent acted with scienter when he misrepresented his management experience in private placement memoranda). Fernandez and DreamFunded

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<sup>9</sup> DreamFunded Marketplace acted with scienter based on Fernandez's acts. *See SEC v. Sells*, 2012 U.S. Dist. LEXIS 112450, at \*24 (N.D. Cal. Aug 10, 2012) (concluding that an officer's "knowledge may be imputed to [his firm] by application of the doctrine of respondeat superior under which wrongful acts of an employee undertaken within the scope of employment can be imputed to the employer").

knew they had not invested over \$100 million in new companies and had not invested any funds in KBlock.

Finally, Fernandez's and DreamFunded's misrepresentations were in connection with the purchase or sale of a security. *See SEC v. Zandford*, 535 U.S. 813, 822 (2002) ("It is enough that the scheme to defraud and the sale of securities coincide."). As Fernandez testified, he posted the video clip to the funding portal's website and social media to promote himself and DreamFunded to issuers and investors looking to participate in crowd-funded offerings. *Cf. Brian Gibson*, Litigation Release No. 22018, 2011 SEC LEXIS 2259, at \*45-48 (June 30, 2011) (alleging that falsified testimonials on respondent's website violated the antifraud provisions of the Exchange Act).

Fernandez argues that he and DreamFunded are not liable for the misrepresentations about the investment in KBlock because Fernandez "was in front of the camera and not the producer." Application at 2. Fernandez argues that he "can't control what they put out." Application at 2. But Fernandez and DreamFunded had complete control the posting of the video clip to DreamFunded's website and social media, and the video clip contained statements about KBlock that were false. Fernandez's and DreamFunded's misrepresentations were fraudulent and violated FINRA Funding Portal Rules 200(b) and 200(a).

Fernandez's and DreamFunded's misrepresentations about DreamFunded's due diligence on issuers also were fraudulent. There is no evidence that Fernandez and DreamFunded conducted any due diligence on issuers,<sup>10</sup> or that the funding portal had a due diligence and deal

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<sup>10</sup> Although funding portals are not required to conduct due diligence on issuers, once Fernandez and DreamFunded represented that they had conducted due diligence on the issuers with offerings on the funding portal platform, they had an obligation to speak truthfully. *Cf. Richmark Cap. Corp.*, 57 S.E.C. 1, 9 (2003) (explaining that a fundamental purpose of the

[Footnote continued on the next page]

flow screening team or an investment committee. “[M]isstatements regarding due diligence [a]re clearly material . . .” *Total Wealth Mgmt., Inc.*, Initial Decisions Release No. 860, 2015 SEC LEXIS 3367, at \*92 (Aug. 17, 2015). Fernandez and DreamFunded acted with scienter because they either knew that the description of their due diligence was likely to mislead investors or recklessly disregarded the risk that it would. *See Id.* at \*99 (“Because he was heavily involved in performing the due diligence, [respondent] knew, or was reckless in not knowing, that it did not remotely measure up to the level of due diligence that had been promised to investors.”). Finally, Fernandez’s and DreamFunded’s misrepresentations about DreamFunded’s issuer due diligence were in connection with the purchase or sale of a security because Fernandez and DreamFunded used the misrepresentations to promote themselves to the individuals and entities that wanted to participate in crowdfunding transactions. *See Zandford*, 535 U.S. at 822. Fernandez’s and DreamFunded’s misrepresentations about their issuer due diligence were fraudulent and violated FINRA Funding Portal Rules 200(b) and 200(a).

**b. Negligent Misrepresentations About Real Estate Transactions**

FINRA Funding Portal Rule 200(c)(2) lists the content standards for funding portal communications. Under FINRA Funding Portal Rule 200(c)(2)(A), funding portal communications must not “include any false, exaggerated, unwarranted, promissory or misleading statement or claim; . . . [or] omit any material fact or qualification if the omission would cause the communication to be misleading . . .” Under FINRA Funding Portal Rule 200(c)(2)(B), “[a]ll funding portal member communications must be based on principles of fair dealing and good faith and must be fair and balanced.” FINRA Funding Portal Rule 200(c)(2) is

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federal securities laws is to “substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities business”), *aff’d*, 86 F. App’x 744 (5th Cir. 2004).

modeled after FINRA Rule 2210(d)(1), and, like that rule, only requires a showing of negligence to prove a rule violation. *See Dep't of Enf't v. Beloyan*, Complaint No. 2005001988201, 2011 FINRA Discip. LEXIS 44, at \*50 (FINRA NAC Dec. 20, 2011) (finding that a showing of negligence was sufficient to establish a violation of the content standards of FINRA Rule 2210).

Fernandez and DreamFunded posted misleading real estate advertisements to DreamFunded's website. The advertisements were misleading in three ways. First, the advertisements made it appear that the real estate investments were part of DreamFunded's crowdfunding business when they were not. Second, the advertisements made it appear that investors could expect a high rate of return when no such guarantee could be made. Finally, the advertisements made it appear that investing in real estate was comparable to purchasing certificates of deposit. That, however, was not true because the real estate transactions depicted in the advertisements were not federally insured. Fernandez's and DreamFunded's posting of the real estate advertisements to DreamFunded's website constituted negligent misrepresentations, in violation of FINRA Funding Portal Rules 200(c)(2) and 200(a).

**c. The Bar and Expulsion for Misrepresentations Are Not Excessive**

The NAC found that Fernandez's and DreamFunded's fraudulent and negligent misrepresentations constituted egregious misconduct that warranted a bar and an expulsion. Decision at 76-78. The NAC explained that Fernandez's and DreamFunded's misrepresentations about the investment in KBlock, DreamFunded's due diligence on issuers, and the advertisements touting the quality and safety of the real estate investments, whether fraudulently or negligently made, presented a disturbing pattern of misconduct, which seemed singularly focused on presenting Fernandez as a wealthy, savvy investor that other investors should seek to emulate. Decision at 78. The NAC stressed that the self-aggrandizing and self-serving nature of

Fernandez's and DreamFunded's fraudulent and negligent misrepresentations was powerful evidence supporting Fernandez's bar and DreamFunded's expulsion. Decision at 78.

### **3. Fernandez's and DreamFunded's Other Regulatory Failures**

The record establishes that Fernandez and DreamFunded committed several violations based on their abdication of their gatekeeper, investor protection, and supervisory responsibilities for crowdfunding transactions.

First, Fernandez and DreamFunded failed to deny an issuer, Bluurp, Inc., access to the funding portal even though its offering raised investor protection concerns, in violation of SEC Regulation Crowdfunding Rule 301(c)(2) and FINRA Funding Portal Rule 200(a). Over the course of a two-week period, Bluurp's chief executive officer asked Fernandez and DreamFunded to lower the target offering amount, asked them to close the offering more than three months early, and asked them to deposit the investors' funds into his personal bank account. Decision at 37-42. Fernandez and DreamFunded closed Bluurp's offering early and disbursed the offering proceeds to the chief executive officer's personal bank account, as he had requested. Decision at 42.

Second, Fernandez and DreamFunded failed to check issuers' backgrounds and securities enforcement regulatory histories, in violation of SEC Regulation Crowdfunding Rule 301(c)(1) and FINRA Funding Portal Rule 200(a). Decision at 58-59. Fernandez testified that he conducted background checks in connection with every offering, and that he outsourced background checks to a private investigator and an escrow agent that he had retained. Decision at 59. There is no documentary evidence, however, corroborating Fernandez's claims, and the Hearing Panel found his testimony on this issue not credible. Decision at 59.

Third, Fernandez and DreamFunded failed to provide investors with a material change notice for Bluurp's offering, in violation of SEC Regulation Crowdfunding Rule 304(c)(1) and

FINRA Funding Portal Rule 200(a). Fernandez and DreamFunded failed to provide a material change notice for a Form C amendment that Bluurp filed with the SEC in June 2017. Decision at 60. The Form C amendment disclosed that Bluurp had decreased its target offering amount, that the amendment was a material change, and that investors must reconfirm their investments within five business days. Decision at 61. Fernandez's and DreamFunded's attorney, Tate, acknowledged that the material change notice had not been provided to investors. Decision at 61.

Fourth, Fernandez and DreamFunded failed to provide investors with early closing notices when the offerings of Bluurp and a second issuer, Me Tyme Network, Inc., closed early, in violation of SEC Regulation Crowdfunding Rule 304(b)(2) and FINRA Funding Portal Rule 200(a). Bluurp's Form C stated that the issuer's offering would remain open until September 2017, but it closed three months early, in June 2017. Me Tyme Network's Form C disclosed that the issuer's offering would remain open until June 2017, but it closed two months early, in April 2017. Decision at 62. Fernandez and DreamFunded could not produce early closing notices for these offerings. Decision at 63.

Fifth, Fernandez and DreamFunded failed to provide Bluurp's and Me Tyme Network's investors with investment cancellation notices, in violation of SEC Regulation Crowdfunding Rule 303(d) and FINRA Funding Portal Rule 200(a). Although Fernandez and DreamFunded provided FINRA staff with two examples of investment cancellation notices, the notices were deficient in a number of ways. Decision at 64.

Sixth, Fernandez and DreamFunded failed to provide Bluurp's and Me Tyme Network's investors with investment confirmation notices, in violation of SEC Regulation Crowdfunding Rule 303(f) and FINRA Funding Portal Rule 200(a). In response to FINRA's request for copies

of investment confirmation notices, Fernandez and DreamFunded provided copies of emails that their escrow agent had generated. Decision at 65. These emails provided none of the information necessary to protect or enforce investors' rights in crowdfunding transactions. Decision at 65.

And seventh, Fernandez and DreamFunded failed to implement policies and procedures reasonably designed to supervise the funding portal's activities and associated persons, in violation of SEC Regulation Crowdfunding Rule 403(a) and FINRA Funding Portal Rules 300(a) and 200(a). The record demonstrates that Fernandez was responsible for establishing and implementing DreamFunded's supervisory system, including its WSPs; that Fernandez was liable for DreamFunded's supervisory failures; that DreamFunded's supervisory system, including its WSPs, were not tailored to address the risks associated with a funding portal business; and, in the instances that DreamFunded had policies and procedures to address crowdfunding transactions, Fernandez did not implement them. Decision at 66-70.

These violations demonstrate Fernandez's and DreamFunded's utter abdication of their gatekeeper, investor protection, and supervisory responsibilities for crowdfunding transactions. The bar and expulsion that the NAC imposed on Fernandez and DreamFunded for these violations are well-founded and unlikely to be set aside.

On appeal, Fernandez and DreamFunded proffer several undeveloped, unsubstantiated, and unsupported claims – ranging from a lack of review by FINRA's Board of Governors, to lead investigator perjury, to selective prosecution based on race. Application at 1-2. Fernandez and DreamFunded cite no evidence to support their claims of perjury or selective prosecution. *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at \*53 (Jan. 30, 2009) (to establish a claim of selective prosecution, an applicant must demonstrate that he was

singled out unfairly for prosecution “based on improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right”).<sup>11</sup> And their claim about the lack of review by FINRA’s Board of Governors is incorrect. The NAC submitted its proposed written decision to FINRA’s Board of Governors in accordance with FINRA Rule 9349(c), but the Board of Governors did not call the decision for discretionary review. Fernandez and DreamFunded do not identify any source, factual basis, documentary evidence – anything – to support their far-fetched and baseless claims. The SEC should reject Fernandez’s and DreamFunded’s arguments and deny their request for a stay. *See Corley v. Rosewood Care Ctr.*, 388 F.3d 990, 1001 (7th Cir. 2004) (“we will not root through the hundreds of documents and thousands of pages that make up the record here to make [appellant’s] case for him”).

\* \* \*

Fernandez and DreamFunded have not demonstrated a strong likelihood of success on the merits of this appeal and have not raised any serious legal issue. The SEC therefore should deny Fernandez’s and DreamFunded’s stay request.

**B. Fernandez and DreamFunded Have Not Demonstrated That a Denial of the Stay Will Impose Irreparable Harm**

In order to demonstrate irreparable harm, a movant must establish that the NAC’s decision will impose injury that is “irreparable as well as certain and great.” *Whitehall Wellington Invs., Inc.*, Exchange Act Release No. 43051, 2000 SEC LEXIS 1481, at \*5 (July 18, 2000); *see Timpinaro*, 1991 SEC LEXIS 2544, at \*8 (stating that “[t]he key word in this consideration is irreparable”). Fernandez’s vague assertions about his future “crowdfunding

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<sup>11</sup> The claims related to lead investigator perjury and selective prosecution based on race are also new arguments that Fernandez and DreamFunded did not raise before the NAC. The SEC should reject these new arguments. *See Nicholas T. Avello*, 58 S.E.C. 395, 400 (2005).

career” do not meet this standard, [Fernandez is not currently working for a funding portal, so denying a stay would be a continuation of the status quo, not the imposition of any harm. And there can be no irreparable harm for a funding portal that ceased operations more than four years ago. *See The Dratel Grp., Inc.*, 2014 SEC LEXIS 1875, at \*17 (Order Denying Stay) (rejecting argument that movant would be irreparably harmed because he “would be barred from a business he has been a part of for over thirty-seven years and [that is] his only source of income”).

**C. Denial of the Stay Will Avoid Potential Harm to Others and Will Serve the Public Interest**

The balance of equities also favors the immediate effectiveness of Fernandez’s bars and DreamFunded’s expulsions. There is zero public interest in granting a stay to a funding portal that ceased operating more than four years ago. By contrast, the public interest strongly favors requiring a funding portal to respond to FINRA’s information and document requests, to comply with the relatively few requirements that apply to funding portals, and to provide investors with some semblance of protection, particularly as Fernandez has acknowledged that he intends to engage in additional capital-raising for DreamFunded. The immediate effect of Fernandez’s bars and DreamFunded’s expulsions protects the investing public and serves the public interest.

**V. CONCLUSION**

The SEC should deny Fernandez’s and DreamFunded’s request for a stay and allow Fernandez’s bars and DreamFunded’s expulsions to take immediate effect.

Respectfully submitted,

/s/ Jante Turner

Jante Turner

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202-728-8317

November 3, 2021

**CERTIFICATE OF COMPLIANCE**

I, Jante Turner, certify that:

- (1) FINRA's Brief in Opposition to Motion for Stay complies with SEC Rule of Practice 151(e) because it omits or redacts any sensitive personal information; and
- (2) FINRA's Brief in Opposition to Motion for Stay complies with the limitation set forth in SEC Rule of Practice 154(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 6524 words.

Respectfully submitted,

/s/ Jante Turner

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Dated: November 3, 2021

**CERTIFICATE OF SERVICE**

On November 3, 2021, I, Jante Turner, certify that I caused a copy of FINRA's Brief in Opposition to Motion for Stay, in the matter of DreamFunded Marketplace, LLC and Manuel Fernandez, Administrative Proceeding File No. 3-20639, to be filed through the SEC's eFAP system on:

Vanessa Countryman, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

and served by email on:

Manuel Fernandez  
c/o DreamFunded, Inc.  
San Francisco HQ  
388 Market Street, 13th Floor  
San Francisco, CA 94111  
manny@dreamfunded.com

Respectfully submitted,

/s/ Jante Turner  
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**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC**

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In the Matter of the Application of  
DreamFunded Marketplace, LLC and Manuel Fernandez  
For Review of FINRA Disciplinary Action  
Administrative Proceeding File No. 3-20639

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**FINRA'S INDEX TO APPENDIX**

**Appendix**

**Description**

A National Adjudicatory Council (“NAC”) Decision in *DreamFunded Marketplace, LLC and Manuel Fernandez*, Dated September 27, 2021

# **APPENDIX A**



**Jante Turner**  
Associate General Counsel

Telephone: (202) 728-8317  
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September 27, 2021

**VIA SEC 19d-1 SYSTEM**

Vanessa Countryman  
Securities and Exchange Commission  
100 F Street, NE – Room 10915  
Washington, DC 20549-1090

**RE: DREAMFUNDED MARKETPLACE, LLC AND  
MANUEL FERNANDEZ  
FINRA COMPLAINT NO. 2017053428201**

Dear Ms. Countryman:

Enclosed please find the decision of the National Adjudicatory Council (“NAC”) in the above referenced matter. The FINRA Board of Governors did not call this matter for review. The attached NAC decision is the final decision of FINRA.

Sincerely,

/s/ Jante Turner

Jante Turner

Enclosure

cc: Kierstin McKenna

BEFORE THE NATIONAL ADJUDICATORY COUNCIL  
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

DreamFunded Marketplace, LLC  
San Francisco, CA,

and

Manuel Fernandez  
San Francisco, CA,

Respondents.

DECISION

Complaint No. 2017053428201

Dated: September 27, 2021

**DreamFunded Marketplace and Fernandez: (1) failed to respond fully and completely to FINRA’s request for information and documents; (2) failed to deny an issuer’s access to the funding portal when the issuer’s offering raised investor protection concerns; (3) made false, exaggerated, unwarranted, promissory, and misleading statements about an investment in an issuer, issuer due diligence, and certain real estate investments; (4) failed to conduct issuer background checks and securities enforcement regulatory histories; (5) failed to provide investors with a material change notice for an offering; (6) failed to provide investors with early closing notices for two offerings; (7) failed to provide investors with investment cancellation notices; (8) failed to provide investors with investment confirmation notices; and (9) failed to implement policies and procedures reasonably designed to supervise the funding portal’s activities and associated persons.**

**Enforcement failed to prove that DreamFunded Marketplace and Fernandez: (1) failed to deny two issuers’ access to the funding portal based on their projections and forecasts; (2) did not have a reasonable basis for believing that certain issuers were not in compliance with the Securities Act of 1933; and (3) failed to provide investors with two additional material change notices for an offering.**

**Held, findings and sanctions modified.**

## **Appearances**

For the Complainant: Edwin Aradi, Esq., Colleen O'Loughlin, Esq., Leo Orenstein, Esq.,  
Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Todd Zuckerbrod, Esq.

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## Decision

This case of first impression interprets and applies the Securities and Exchange Commission's ("SEC") crowdfunding rules and FINRA's funding portal rules to a FINRA funding portal member and its associated person. Between July 2016 and November 2017, DreamFunded Marketplace, LLC ("DreamFunded Marketplace") was a FINRA funding portal member. Manuel Fernandez was DreamFunded Marketplace's founder, chief executive officer, chief financial officer, and chief compliance officer. On June 5, 2019, an Extended Hearing Panel found that DreamFunded Marketplace and Fernandez violated numerous SEC regulation crowdfunding rules and FINRA funding portal rules as they served as intermediaries for crowdfunded offerings facilitated through their online funding portal – DreamFunded.com.

Specifically, the Hearing Panel found that DreamFunded Marketplace and Fernandez: (1) failed to respond fully and completely to FINRA's request for information and documents (cause one); (2) failed to deny an issuer's access to the funding portal when the issuer's offering presented the potential for fraud and raised investor protection concerns (cause two); (3) made false, exaggerated, unwarranted, promissory, and misleading statements about an investment in an issuer, the due diligence conducted on issuers, and certain real estate investments (cause three); (4) failed to conduct issuer background checks and securities enforcement regulatory histories (cause five); (5) failed to provide investors with a material change notice for an offering (cause six); (6) failed to provide investors with early closing notices for two offerings (cause seven); (7) failed to provide investors with investment cancellation notices (cause eight); (8) failed to provide investors with investment confirmation notices (cause nine); and (9) failed to implement policies and procedures reasonably designed to supervise the funding portal's activities and associated persons (cause ten). The Hearing Panel, however, found that FINRA's Department of Enforcement ("Enforcement") failed to prove that DreamFunded Marketplace and Fernandez did not have a reasonable basis for believing that certain issuers were not in compliance with the Securities Act of 1933 ("Securities Act") under cause four, and the Hearing Panel dismissed parts of Enforcement's allegations under causes two and six.

For sanctions, the Hearing Panel expelled DreamFunded Marketplace from funding portal membership, and barred Fernandez from associating with any FINRA funding portal member in any capacity, for: (1) failing to respond fully and completely to FINRA's request for information and documents under cause one; and (2) making false, exaggerated, unwarranted, promissory, and misleading statements about Fernandez's investment in an issuer and the funding portal's due diligence on issuers under cause three.<sup>1</sup> The Hearing Panel also assessed, but declined to impose, the following sanctions on DreamFunded Marketplace: (1) four 30-calendar day suspensions under cause two, cause five, causes six through nine as an aggregate sanction, and cause ten; (2) a letter of caution for the remaining liability under cause three; and (3) the submission and creation of a supervisory plan to address the funding portal's deficiencies under cause ten. For Fernandez, the Hearing Panel assessed, but declined to impose, the following sanctions: (1) a six-month suspension and \$10,000 fine under cause two; (3) three 30-calendar day suspensions under cause five, causes six through nine as an aggregate sanction, and cause ten; (3) a letter of caution for the remaining liability under cause three; and (4) the submission and creation of a supervisory plan to

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<sup>1</sup> These sanctions represent two of the three parts of the Hearing Panel's findings under cause three.

address the funding portal's deficiencies under cause ten. After an independent review of the record, including all causes of action and all of the Hearing Panel's findings and sanctions,<sup>2</sup> we modify the Hearing Panel's findings and sanctions.

I. The Regulatory Framework for Securities-Based Crowdfunding Transactions

Crowdfunding is a relatively new and evolving method of using the internet to raise capital. *Final Rule: Crowdfunding*, Exchange Act Release No. 76324, 2015 SEC LEXIS 5486, at \*2 (Oct. 30, 2015) ("*SEC Crowdfunding Final Rule*"). An entity or individual raising funds through crowdfunding typically seeks small individual contributions from a large number of people. *Id.* Individuals interested in a crowdfunding campaign – members of the “crowd” – typically share information about the project, cause, idea, or business with each other and use the information to decide whether to fund the campaign based on the collective “wisdom of the crowd.” *Id.*

A. Crowdfunding and Defining a “Security” Under the Securities Act of 1933 and Securities Exchange Act of 1934

Prior to 2012, crowdfunding generally did not involve sharing in profits raised through crowdfunding transactions because this type of profit-sharing typically triggered the registration requirements of the Securities Act of 1933 (“Securities Act”). *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*4. These registration requirements stemmed from the fact that crowdfunding transactions that incorporated profit-sharing typically fell within the definition of a security under the Securities Act and Securities Exchange Act of 1934 (“Exchange Act”). *See* Section 2(a)(1) of the Securities Act, 15 U.S.C. § 77b(a)(1) (2021) (defining security); Section 3(a)(10) of the Exchange Act, 15 U.S.C. § 78c(a)(10) (2021) (defining security); *Reves v. Ernst & Young*, 494 U.S. 56 (1990) (articulating a family resemblance test for notes that are not securities); *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) (explaining that an investment is a security under the investment contracts test of the Securities Act and Exchange Act if there is an investment of money in a common enterprise with a reasonable expectation to be derived from the managerial efforts of others).

The structure of crowdfunding transactions aside, the SEC notes that there are attributes specific to crowdfunding transactions that favor not subjecting them fully to the rigors of securities registration. The SEC, for example, explains that “registered offerings are not feasible for raising smaller amounts of capital, as is done in a typical crowdfunding transaction, because of the costs of conducting a registered offering and the resulting ongoing reporting obligations under the [Exchange Act] that may arise as a result of the offering.” *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*4-5. The SEC also observes that certain “purchaser qualification requirements for offering exemptions that permit general solicitation and general advertising[]

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<sup>2</sup> DreamFunded Marketplace and Fernandez appealed the Hearing Panel's decision. Enforcement filed a cross-appeal. DreamFunded Marketplace's and Fernandez's appeal focuses on the Hearing Panel's findings under cause one and cause ten and parts of the Hearing Panel's findings under cause three. Enforcement's appeal focuses on the parts of cause two that the Hearing Panel dismissed, in addition to the Hearing Panel's dismissal of the entirety of cause four. The novelty and importance of the issues presented, however, call for the de novo review of this entire case.

have made private placement exemptions generally unavailable for crowdfunding transactions, which are intended to involve a large number of investors and not be limited to investors that meet specific qualifications.” *Id.* at \*5. Finally, the SEC states that, under current regulations, an individual who operates a website to effect the purchase and sale of securities for the account of others are required to register with the SEC as a broker-dealer and comply with the laws and regulations applicable to broker-dealers. *Id.* at \*6. The SEC, however, notes that a “person that operates such a website only for the purchase of securities of startups and small businesses . . . may find it impractical in view of the limited nature of that person’s activities and business to register as a broker-dealer and operate under the full set of regulatory obligations that apply to broker-dealers.” *Id.* It is within this balance of regulatory oversight and investor protection, on the one hand, and capital formation and cost considerations, on the other hand, that Title III of the Jumpstart Our Business Startups Act of 2012 (“JOBS Act”), Pub. L. No. 112-106, 126 Stat. 306 (2012), emerges to provide a securities registration exemption for certain crowdfunding transactions. *Id.* at \*7.

B. Title III of the Jumpstart Our Business Startups Act of 2012 (JOBS Act)

Under the Securities Act, the offer and sale of securities must be registered unless an exemption from securities registration is available. *See* Section 5 of the Securities Act, 15 U.S.C. § 77e(a), (c) (2021). The JOBS Act adds Section 4(a)(6) to the Securities Act (“Crowdfunding Exemption”) to provide an exemption from registration for certain crowdfunding transactions. *See* Section 4(a)(6) of the Securities Act, 15 U.S.C. § 77d(a)(6) (2021). The Crowdfunding Exemption “help[s] provide startups and small businesses with capital by making relatively low dollar offerings of securities, featuring relatively low dollar investments by the ‘crowd,’ less costly.” *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*3. In this way, the Crowdfunding Exemption establishes a regulatory structure for startups and small businesses to raise capital through securities offerings using crowdfunding transactions. *Id.* at \*2.

The Crowdfunding Exemption operates in two ways – by allowing internet-based platforms, i.e., funding portals, to facilitate the offer and sale of securities-based crowdfunding transactions without securities registration and by allowing funding portals to offer and sell securities in crowdfunding transactions without registering with the SEC as broker-dealers. *Id.* As the SEC stresses, the Crowdfunding Exemption “alleviate[s] the funding gap and accompanying regulatory concerns faced by small businesses . . . by providing crowdfunding platforms a means by which to facilitate the offer and sale of securities without registering as brokers . . . [, and by providing] a framework for regulatory oversight to protect investors.” *Id.* at \*993-94. To that end, the Crowdfunding Exemption includes investor protection provisions, such as investment limits, required issuer disclosures, and the required use of regulated funding portals. *Id.* at \*3. In 2015, the SEC adopted SEC Regulation Crowdfunding to implement the crowdfunding provisions of the JOBS Act, which includes the Crowdfunding Exemption. Eligible issuers began raising capital using SEC Regulation Crowdfunding in May 2016.<sup>3</sup> *Id.* at \*1.

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<sup>3</sup> Ineligible issuers include foreign companies, companies that already are reporting companies under the Exchange Act, certain investment companies, companies that are disqualified under SEC Regulation Crowdfunding’s disqualification rules, companies that have failed to

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C. SEC Regulation Crowdfunding

SEC Regulation Crowdfunding has three specific components. First, SEC Regulation Crowdfunding provides the rules governing the offer and sale of securities under the Crowdfunding Exemption, including rules that limit the amounts that issuers can raise under the Crowdfunding Exemption and disclosures that issuers must provide to investors participating in crowdfunding transactions. *Id.* at \*1, 11. Second, SEC Regulation Crowdfunding conditionally exempts securities sold pursuant to the Crowdfunding Exemption from the registration requirements of Section 12(g) of the Exchange Act.<sup>4</sup> *Id.* Finally, SEC Regulation Crowdfunding establishes the framework for the regulation of registered funding portals that issuers are required to use as intermediaries in the offer and sale of securities in reliance on the Crowdfunding Exemption. *Id.* It is within the regulatory framework of the JOBS Act and SEC Regulation Crowdfunding that FINRA implemented funding portal rules to regulate the funding portals that act as intermediaries for securities-based crowdfunding transactions and to further the gatekeeper concepts found in the JOBS Act.

D. FINRA's Funding Portal Rules

In addition to Section 4(a)(6) of the Securities Act, 15 U.S.C. § 77d(a)(6) (2021), the JOBS Act also adds Section 4A to the Securities Act.<sup>5</sup> *See* Section 4A of the Securities Act, 15 U.S.C. § 77d-1 (2021). Section 4A of the Securities Act reinforces the importance of funding portals serving as gatekeepers in crowdfunding transactions. Under Section 4A(a)(5), for example, intermediaries in crowdfunding transactions must “take such measures to reduce the risk of fraud with respect to such transaction[s] . . . .” Section 4A(a)(5) of the Securities Act, 15 U.S.C. § 77d-1(a)(5) (2021). Similarly, under Section 4A(a)(1), each intermediary in a crowdfunding transaction must be registered with the SEC as either a broker-dealer or as a funding portal.<sup>6</sup> *See*

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comply with the annual reporting requirements under SEC Regulation Crowdfunding during the two years immediately preceding the filing of the offering statement, and companies that have no specific business plan or have indicated their business plan is to engage in a merger or acquisition with an unidentified company or companies. *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*12.

<sup>4</sup> Section 12(g) of the Exchange Act establishes the threshold at which an issuer is required to register a class of securities with the SEC. *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*8. The JOBS Act amended Section 12(g) to “exempt, conditionally or unconditionally, securities acquired pursuant to an offering made under [the Crowdfunding Exemption] from the provisions of this subsection.” 15 U.S.C. § 781(g)(6) (2021); *see SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*616-24.

<sup>5</sup> For purposes of this decision, we refer to Section 4(a)(6) and Section 4A of the Securities Act, collectively, as the Crowdfunding Exemption.

<sup>6</sup> Broker-dealers register with the SEC on the existing Form BD using FINRA's CRD system. *Registration of Funding Portals: A Small Entity Compliance Guide*, <https://www.sec.gov/divisions/marketreg/tmcompliance/fpregistrationguide.htm> (last visited Sept. 27,

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Section 4A(a)(1) of the Securities Act, 15 U.S.C. § 77d-1(a)(1)(A), (B) (2021); *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*14 (“One of the key investor protections . . . of the JOBS Act is the requirement that [SEC] Regulation Crowdfunding transactions take place through an SEC-registered intermediary, either a broker-dealer or a funding portal.”).

The JOBS Act directs intermediaries in securities-based crowdfunding transactions to register with a self-regulatory organization as defined in Section 3(a)(26) of the Exchange Act, 15 U.S.C. § 78c(a)(26). *See* Section 4A(a)(2) of the Securities Act, 15 U.S.C. § 77d-1(a)(2) (2021). Section 3(h)(1)(B) of the Exchange Act reinforces this prerequisite and mandates, as a condition of an exemption from broker-dealer registration, that funding portals become “member[s] of a national securities association registered [with the SEC] under [S]ection 15A” of the Exchange Act. 15 U.S.C. § 78c(h)(1)(B) (2021) (limited exemption for funding portals); *see* 15 U.S.C. § 78o-3 (2021) (registered securities associations); *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*289-90. Currently, FINRA is the only registered national securities association. *Id.* at \*290. As a national securities association, pursuant to Section 3(h)(2) of the Exchange Act, FINRA may “only examine for[,] and enforce against registered funding portals[,] rules that [it] has written specifically for registered funding portals.” *Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Amendment No. 1 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendment No. 1, to Adopt the Funding Portal Rules and Related Forms and Rule 4518 (“FINRA Crowdfunding Approval Order”)*, Exchange Act Release No. 76970, 2016 SEC LEXIS 262 at \*3-4 (Jan. 22, 2016). To that end, FINRA adopted and implemented its funding portal rules.

FINRA’s funding portal rules became effective on January 29, 2016. *FINRA Regulatory Notice 16-06 (“FINRA Crowdfunding Regulatory Notice”)*, 2016 FINRA LEXIS 6 at \*1 (Jan. 2016). The funding portal rules consist of a set of seven rules (Funding Portal Rules 100, 110, 200, 300, 800, 900 and 1200) and several related forms. *Id.* at \*4. FINRA’s funding portal rules “have been written specifically for funding portals and have been streamlined to reflect the limited scope of activity permitted by funding portals while also maintaining investor protection.” *Id.*

## II. Background and Procedural History

FINRA regulates approximately 60 funding portals. Between July 2016 and November 2017, the period relevant to the conduct in this case, DreamFunded Marketplace was one of them.

### A. The Respondents: DreamFunded Marketplace and Fernandez

In March 2016, Fernandez established DreamFunded Marketplace. DreamFunded Marketplace operated as a subsidiary of DreamFunded, Inc. (“Parent Company”). DreamFunded Marketplace applied for FINRA funding portal membership in May 2016. In July 2016, FINRA

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2021). Funding portals, however, are a new type of SEC-registrant. *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*289. Beginning in January 2016, funding portals registered with the SEC using a Form Funding Portal through the SEC’s Electronic Data Gathering, Analysis, and Retrieval (“EDGAR”) system. *Registration of Funding Portals: A Small Entity Compliance Guide*, <https://www.sec.gov/divisions/marketreg/tmcompliance/fpreistrationguide.htm> (last visited Sept. 27, 2021).

approved DreamFunded Marketplace’s application. DreamFunded Marketplace operated for about 15 months, withdrawing its SEC registration in October 2017. In November 2017, FINRA terminated DreamFunded Marketplace’s status as a funding portal member. When in operation, DreamFunded Marketplace was headquartered in San Francisco, California.

For the entirety of its FINRA funding portal membership, Fernandez served as DreamFunded Marketplace’s chief executive officer, chief financial officer, and chief compliance officer. Fernandez described himself as a “Silicon Valley angel investor, angel group founder, serial entrepreneur, and keynote speaker.”<sup>7</sup> When the hearing occurred in September 2018, Fernandez testified that he was then-focused on assisting a company in Singapore with an initial coin offering.

B. Other Relevant Entities

While DreamFunded Marketplace was a FINRA funding portal member, it served as the intermediary for 15 securities-based crowdfunded offerings through its online funding portal – DreamFunded.com. DreamFunded Marketplace’s handling of three of those 15 offerings (20 percent) is the subject of this case. The issuers for those three crowdfunded offerings were – Issuer A, Issuer B, and Issuer C.

Any issuer conducting an offering pursuant to SEC Regulation Crowdfunding must electronically file a Form C offering statement through the SEC’s EDGAR system and with the intermediary facilitating the offering, which, in this case, is DreamFunded Marketplace. *Regulation Crowdfunding: A Small Entity Compliance Guide for Issuers*, <https://www.sec.gov/info/smallbus/sec/rccomplianceguide-051316.htm> (last visited Sept. 27, 2021). The Form C includes certain issuer disclosures, including information about officers, directors, and owners of 20 percent or more of the issuer; a description of the issuer’s business and the use of proceeds from the offering; the price to the public of the securities or the method for determining the price; the target offering amount and the deadline to reach the target offering amount; whether the issuer will accept investments in excess of the target offering amount; certain related-party transactions; and a discussion of the issuer’s financial condition and financial statements. *Id.*

1. Issuer A

Issuer A filed the Form C with the SEC in October 2016, one month after the issuer’s date of organization.<sup>8</sup> Issuer A is a “social networking” company whose primary product, a social media application, allowed users to post content and facilitate live streaming across social media platforms simultaneously. Issuer A planned to offer 100,000 shares for a target amount of \$10,000 and maximum funding amount of \$100,000. Issuer A’s target closing date was in September 2017,

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<sup>7</sup> “An angel investor (also known as a private investor, seed investor or angel funder) is a high-net-worth individual who provides financial backing for small startups or entrepreneurs, typically in exchange for ownership equity in the company.” Definition of “angel investor,” <https://www.investopedia.com/terms/a/angelinvestor.asp> (last visited Sept. 27, 2021).

<sup>8</sup> Issuer A filed three amendments to the Form C, two in January 2017 and one in June 2017. See Part III.C.2.a.(3) (Issuer A’s First and Second Amendments to the Form C).

but the offering closed three months early, in June 2017. DreamFunded Marketplace disbursed the offering proceeds to Issuer A, and removed Issuer A's offering from the funding portal, in April 2017.

2. Issuer B

Issuer B filed the Form C in January 2017, nine months after its date of organization. Issuer B provided "a unique video-on-demand network and distribution platform serving the emotional wellness industry." Issuer B planned to offer 10,000 shares for a target amount of \$10,000 and maximum funding amount of \$100,000. Issuer B's target closing date was in June 2017. Issuer B's offering closed early, after Issuer B raised \$10,500, a little more than the target amount. DreamFunded Marketplace disbursed the offering proceeds to Issuer B, and removed Issuer B's offering from the funding portal, in April 2017.

3. Issuer C

Issuer C filed the Form C in January 2017, nine months after its date of organization.<sup>9</sup> Issuer C invented and marketed "innovative firefighter equipment." Issuer C planned to offer 10,000 shares for a target amount of \$10,000 and maximum funding amount of \$100,000. Issuer C's target closing date was in September 2017. Issuer C's offering did not reach its target amount, and, in April 2017, DreamFunded Marketplace removed Issuer C's offering from the funding portal. Issuer C filed an offering statement withdrawal with the SEC in June 2017.

C. Procedural History

This disciplinary proceeding followed investigations by FINRA's Membership Application Program ("MAP") Group and Office of Fraud Detection and Market Intelligence ("OFDMI"). In February 2018, Enforcement filed a 10-count complaint against DreamFunded Marketplace and Fernandez. An eight-day hearing took place in Washington, District of Columbia, in September 2018 and November 2018, respectively. Four individuals testified at the hearing – Fernandez, former Enforcement director – Joshua Doolittle, MAP Group examiner – Stephanie Volkell, and OFDMI investigator – Patrick Devero.

The Hearing Panel issued a decision in June 2019. The Hearing Panel generally found that DreamFunded Marketplace and Fernandez had engaged in the violations alleged in the complaint. The Hearing Panel, however, dismissed Enforcement's allegations in three specific areas. First, the Hearing Panel dismissed the entirety of Enforcement's allegations under cause four, which alleged that DreamFunded Marketplace and Fernandez had a reasonable basis for believing that the issuers had complied with the Securities Act. Second, the Hearing Panel dismissed parts of Enforcement's allegations under cause two, which alleged that DreamFunded Marketplace and Fernandez improperly continued to provide issuers with access to the funding portal when the

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<sup>9</sup> The record does not contain a copy of Issuer C's Form C, so we obtained Issuer C's Form C from the SEC's EDGAR system and took official notice of the filing. *See* FINRA Rule 9145(b) (explaining that FINRA adjudicators "may take official notice of such matters as might be judicially noticed by a court, or of other matters within the specialized knowledge of FINRA as an expert body.").

issuers' offerings presented the potential for fraud and raised investor protection concerns. Third, the Hearing Panel dismissed parts of Enforcement's allegations under cause six, which alleged that DreamFunded Marketplace and Fernandez failed to provide investors with notice of material changes to the terms of an offering. The Hearing Panel expelled DreamFunded Marketplace from funding portal membership, and barred Fernandez from associating with any FINRA funding portal member in any capacity, for failing to respond fully and completely to FINRA's request for information and documents; and making false, exaggerated, unwarranted, promissory, and misleading statements about Fernandez's investment in an issuer and the funding portal's due diligence on issuers. The Hearing Panel also assessed, but declined to impose, a variety of other sanctions on DreamFunded Marketplace and Fernandez for their misconduct. DreamFunded Marketplace's and Fernandez's appeal, and Enforcement's cross-appeal, timely followed the issuance of the Hearing Panel's decision.

### III. Discussion

At this juncture, we turn to the 10 specific causes of action that are the subject of this case. As we do so, the key principle that guides our analysis is balance – a balance between investor protection and capital formation, as well as a balance between regulatory oversight and cost considerations, which is basis of crowdfunding regulatory framework. It is clear that the JOBS Act, SEC Regulation Crowdfunding, and FINRA's funding portal rules, as a thoroughly tiered regulatory framework, each sought to capture the balance between protecting the investing public and the securities markets, while supporting capital-raising efforts and moderating the expenses associated with the execution of securities-based crowdfunding transactions. With the principle of balance at the forefront of this decision, we reviewed the findings of the Hearing Panel's decision and conclude that, for the most part, the Hearing Panel captured the essence of that balance. There are, however, several areas where we deviate from the Hearing Panel's decision and modify their legal conclusions. Where we do so, we provide a clear explanation for the deviation.

#### A. The Hearing Panel's Assessment of Fernandez's Lack of Credibility

Fernandez's credibility is central to this case, and, the Hearing Panel's findings concerning Fernandez's credibility, or, rather, the lack thereof, is decisive in the liability findings that are to follow in this decision. For that reason, we begin with a brief summary of the Hearing Panel's determinations about Fernandez's credibility, noting that the Hearing Panel meticulously explained the bases of its credibility findings in its decision.

To summarize, the Hearing Panel found that "much of Fernandez's . . . testimony was not truthful." The Hearing Panel described Fernandez's testimony using terms such as "evasive," "vague," and "inconsistent." The Hearing Panel explained that Fernandez's testimony "was not credible, lacked corroboration, or was contradicted by other more credible [documentary] evidence." The Hearing Panel emphasized that point, asserting that Fernandez "avoid[ed] answering questions, even simple questions that would appear to be uncontroversial." In the end, the Hearing Panel found that "Fernandez was vague and evasive to the point of absurdity." On appeal, we have no basis to overturn the Hearing Panel's thorough, well-informed, and well-founded findings concerning Fernandez's credibility. *See William H. Murphy & Co.*, Exchange

Act Release No. 90759, 2020 SEC LEXIS 5218, at \*28-29 (Dec. 21, 2020) (“[w]e generally defer to a FINRA Hearing Panel’s credibility determinations in the absence of substantial evidence to support overturning them”).

B. Cause One: DreamFunded Marketplace and Fernandez Failed to Respond Fully and Completely to FINRA’s Information and Document Request

Under cause one, the Hearing Panel found that DreamFunded Marketplace and Fernandez violated FINRA Funding Portal Rules 800(a) and 200(a) and FINRA Rule 8210 because they failed to respond fully and completely to FINRA’s request for information and documents. Specifically, the Hearing Panel determined that: (1) FINRA had authority to issue the FINRA Rule 8210 request to DreamFunded Marketplace and Fernandez; (2) DreamFunded Marketplace and Fernandez failed to respond fully and completely to FINRA’s request for information and documents; and (3) DreamFunded Marketplace’s and Fernandez’s explanations for their noncompliance with the information and document request did not negate their liability for the violation. As explained below, we affirm each of these findings.

1. Rules for Cause One

The rules related to cause one are FINRA Funding Portal Rules 800(a) and 200(a) and FINRA Rule 8210.

a. FINRA Funding Portal Rule 800(a)

FINRA Funding Portal Rule 800 covers investigations and sanctions for funding portals. Subsection (a) of the rule, FINRA Funding Portal Rule 800(a), applies the FINRA Rule 8000 Series to funding portals and states that “all funding portal members shall be subject to the FINRA Rule 8000 Series, unless the context requires otherwise . . . .”<sup>10</sup>

b. FINRA Rule 8210

The FINRA Rule 8000 Series covers investigations and sanctions for broker-dealers. FINRA Rule 8210 falls within the FINRA Rule 8000 Series and applies to FINRA funding portal members by operation of FINRA Funding Portal Rule 800(a). *See* FINRA Funding Portal Rule 800(a); *FINRA Crowdfunding Regulatory Notice 16-06*, 2016 FINRA LEXIS 6 at \*5 n.11 (“Under Funding Portal Rule 800, funding portal members are subject to FINRA Rule 8210, which requires, in part, that a member must provide information and testimony and must permit an inspection and copying of books, records or accounts pursuant to the rule.”).

As applied here, FINRA Rule 8210 provides for a funding portal member’s provision of information and testimony to FINRA, and FINRA’s inspection and copying of a funding portal member’s books and records. FINRA Rule 8210(a)(1) requires “a [funding portal] member, person associated with a [funding portal] member, or any other person subject to FINRA’s jurisdiction to provide information orally, in writing, or electronically (if the requested information

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<sup>10</sup> FINRA Rule 800(a) states that funding portal members are not subject to FINRA Rules 8110, 8211, 8213 and 8312.

is, or is required to be, maintained in electronic form) . . . with respect to any matter involved in the investigation, complaint, examination, or proceeding . . . .” FINRA Rule 8210(a)(2) adds to this requirement and authorizes FINRA to “inspect and copy the books, records, and accounts of such [funding portal] member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding that is in such [funding portal] member’s or person’s possession, custody or control.”

A violation of FINRA Rule 8210 occurs when a funding portal member or its associated person fails to provide full and prompt cooperation to FINRA in response to a request for information and documents. *See Brian L. Gibbons*, 52 S.E.C. 791, 794 n.11 (1996), *aff’d*, 112 F.3d 516 (9th Cir. 1997) (table). “[A]ssociated persons may not ignore [FINRA] inquiries; nor take it upon themselves to determine whether information is material to an . . . investigation of their conduct.” *CMG Institutional Trading LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at \*21 (Jan. 30, 2009) (internal quotation marks and citations omitted). FINRA funding portal members and their associated persons have an unequivocal and unqualified obligation to respond fully to FINRA’s inquiries. *See Dep’t of Enforcement v. Asensio Brokerage Servs., Inc.*, Complaint No. CAF030067, 2006 NASD Discip. LEXIS 20, at \*44 (NASD NAC July 28, 2006), *aff’d*, Exchange Act Release No. 62315, 2010 SEC LEXIS 2014 (June 17, 2010). A funding portal member’s or associated person’s failure to comply with FINRA’s requests for information and documents “frustrates [FINRA’s] ability to detect misconduct, . . . threatens investors and markets,” violates FINRA Rule 8210, and jeopardizes the important policies that underlie the rule. *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at \*13 (Apr. 11, 2008), *aff’d*, 566 F.3d 1172 (D.C. Cir. 2009); *see Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 1350, at \*12-19 (Apr. 17, 2014).

c. FINRA Funding Portal Rule 200(a)

DreamFunded Marketplace’s and Fernandez’s conduct in handling FINRA’s information and document request involves not only FINRA Funding Portal Rule 800(a) and FINRA Rule 8210. It also implicates FINRA Funding Portal Rule 200(a).

FINRA Funding Portal 200(a), which models FINRA Rule 2010, is an ethical standards rule, as that rule applies to funding portals. FINRA Funding Portal Rule 200(a) states that “[a] funding portal member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.”<sup>11</sup> As we have found numerous times in the broker-dealer context, we find that a violation of any FINRA funding portal rule, or FINRA rule more generally,<sup>12</sup> violates FINRA Funding Portal Rule 200(a). *Cf. Wedbush Sec., Inc.*, Exchange

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<sup>11</sup> FINRA Rule 2010 states that “a [broker-dealer] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.”

<sup>12</sup> FINRA Funding Portal Rule 200(a) applies to persons associated with funding portal members by operation of FINRA Funding Portal Rule 100(a), just as FINRA Rule 2010 applies to persons associated with broker-dealers by operation of FINRA Rule 140(a). *See* FINRA Funding Portal Rule 100(a) (“Persons associated with a funding portal member shall have the same duties

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Act Release No. 78568, 2016 SEC LEXIS 2794, at \*15 n.11 (Aug. 12, 2016) (stating that “a violation of any FINRA rule also constitutes a violation of FINRA Rule 2010”); *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, \*57 n.49 (Sept. 24, 2015) (explaining that a violation of FINRA Rule 8210 constitutes a violation of FINRA’s ethical standards rule, FINRA Rule 2010).<sup>13</sup>

## 2. Facts for Cause One

The MAP Group reviews funding portal applications for FINRA membership, handles surveillance after funding portals become FINRA members, conducts first-year cycle examinations of funding portals, and investigates funding portals in cause examinations. During the new membership application process, the MAP Group reviews the funding portal’s proposed procedures to ensure that they address the SEC regulation crowdfunding rules and FINRA funding portal rules. In the examination process, the MAP Group reviews the funding portal member’s procedures, as implemented, and provides comments on areas of deficiency to the funding portal member, as needed. During a cycle examination, the MAP Group examines the funding portal member’s overall operation and determines whether its operation complies with the SEC regulation crowdfunding rules and FINRA funding portal rules. In a cause examination, the MAP Group focuses on narrower issues involving specific rule violations. Stephanie Volkell, the MAP Group examiner who testified at the hearing, worked with DreamFunded Marketplace during the new membership application process and conducted surveillance as the funding portal navigated

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and obligations as a funding portal member under the Funding Portal Rules.”); FINRA Rule 140(a) (“The Rules shall apply to all [broker-dealer] members and persons associated with a [broker-dealer] member. Persons associated with a [broker-dealer] member shall have the same duties and obligations as a [broker-dealer] member under the Rules.”); *see also Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629 at \*1, n.1 (Sept. 3, 2015) (explaining that FINRA Rule 140(a) makes FINRA Rule 2010 applicable to associated persons).

<sup>13</sup> The Hearing Panel found that “[b]ecause [FINRA] Funding Portal Rule 200(a) contains language identical to [FINRA] Rule 2010, we construe [FINRA Funding Portal Rule 200(a)] in the same manner as FINRA Rule 2010 . . . . [and,] under [FINRA] Funding Portal Rule 200(a)[,] FINRA has the same authority over the business-related conduct of funding portal members and their associated persons as it has over broker-dealers and their associated persons under FINRA Rule 2010.” But none of the causes of action at issue in this case involves a stand-alone violation of FINRA Funding Portal Rule 200(a); rather, each FINRA Funding Portal Rule 200(a) violation is based on the violation of an SEC regulation crowdfunding rule or another FINRA funding portal rule. Consequently, we do not affirm this statement in the Hearing Panel’s decision.

its FINRA membership.<sup>14</sup> The MAP Group opened a cause examination when Volkell saw a video clip of Fernandez making an offer to invest in Issuer C in October 2016.<sup>15</sup>

While the MAP Group focuses on funding portals, and their lawful operation, OFDMI focuses on the securities-based crowdfunded offerings that funding portals facilitate. OFDMI uses the SEC's EDGAR system to assist with its surveillance and receives an automated link to new crowdfunded filings on EDGAR on a daily basis. By the time Volkell and the MAP Group initiated DreamFunded Marketplace's cause examination in October 2016, OFDMI had already communicated with DreamFunded Marketplace and Fernandez about a potential problem with one of its offerings. Patrick Devero, the OFDMI investigator who testified at the hearing, reviewed DreamFunded Marketplace's offerings, and, on behalf of OFDMI, communicated with DreamFunded Marketplace and Fernandez about them. Devero's involvement with DreamFunded Marketplace and Fernandez began in August 2016.

In August 2016, Devero noticed that an individual associated with DreamFunded Marketplace was the sole owner of an issuer conducting a crowdfunded offering on the funding portal. Devero testified that this concerned him because the DreamFunded Marketplace association and issuer ownership may have violated the prohibition on an intermediary's or intermediary's officer's financial interest in an issuer. Devero spoke to the individual who informed him (Devero) that he was no longer with the DreamFunded Marketplace and that the offering never went live. Devero confirmed that information with Fernandez and closed the matter.

Devero continued his surveillance of DreamFunded Marketplace's offerings throughout late-2016 and into early-2017. Devero testified that, during this period, DreamFunded

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<sup>14</sup> For example, during DreamFunded Marketplace's new membership application process, Volkell advised Fernandez of aspects of DreamFunded Marketplace's website that were inconsistent with regulatory requirements, and she and Fernandez worked together to make the website compliant. When Volkell conducted DreamFunded Marketplace's surveillance, she reviewed the funding portal's website, and related social media, for exaggerated, promotional, or misleading language.

<sup>15</sup> Volkell testified that the video clip raised concerns for her because Fernandez's offer to invest in Issuer C may have constituted an intermediary's or intermediary's officer's financial interest in an issuer, which may violate Section 4A(a)(11) of the Securities Act and SEC Regulation Crowdfunding Rule 300(b). *See* Section 4A(a)(11) of the Securities Act, 15 U.S.C. § 77d-1(a)(11) (2021) (explaining that intermediaries for securities-based crowdfunding transactions must "prohibit its directors, officers, or partners (or any person occupying a similar status or performing a similar function) from having any financial interest in an issuer using its services . . . ."); SEC Regulation Crowdfunding Rule 300(b), 17 C.F.R. § 227.300(b) (2021) (prohibiting the directors, officers, and partners of an intermediary from having a financial interest in an issuer and limiting an intermediary's ability to have a financial interest in an issuer to certain circumstances). We discuss the video clip and its importance under cause three in Part III.D. (DreamFunded Marketplace and Fernandez Made False, Exaggerated, Unwarranted, Promissory, and Misleading Statements About an Investment in Issuer C, Their Issuer Due Diligence, and Certain Real Estate Investments).

Marketplace's website became more active, and that DreamFunded Marketplace posted more than 12 crowdfunded offerings between October 2016 and February 2017. Devero testified that OFDMI had concerns about the DreamFunded Marketplace's offerings, which focused on the offerings' high valuations, unsupported and high revenue projections, and inconsistent statements within issuers' Form C filings. OFDMI monitored the offerings, but did not take additional steps because none of the offerings had closed by February 2017.

Devero continued his surveillance of DreamFunded Marketplace throughout March, April, and May 2017. When Devero went to DreamFunded Marketplace's website in June 2017, however, he noted that the funding portal's website had changed significantly. DreamFunded Marketplace had seemingly transitioned its business from serving as an intermediary for securities-based crowdfunded offerings to promoting and facilitating real estate investments. Devero testified that DreamFunded Marketplace's website no longer showed any crowdfunded offerings; rather, the website contained pictures of single-family homes with captions claiming that deals on the homes had yielded 10 percent returns, and that such returns were favorable when compared to certificates of deposit. These real estate investments had no relation to the crowdfunded offerings that had been displayed on DreamFunded Marketplace's website.

When OFDMI staff went to the SEC's EDGAR system to attempt to determine the status of the crowdfunded offerings that had appeared on DreamFunded Marketplace's website, the issuers' Forms C suggested that the offerings were live and ongoing. But, without any current information from DreamFunded Marketplace's website, Devero and the OFDMI staff could not be certain. Devero testified that removing the crowdfunded offerings from DreamFunded Marketplace's website made it impossible for OFDMI staff to monitor them. Devero explained that OFDMI staff could not see whether any crowdfunded offerings had successfully closed, could not determine how many investors had participated in an offering, and could not ascertain how much an offering had raised. In July 2017, Devero sent DreamFunded Marketplace and Fernandez the first FINRA Rule 8210 request for information and documents to determine the status of the offerings that DreamFunded Marketplace had facilitated and to find out why the offerings had been removed from the website.<sup>16</sup>

a. The First FINRA Rule 8210 Request for Information and Documents – July 2017

On July 7, 2017, Devero sent Fernandez the first letter requesting information and documents pursuant to FINRA Rule 8210. Devero informed Fernandez that OFDMI was conducting a review of the crowdfunded offerings for which DreamFunded Marketplace had acted as intermediary.

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<sup>16</sup> The MAP Group's cause examination of DreamFunded Marketplace continued from October 2016 to July 2017. During that time, Volkell sent a series of inquiries to DreamFunded Marketplace and Fernandez to determine whether an SEC regulation crowdfunding rule, or FINRA funding portal rule, had been violated. Volkell's inquiries were not made pursuant to FINRA Rule 8210. In July 2017, the staff of the MAP Group and OFDMI met to discuss their converging investigations of DreamFunded Marketplace and the funding portal's offerings. From that point forward, Devero and OFDMI managed FINRA's investigation. The MAP Group closed its cause examination with a referral to Enforcement.

The first request for information and documents focused on Issuer A and Issuer B. The request asked for a copy of DreamFunded Marketplace's due diligence file for each issuer, a detailed explanation of the steps taken to reduce the risk of fraud in the offerings, copies of documents relating to the issuers and their offerings, and a list of investors who had participated in the offerings with the amount each investor contributed. The request also asked DreamFunded Marketplace and Fernandez to submit copies of all notices sent to investors in connection with Issuer A's amendments to the Form C and to provide a detailed explanation of the business rationale for the change in the minimum target amount for Issuer A's offering. Finally, the request asked DreamFunded Marketplace and Fernandez to provide the current status of Issuer A's and Issuer B's offerings, the date the offerings were removed from DreamFunded Marketplace's website, and an explanation for their removal.

On July 19, 2017, MT, DreamFunded Marketplace's and Fernandez's attorney, provided a written response to the request. MT stated that Issuer A's and Issuer B's offerings "were ended and removed on or around April 30, 2017." MT explained that Issuer A had "terminated and removed its offering at the request of [DreamFunded Marketplace] based upon its failure to provide the required financial information." MT also asserted that DreamFunded Marketplace had "terminated and removed [Issuer B's] offering . . . at the direction of [Issuer B] because the minimum [target] amount had already been reached and investor activity was lacking." MT's representations about the April 2017 closing of Issuer A's and Issuer B's offerings raised concerns for OFDMI staff, primarily, because the representations suggested that Issuer A's and Issuer B's offerings terminated earlier than its scheduled closing dates.<sup>17</sup> Issuer A's offering was scheduled to close in September 2017, while Issuer B's offering was scheduled to close in June 2017.<sup>18</sup>

MT's response to OFDMI's information and document request also raised other concerns. For example, in response to questions about DreamFunded Marketplace's and Fernandez's due diligence on Issuer A, DreamFunded Marketplace and Fernandez produced a company profile for Issuer A with a copyright date in 2017. But the copyright date on the company profile was one year after Issuer A filed the Form C to initiate its offering on DreamFunded Marketplace's website. Similarly, in response to questions about the due diligence that DreamFunded Marketplace and Fernandez conducted on Issuer B, they provided a screenshot of a profile of Issuer B's founder and chief executive officer. The screenshot raised concerns because it was

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<sup>17</sup> In this case, the earlier closing of Issuer A's and Issuer B's offerings meant that DreamFunded Marketplace and Fernandez disbursed the proceeds of Issuer A's and Issuer B's offerings to them earlier than scheduled. The importance of these early offering closings, and early offering proceed disbursements, are discussed under cause two in Part III.C. (Cause Two: DreamFunded Marketplace and Fernandez Failed to Deny Issuer A's Access to the Funding Portal), under cause six in Part III.G.1. (DreamFunded Marketplace and Fernandez Failed to Provide Investors with a Material Change Notice for Issuer A's Offering), and under cause seven in Part III.G.2. (DreamFunded Marketplace and Fernandez Failed to Provide Investors with Early Closing Notices for Issuer A's and Issuer B's Offerings).

<sup>18</sup> MT's representations about Issuer A's and Issuer B's closing date also raised concerns for OFDMI staff because it was inaccurate. MT stated that Issuer A's and Issuer B's offerings closed on April 30, 2017, but Issuer A's and Issuer B's offerings closed on June 26, 2017 and April 14, 2017, respectively.

dated July 11, 2017, three months after Issuer B's offering on DreamFunded Marketplace's website closed and eight days before DreamFunded Marketplace and Fernandez provided their response to OFDMI staff. Devero testified that DreamFunded Marketplace's and Fernandez's responses concerning their due diligence on issuers suggested that they did not conduct issuer due diligence prior to posting the offerings on DreamFunded Marketplace's website, and that they were belatedly cobbling together issuer due diligence in response to OFDMI staff's request for DreamFunded Marketplace's due diligence files.

b. The Second FINRA Rule 8210 Request for Information and Documents – Early-August 2017

On August 1, 2017, Devero sent DreamFunded Marketplace and Fernandez a second request for information and documents pursuant to FINRA Rule 8210. The second request required DreamFunded Marketplace and Fernandez to produce additional documents for Issuer A and Issuer B and their offerings, and it sought information and documents related to other issuer offerings posted on DreamFunded Marketplace's website, including Issuer C. MT responded on August 23, 2017. But MT's responses, once again, raised concerns for OFDMI staff.

For example, OFDMI staff requested copies of the notices that DreamFunded Marketplace and Fernandez sent to investors in connection with the early closing of Issuer A's and Issuer B's offerings. MT responded that DreamFunded Marketplace had no records of early closing notices sent to investors. Problematically, MT's response contradicted an earlier letter that he had sent to OFDMI staff, in which he represented that DreamFunded Marketplace and Fernandez had emailed the notices to investors. The August 2017 response that MT provided to OFDMI staff did not address the contradiction in MT's responses concerning the early closing notices.<sup>19</sup>

OFDMI staff also requested copies of investment cancellation notices, investment confirmation notices, and material change notices that DreamFunded Marketplace and Fernandez sent to Issuer A's and Issuer B's investors. DreamFunded Marketplace and Fernandez supplied sample responsive documents for two of the three categories (investment cancellation and confirmation notices), but the documents that DreamFunded Marketplace and Fernandez provided raised additional concerns for OFDMI staff. The sample investment cancellation notices properly reflected DreamFunded Marketplace's receipt of investor funds, but they did not contain the required language to advise investors of their inability to cancel their investments within 48 hours of an offering's scheduled closing.<sup>20</sup> The sample investment confirmation notices properly

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<sup>19</sup> During the course of its investigation, OFDMI staff never received copies of early closing notices for offerings posted on DreamFunded Marketplace's website. DreamFunded Marketplace's and Fernandez's failure to provide investors with the early closing notices is discussed under cause seven in Part III.G.2. (DreamFunded Marketplace and Fernandez Failed to Provide Investors with Early Closing Notices for Issuer A's and Issuer B's Offerings).

<sup>20</sup> See 17 C.F.R. § 227.201(j)(1) (2021) (explaining that issuers of securities-based crowdfunded offerings must file with the SEC, and provide to investors and intermediaries, disclosures that describe the process for the completion of a transactions or the canceling of an

[Footnote continued on next page]

confirmed the offering's scheduled closing date and the amount of the investors' investments, but they did not inform the investors of the number of shares that they had purchased, the price of those securities, or how much the offering had raised in total.<sup>21</sup> For the material change notices, MT only stated that "[t]he notices of material change were not provided by [DreamFunded Marketplace]."<sup>22</sup>

c. The Third FINRA Rule 8210 Request for Information and Documents – Late-August 2017

On August 30, 2017, Devero sent DreamFunded Marketplace, Fernandez, and MT the third request for information and documents pursuant to FINRA Rule 8210. On September 28, 2017, Fernandez responded by email. Fernandez stated that he was "working on the SEC form to withdraw the FINRA membership as a registered funding portal. Startup funding did not work for us . . . . I am understaffed and underfunded, the model has not worked for us." The next day, however, MT emailed Devero and stated that Fernandez informed him that he (Fernandez)

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investment "until 48 hours prior to the deadline identified in the issuer's offering materials"); Updated Investor Bulletin: Crowdfunding for Investors, [https://www.sec.gov/oiea/investor-alerts-bulletins/ib\\_crowdfunding-.html](https://www.sec.gov/oiea/investor-alerts-bulletins/ib_crowdfunding-.html) (last visited Sept. 27, 2021) ("You have up to 48 hours prior to the end of the offer period to change your mind and cancel your investment commitment for any reason. Once the offering period is within 48 hours of ending, you will not be able to cancel for any reason even if you make your commitment during this period. However, if the company makes a material change to the offering terms or other information disclosed to you, you will be given five business days to reconfirm your investment commitment."). The adequacy of the investment cancellation notices that DreamFunded Marketplace and Fernandez provided to investors is discussed under cause eight in Part III.G.3. (DreamFunded Marketplace and Fernandez Failed to Provide Issuer A's and Issuer B's Investors with Investment Cancellation Notices).

<sup>21</sup> See 17 C.F.R. §227.303(f)(1) (2021) (listing the required disclosures for trade confirmations that intermediaries provide to investors "at or before the completion of a transaction in a" securities-based crowdfunded offering). The adequacy of the investment confirmation notices that DreamFunded Marketplace and Fernandez provided to investors is discussed under cause nine in Part III.G.4. (DreamFunded Marketplace and Fernandez Failed to Provide Issuer A's and Issuer B's Investors with Investment Confirmation Notices).

<sup>22</sup> Issuer A filed three Form C amendments with the SEC in January 2017 and June 2017, respectively. OFDMI staff asked DreamFunded Marketplace and Fernandez to produce copies of any material change notices sent to investors in connection with the filings. See 17 C.F.R. §227.304(c)(1) (2021) (explaining that investors have five business days to cancel or reconfirm investments when the offering terms has material changes). The material change notices are discussed under cause six in Part III.G.1. (DreamFunded Marketplace and Fernandez Failed to Provide Investors with a Material Change Notice for Issuer A's Offering).

intended to fully cooperate with FINRA's investigation, and that he (Fernandez) would provide additional documents within a couple of days.<sup>23</sup>

d. FINRA's Request for Fernandez's On-the-Record Testimony in October 2017

On September 11, 2017, FINRA staff sent Fernandez a request for on-the-record testimony made pursuant to FINRA Rule 8210.<sup>24</sup> FINRA staff took Fernandez's sworn testimony on October 20, 2017.

Although DreamFunded Marketplace's and Fernandez's attorney, MT, had been corresponding with FINRA staff through September 2017, Fernandez appeared for his on-the-record testimony without counsel. When FINRA staff asked, "are you represented by counsel?" Fernandez replied, "[n]ot today." When FINRA staff asked Fernandez if he "understand[s] that [he] ha[s] the right to be represented by an attorney?" Fernandez replied, "I do." And when FINRA staff asked Fernandez if he was "willing to proceed without counsel?" Fernandez replied, "I believe so. I don't know what the line of questioning is, but sure." With that, Fernandez's on-the-record testimony began.

Fernandez's on-the-record testimony reinforced certain areas of concern for FINRA staff. First, the testimony reiterated FINRA staff's concerns about the source of DreamFunded Marketplace's start-up funding, and how those funds had been spent. Fernandez testified that he had raised about \$1 million from "30 plus" investors to start DreamFunded Marketplace. But he noted that the investments may have flowed into, or through, the Parent Company, and that all but \$100 of the investments had been spent on DreamFunded Marketplace's "[o]perations, marketing, [and] legal." When FINRA staff asked Fernandez how the \$1 million in investments had been allocated among the three categories, Fernandez did not "have the exact numbers" with him, but stated that about \$50,000 went toward legal, about \$300,000 to marketing, "and the rest in operations." When FINRA staff asked whether "the rest in operations" equaled about \$650,000, Fernandez replied, "[s]ure."

Second, Fernandez's testimony raised concerns about the accounting and recording of the \$1 million investment. When FINRA staff asked Fernandez about the financial records prepared to reflect how the investments had been spent, he replied that he was preparing a "spreadsheet going back looking at where . . . it was spent . . ." He emphasized this point noting that he did "something" "for every year." But when FINRA staff asked Fernandez to identify the sources for the numbers for the annual spreadsheets, Fernandez identified an accounting software, bank statements, and "memory." Fernandez also noted that he paid independent contractors with cash, made payments pursuant to "verbal agreements," not written contracts, paid his wife and daughter

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<sup>23</sup> The record does not contain a copy of Devero's third request for information and documents. But it does contain Devero's email transmitting the request and Fernandez's and MT's emailed responses.

<sup>24</sup> The record does not contain a copy of FINRA's request for Fernandez's on-the-record testimony, but a transcript of the testimony is in the record.

for social media and online marketing work, and contributed his own capital to DreamFunded Marketplace, but “didn’t keep track of it.”<sup>25</sup>

Finally, Fernandez’s testimony raised concerns because he had indicated that he intended to engage in additional capital-raising soon. Although Fernandez testified that DreamFunded Marketplace was “out of business” when the on-the-record testimony occurred in October 2017, he also noted that he intended to utilize DreamFunded Marketplace as a “brand name” to “engage with a broker/dealer [to] focus on accredited investors co-investing . . . with other notable investors in [Silicon] Valley.” To execute this plan, Fernandez testified that he informed some of his investors that he needed another \$2 million in investments to “continue to build this business out.” He, however, testified that he did not inform these investors that DreamFunded Marketplace had ceased operating as a crowdfunding portal, was in the process of withdrawing from SEC and FINRA funding portal membership, and was in poor financial condition with only \$100 of earlier-invested funds remaining. In the middle of this set of questions and responses, FINRA staff paused Fernandez’s testimony to inform him that they would be requesting “the documents you have that show the accounting for how the money raised for [DreamFunded Marketplace and the Parent Company] has been spent, . . . [the spreadsheets] you created to do the accounting[,] . . . [b]asically any records you have in your possession that show how that money was spent . . . .”

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<sup>25</sup> DreamFunded Marketplace applied for FINRA funding portal membership in May 2016. FINRA approved the application in July 2016. As part of the application process, the MAP Group asked DreamFunded Marketplace and Fernandez to respond to several questions, including questions about how DreamFunded Marketplace and the Parent Company were funded. The MAP Group also asked DreamFunded Marketplace and Fernandez to provide documents related to the funding. DreamFunded Marketplace and Fernandez responded in June 2016. In response to the MAP Group’s questions about DreamFunded Marketplace’s and the Parent Company’s funding, DreamFunded Marketplace and Fernandez provided a three-bullet-point narrative statement and attached a type-written document titled “Source of Funds Reconciliation.” DreamFunded Marketplace’s and Fernandez’s Source of Funds Reconciliation and narrative statement to the MAP Group are important for three reasons. First, they demonstrate that FINRA staff’s concerns about the funding of DreamFunded Marketplace and the Parent Company had been an ongoing issue from the funding portal’s early days as a FINRA member. Second, they demonstrate that a new issue had emerged from Fernandez’s on-the-record testimony, which was how Fernandez had spent, and accounted for, the funds invested to start DreamFunded Marketplace. And third, the Hearing Panel’s decision focuses on investments of \$878,000 in DreamFunded Marketplace and the Parent Company, as opposed to the \$1 million that Fernandez cites in his on-the-record testimony. That figure, \$878,000, comes from the Source of Funds Reconciliation and narrative statement that DreamFunded Marketplace and Fernandez provided to the MAP Group as part of the application process in June 2016. We, like the Hearing Panel, favor the reliability of the documentary evidence in the record, as opposed to Fernandez’s testimony, and, from this point forward, when we discuss FINRA’s inquiry into the source funding of DreamFunded Marketplace and the Parent Company, we will point to the \$878,000 documented in the record, not the \$1 million from Fernandez’s on-the-record testimony.

e. The Fourth FINRA Rule 8210 Request for Information, Documents, and Testimony – October 2017

On October 24, 2017, Devero sent the request for information and documents discussed during Fernandez’s on-the-record testimony. Devero made the request pursuant to FINRA Rule 8210 and directed it to DreamFunded Marketplace, Fernandez, and their then-attorney, MT. This request is the subject of Enforcement’s complaint, and the Hearing Panel’s findings, under cause one.

The fourth request asked DreamFunded Marketplace and Fernandez to provide information and documents in 11 specified categories for a specified “review period” between January 2014 and October 2017. The requested information and documents included:

- Request No. 3. Monthly account statements for all bank accounts of DreamFunded Marketplace, the Parent Company, and Fernandez during the review period; and
- Request No. 8. All accounting or bookkeeping records maintained by DreamFunded Marketplace and the Parent Company during the review period.<sup>26</sup>

The deadline for DreamFunded Marketplace and Fernandez to respond was November 7, 2017.

(1) The First Postponement

In early-November 2017, FINRA staff spoke to DreamFunded Marketplace’s and Fernandez’s attorney, MT, about the concerns that caused the staff to issue the fourth request for information and documents in the first place. Among other topics, FINRA staff and MT discussed the possibility of settling certain claims that Enforcement had contemplated bringing against DreamFunded Marketplace and Fernandez. Because the settlement discussions were ongoing throughout November 2017, Enforcement did not renew the fourth request for information and documents when the deadline passed on November 7, 2017. The settlement discussions subsequently fell apart, and, on December 6, 2017, MT informed FINRA staff that he no longer represented DreamFunded Marketplace or Fernandez.

(2) FINRA Staff’s Renewed Request for Information and Documents and Request for Fernandez’s Second On-the-Record Testimony

Fernandez retained SA as the new attorney to represent him and DreamFunded Marketplace before FINRA. Around this time, the communications among SA, DreamFunded Marketplace, Fernandez, and FINRA transitioned from OFDMI to Enforcement. On December 15, 2017, Enforcement attorney, Edwin Aradi, sent SA a copy of the fourth request for information

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<sup>26</sup> Request No. 3 and Request No. 8 are the two categories of documents that Enforcement’s complaint, and the Hearing Panel’s decision, identifies as unanswered or incomplete under cause one.

and documents from October 2017. Five days later, on December 20, 2017, Aradi sent SA a request for Fernandez's second on-the-record testimony.<sup>27</sup>

(3) The Second Postponement

Over the next week, SA and Aradi corresponded by email to set a new document production deadline and to schedule Fernandez's second on-the-record testimony. Aradi granted DreamFunded Marketplace's and Fernandez's request for an extension of the document production deadline to January 5, 2018. Aradi and SA agreed that Fernandez would appear for the second on-the-record testimony on January 18, 2018.

On January 5, 2018, SA made a partial production of documents on behalf of DreamFunded Marketplace and Fernandez, which related to Request No. 5, Request No. 6, Request No. 7, Request No. 10, and Request No. 11. DreamFunded Marketplace and Fernandez did not provide any documents in response to Request No. 3 or Request No. 8.

On January 12, 2018, Aradi sent SA a letter concerning the production on January 5, 2018. Aradi characterized the production as "only a limited document production relating to only a few of the outstanding requests." Aradi's letter stated that SA had represented to Enforcement that DreamFunded Marketplace and Fernandez "would not be producing any additional documents today[,] and that . . . they have not yet provided you with a majority of the requested documents." Based on these representations, Aradi provided DreamFunded Marketplace and Fernandez with another deadline extension to provide "a full and complete response to the [FINRA] Rule 8210 request." Aradi extended the document production deadline to January 19, 2018, and the date for Fernandez to appear for his second on-the-record testimony to the week of February 5, 2018.

(4) The Third Postponement

On January 19, 2018, SA produced additional documents on behalf of DreamFunded Marketplace and Fernandez. DreamFunded Marketplace's and Fernandez's response included some responsive documents for three of the 11 categories of documents listed in the request from October 24, 2017 – Request No. 1, Request No. 3, and Request No. 9.

As it related to Request No. 3, one of the two unanswered or incomplete categories identified in Enforcement's complaint and the Hearing Panel's decision, DreamFunded Marketplace and Fernandez provided 16 bank account statements for DreamFunded Marketplace and the Parent Company. DreamFunded Marketplace and Fernandez did not provide any bank account statements for Fernandez, and they failed to produce any documents in response to Request No. 8. The 16 bank account statements, which DreamFunded Marketplace and Fernandez

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<sup>27</sup> The record does not contain a copy of FINRA's request for Fernandez's second on-the-record testimony.

produced on January 19, 2018, represented about five percent of the requested bank account statements.<sup>28</sup>

SA also requested an additional extension to complete the document production. SA stated that “Fernandez became ill on Wednesday[,] January 17[, 2018, and] was diagnosed with [a] [REDACTED] SA noted that Fernandez’s “physician prescribed bed rest from Wednesday [January 17, 2018] through this coming weekend.” SA provided a signed physician’s letter to support his representations. SA also informed FINRA staff that Fernandez would appear for his second on-the-record testimony on February 6, 2018, and he requested the opportunity to inspect the transcript of Fernandez’s first on-the-record testimony at FINRA’s San Francisco district office on February 5, 2018.

During the weekend of January 20, 2018, the weekend of the “prescribed bed rest,” Fernandez made several social media posts about his activities that weekend. For example, on January 20, 2018, Fernandez commented on the weather at the Sundance Film Festival in Park City, Utah, and posted pictures of the event. On January 21, 2018, Fernandez posted a picture of him and a famous former football player on an airplane. At the hearing, when asked about the film festival attendance during the period of prescribed bed rest, Fernandez testified that a cable news network had invited him to the event, and he explained that “I’m a guy that sometimes gets better, and gotta make money, so I just gotta push myself like anyone that has to make money. I sometimes go in sick.”

Aradi was unaware of Fernandez’s weekend activities when he responded to SA’s letter on January 22, 2018. Aradi explained that “DreamFunded Marketplace and [ ] Fernandez still have not provided complete responses to the requests for information and documents issued on October 24, 2017, i.e., nearly three months ago.” Aradi also noted that Enforcement had “previously granted [DreamFunded Marketplace and Fernandez] at least three extensions of time in which to respond: (i) December 29, 2017; (ii) January 5, 2018; and (iii) January 19, 2018 . . . .” In light of the fact that “Fernandez recently experienced a medical issue,” however, Aradi granted the request for the additional extension. Aradi extended the deadline for the document production to January

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<sup>28</sup> DreamFunded Marketplace had three bank accounts. The Parent Company, and two entities affiliated with the Parent Company, also had three bank accounts. Accordingly, DreamFunded Marketplace and Fernandez should have produced 276 bank account statements to FINRA for DreamFunded Marketplace, the Parent Company, and the two affiliated entities. The 276 figure is composed of 46 statements (one for each month of the review period between January 2014 and October 2017) multiplied by the six bank accounts. As part of the new membership application that DreamFunded Marketplace submitted to FINRA, DreamFunded Marketplace and Fernandez produced 24 bank account statements for DreamFunded Marketplace, the Parent Company, and the affiliated entities. As noted above, in response to the subject request for information and documents from October 24, 2017, DreamFunded Marketplace and Fernandez produced 16 bank account statements for DreamFunded Marketplace, the Parent Company, and the affiliated entities. These 40 bank account statements represent about 14 percent of the requested bank account statements under Request No. 3. DreamFunded Marketplace and Fernandez produced no bank account statements for Fernandez under Request No. 3, and they failed to produce any accounting or bookkeeping records for DreamFunded Marketplace or the Parent Company under Request No. 8.

29, 2018, and he rescheduled the date for Fernandez's second on-the-record testimony to the week of February 12, 2018.

(5) The Fourth Postponement

On January 25, 2018, three days after Aradi sent his letter to SA with new deadlines, SA sent Aradi an email informing him and Enforcement staff that he no longer represented DreamFunded Marketplace or Fernandez. SA advised Aradi to "communicate with them directly," and Aradi did so on that same day. Aradi emailed Fernandez with copies of the correspondence sent to SA on January 22, 2018, and reminded him that "the final deadline for your complete response to the pending request for information and documents issued pursuant to FINRA Rule 8210 is [due on] . . . January 29, 2018."

One day after Aradi sent this email, on January 26, 2018, Fernandez emailed Aradi stating "I am ill and here is my doctor's note to return to work on [February 5, 2018]." Fernandez attached a note from the same doctor who had prescribed bed rest for Fernandez's [REDACTED] on January 17, 2018. In this instance, however, the doctor's note indicated no medical diagnosis or problem. It only stated that Fernandez would be "[s]ufficiently recovered to resume a normal workload . . . on [February 5, 2018]."

During this period of purported illness, Fernandez posted a picture of himself on social media attending a concert in Las Vegas, Nevada, on January 28, 2018. At the hearing, Fernandez testified that he attended that concert with a relative, and that he did so to comfort the relative because she was upset about a mass shooting that had occurred in Las Vegas about three months earlier.

On January 29, 2018, Aradi responded to the email that Fernandez sent on January 26, 2018. Aradi stated that Fernandez had more than three months to respond to the FINRA Rule 8210 request issued on October 24, 2017. Aradi stressed that Fernandez had already received three extensions of time to respond fully, and that the documents that FINRA was seeking should be in his "possession[], custody, or control, and should not require that [he] request[s] documents from third parties." Aradi then turned to Fernandez's claims of illness and the doctor's note that he provided to substantiate his claims. Aradi explained that, "unlike your prior note," this one "does not specify the nature of your illness." Aradi also noted that Fernandez had "travelled extensively, appeared at industry conferences, and socialized extensively during the time periods in which you claim that you were unable to work." Aradi warned Fernandez, "[i]f you provide a full and complete response to the pending [FINRA] Rule 8210 request on or before February 6, 201[8], we will consider holding off on filing the [c]omplaint. If you do not, we will seek authorization to file the [c]omplaint shortly thereafter."

(6) Enforcement Files the Complaint

On February 6, 2018, Aradi's deadline for Fernandez to provide a full and complete production of documents, Fernandez emailed Aradi. First, Fernandez stated that he had not had three months to respond to the request for information and documents from October 24, 2017. Fernandez cited ongoing settlement discussions with Enforcement from the fall of 2017 as the

basis for not having a full three months to respond.<sup>29</sup> Second, Fernandez asserted that he had “provided the documents requested that [he had] in [his] possession, custody, or control. He reinforced that the “banking records and bookkeeping data [was] with [his accountant] and bookkeeper.” Third, Fernandez explained that it was his understanding, based on representations from “one of [his] lawyers,” that his obligation to respond to FINRA’s request for information and documents ended with the termination of DreamFunded Marketplace’s FINRA funding portal membership in November 2017. Fourth, Fernandez disclosed that a company named ValueSetters, Inc. had acquired DreamFunded Marketplace, and that Fernandez had joined ValueSetters’s Board of Advisors as part of the acquisition agreement. Finally, Fernandez noted that his “illness [was] that same that it was in the past,” but he acknowledged that he had traveled to Park City, Utah, and Las Vegas, Nevada, in late-January 2018. Fernandez explained that he “travel[ed] when [he] thought [he] felt better, but that [travel] made [his] health worse.”

Fernandez described the “task” of gathering the documents as “burdensome,” and he asked Aradi to “slow down on that formal complaint [to] allow [him] to get the docs that you requested.” Fernandez ended his email noting that “[t]oday I am getting back to work, and to me, it does not make sense that you want all the docs today, a day after I just returned to work.” Seventeen days passed. Fernandez did not communicate any further with FINRA, and he produced no additional documents during that 17-day period. On February 23, 2018, Enforcement filed the complaint.

### 3. Legal Conclusions for Cause One

The Hearing Panel’s conclusion that DreamFunded Marketplace and Fernandez did not respond fully and completely to FINRA’s request for information and documents, in violation of FINRA Funding Portal Rules 800(a) and 200(a) and FINRA Rule 8210, was composed of three specific findings. First, the Hearing Panel found that FINRA had authority to issue the FINRA Rule 8210 request to DreamFunded Marketplace and Fernandez. Second, the Hearing Panel found that DreamFunded Marketplace and Fernandez failed to respond fully and completely to FINRA’s request for information and documents. And third, the Hearing Panel found that DreamFunded Marketplace’s and Fernandez’s explanations for their noncompliance with the information and document request did not negate their liability for the violation. We affirm these findings as explained below.

#### a. The JOBS Act, SEC Regulation Crowdfunding, and FINRA’s Funding Portal Rules Authorized FINRA to Issue the FINRA Rule 8210 Request to DreamFunded Marketplace and Fernandez

DreamFunded Marketplace’s and Fernandez’s primary argument under cause one concerns FINRA’s examination authority under the JOBS Act. DreamFunded Marketplace and Fernandez

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<sup>29</sup> The subject request for information and documents is dated October 24, 2017. The referenced settlement discussions with Enforcement occurred throughout November 2017, but had fallen apart by December 15, 2017, when Aradi sent a copy of the request to DreamFunded Marketplace’s and Fernandez’s new attorney, SA. Consequently, the settlement discussions have no bearing on the second, third, or fourth postponements.

frame their argument in a number of different ways,<sup>30</sup> but they boil down to two main points. First, DreamFunded Marketplace and Fernandez argue that FINRA improperly subjected them to the requirements of FINRA Rule 8210, exercised “authority [that] is greater than that of the Constitution of the United States,” and “exceeded the scope of [its] authority (i.e. jurisdiction)” under the JOBS Act. Second, DreamFunded Marketplace and Fernandez point to SEC Regulation Crowdfunding Rule 403(c), argue that SEC Regulation Crowdfunding Rule 403(c) limits FINRA’s examination authority to information and documents that “relate to [a funding portal’s] activities as a funding portal,” and assert that FINRA exceeded its grant of examination authority under SEC Regulation Crowdfunding Rule 403(c) by requesting information and documents related to the Parent Company’s finances and DreamFunded Marketplace’s source funding. We reject both of these arguments.

(1) DreamFunded Marketplace and Fernandez Are Subject to the Requirements of FINRA Rule 8210

As an initial matter, we find that DreamFunded Marketplace and Fernandez are subject to the requirements of FINRA Rule 8210. Under Section 4A(a)(1) of the Securities Act, the JOBS Act requires that intermediaries in crowdfunding transactions register with the SEC as broker-dealers or funding portals. *See* 15 U.S.C. § 77d-1(a)(1)(A), (B) (2021) (requiring SEC registration); *see also* Section 4(a)(6)(C) of the Securities Act, 15 U.S.C. § 77d(a)(6)(C) (2021) (explaining that crowdfunding transactions conducted through broker-dealers or funding portals, which comply with the requirements of Section 4A(a) of the Securities Act, qualify for the Crowdfunding Exemption). Similarly, under Section 4A(a)(2) of the Securities Act, the JOBS Act requires that broker-dealers and funding portals that serve as crowdfunding transaction intermediaries register with a national securities association, which, at this time, is limited to FINRA. *See* 15 U.S.C. § 77d-1(a)(2) (2021) (requiring registration with a self-regulatory organization). Accordingly, by its terms, the JOBS Act subjects broker-dealers and funding portals that act as intermediaries in securities-based crowdfunding transactions to the SEC’s and FINRA’s regulatory oversight. *See SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*14 (“One of the key investor protections . . . of the JOBS Act is the requirement that [SEC] Regulation Crowdfunding transactions take place through an SEC-registered intermediary, either a broker-dealer or a funding portal.”).

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<sup>30</sup> DreamFunded Marketplace’s and Fernandez’s appellate briefs contain several undeveloped, unsubstantiated, and unsupported claims – ranging from Hearing Panel bias to the Hearing Panel’s admission of “false testimony,” “fabricated evidence,” and “evidence demonstrably proven to have been planted by a skilled hacker.” DreamFunded Marketplace and Fernandez assert that the Hearing Panel “ignored irreputable [sic] evidence which contradicts its rulings” without identifying that evidence or pinpointing where, in the record, that evidence can be found. DreamFunded Marketplace and Fernandez also argue that the Hearing Panel rejected proffered evidence without saying what that evidence is or citing where, in the record, that evidence was proffered and rejected. We reject DreamFunded Marketplace’s and Fernandez’s undeveloped, unsubstantiated, and unsupported arguments. *See Corley v. Rosewood Care Ctr.*, 388 F.3d 990, 1001 (7th Cir. 2004) (“[W]e will not root through the hundreds of documents and thousands of pages that make up the record here to make [appellant’s] case for him.”); *Cuenca v. Univ. of Kan.*, 101 Fed. Appx. 782, 786 (10th Cir. 2004) (“We will not become advocates for [appellant], combing the record to make his case for him.”).

From there, the JOBS Act directs FINRA, as a national securities association, to “only examine for and enforce against a registered funding portal rules of such national securities association written specifically for registered funding portals.” Section 3(h)(2) of the Exchange Act, 15 U.S.C. § 78c(h)(2) (2021). In response to the JOBS Act’s mandate, FINRA proposed its funding portal rules, and, in accordance with Section 19(b)(1) of the Exchange Act, 15 U.S.C. § 78s(b)(1) (2021), and Exchange Act Rule 19b-4, 17 C.F.R. § 240.19b-4 (2021), FINRA filed those rules with the SEC. *See Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Adopt the Funding Portal Rules and Related Forms and FINRA Rule 4518 (“FINRA Crowdfunding Proposed Rule”)*, Exchange Act Release No. 76239, 2015 SEC LEXIS 4364, at \*1 (Oct. 22, 2015). The SEC published FINRA’s proposed funding portal rules for the solicitation of comments from interested persons. *Id.* FINRA received three comment letters on the proposed funding portal rules and provided a response to those comments. *See FINRA Crowdfunding Approval Order*, 2016 SEC LEXIS 262, at \*1 n.4, 2 n.6. In January 2016, the SEC approved FINRA’s funding portal rules. *See id.* at \*1.<sup>31</sup> Based on these actions, FINRA Funding Portal Rule 800 is a duly promulgated FINRA rule that is applicable to funding portals that serve as intermediaries in crowdfunding transactions. By operation of FINRA Funding Portal Rule 800, these intermediaries become subject to the requirements of FINRA Rule 8210.

FINRA Funding Portal Rule 800(a) states that “all funding portal members shall be subject to the FINRA Rule 8000 Series, unless the context requires otherwise . . . .” When the SEC approved FINRA Funding Portal Rule 800, the FINRA Crowdfunding Approval Order explained that “[FINRA] Funding Portal Rule 800(a) is designed to provide that funding portal members will be subject to specified FINRA rules governing investigations and sanctions.” *FINRA Crowdfunding Approval Order*, 2016 SEC LEXIS 262, at \*26. The FINRA Rule 8000 Series governs FINRA’s investigations and sanctions.

Because the SEC and FINRA intended for nearly all of the FINRA Rule 8000 Series to apply to the funding portals involved in crowdfunding transactions, the FINRA Crowdfunding Approval Order took the additional step of identifying the specific rules within the FINRA Rule 8000 Series that do not apply to these intermediaries. *See FINRA Crowdfunding Approval Order*, 2016 SEC LEXIS 262, at \*26-27. The FINRA Crowdfunding Approval Order states that “FINRA Rules 8110 (Availability of Manual to Customers), 8211 (Automated Submission of Trading Data Requested by FINRA), 8213 (Automated Submission of Trading Data for Non-Exchange-Listed Securities Requested by FINRA)[,] and 8312 (FINRA BrokerCheck Disclosure) . . .” do not apply to the funding portals that facilitate crowdfunding transactions. *Id.* at \*26. FINRA Rule 8210 is not listed among these four rules, and that exclusion is intentional.<sup>32</sup>

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<sup>31</sup> In connection with the SEC’s approval of FINRA’s funding portal rules, FINRA published a regulatory notice to “provide a[n] . . . overview of the new [f]unding [p]ortal [r]ules and provide information for prospective funding portals that plan to apply for FINRA membership.” *FINRA Crowdfunding Regulatory Notice 16-06*, 2016 FINRA LEXIS 6 at \*1.

<sup>32</sup> FINRA Funding Portal Rule 800(a) identifies these same four rules (FINRA Rules 8110, 8211, 8213, and 8312) as not applying to intermediaries in crowdfunding transactions. The

[Footnote continued on next page]

SEC Regulation Crowdfunding, for example, recognizes that FINRA needs the ability to compel the production of information and documents from intermediaries in crowdfunding transactions in order to “effectively gather information about the activities in which a funding portal has been engaged . . . [and] to discern whether the funding portals . . . are in compliance with the requirements of [SEC] Regulation Crowdfunding and any other applicable federal securities laws.” *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*598. The FINRA Crowdfunding Approval Order espouses a similar expectation and points directly to FINRA Rule 8210. The FINRA Crowdfunding Approval Order states that “FINRA Rule 8210 authorizes [FINRA] to require associated persons of broker[-]dealers to provide information[,]” and that FINRA must “be able to obtain information and testimony from . . . a funding portal[] . . . in the same manner that it may from . . . a broker-dealer[] . . .” *FINRA Crowdfunding Approval Order*, 2016 SEC LEXIS 262, at \*25.

Reading FINRA Funding Portal Rule 800(a) as somehow excluding FINRA Rule 8210 undercuts FINRA’s regulatory oversight of intermediaries in securities-based crowdfunding transactions. FINRA Rule 8210 constitutes a critical tool for FINRA’s protection of the investing public and the securities markets, and, in the absence of subpoena power, is “essential to FINRA’s ability to investigate possible misconduct by its members and associated persons.” *Mielke*, 2015 SEC LEXIS 3927, at \*54; *see Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at \*21 (Sept. 10, 2010) (“Without subpoena power, [FINRA] must rely on [FINRA] Rule 8210 to obtain information from its members necessary to carry out its investigations and fulfill its regulatory mandate.”). Congress, through the JOBS Act, and the SEC, through its approval of FINRA’s funding portal rules, intended for FINRA “to police the activities of its members and associated persons,” and FINRA relies on FINRA Rule 8210 to do so. *Ricupero*, 2010 SEC LEXIS 2988, at \*20-21. We therefore find that FINRA Funding Portal Rule 800(a) subjected DreamFunded Marketplace and Fernandez to the requirements of FINRA Rule 8210, and that FINRA Rule 8210, in turn, required DreamFunded Marketplace’s and Fernandez’s full and complete response to FINRA’s request for information and documents concerning the Parent Company’s finances and DreamFunded Marketplace’s source funding. *See FINRA Crowdfunding Regulatory Notice*, 2016 FINRA LEXIS 6 at \*5 n.11 (“Under [FINRA] Funding Portal Rule 800, funding portal members are subject to FINRA Rule 8210, which requires, in part, that a member must provide information and testimony and must permit an inspection and copying of books, records or accounts pursuant to the rule.”).

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FINRA Crowdfunding Proposed Rule explained that FINRA’s exemption of these rules was aimed at achieving a balance between the burden and cost associated with regulation and the necessity and utility associated with investor protection. *See FINRA Crowdfunding Proposed Rule*, 2015 SEC LEXIS 4364, at \*52 n.47. The FINRA Crowdfunding Proposed Rule states that “FINRA does not propose to apply FINRA Rule 8110 as part of the [f]unding [p]ortal [r]ules as the rule addresses availability of the complete FINRA Manual[,] and FINRA is not proposing to apply the complete Manual to funding portal members.” *Id.* The FINRA Crowdfunding Proposed Rule states that FINRA decided to exempt FINRA Rules 8211 and 8213 because those rules “address trading data and are not applicable to funding portals by virtue of the limited nature of their business.” *Id.* “With respect to FINRA Rule 8312,” the FINRA Crowdfunding Proposed Rule states that “FINRA is proposing [FINRA] Funding Portal Rule 800(b) as a streamlined version of [FINRA Rule 8312] to apply to funding portal[s].” *Id.*

(2) Fernandez Is Subject to the Requirements of FINRA Rule 8210 Based on FINRA Funding Portal Rules 100(a) and 100(b)

As noted in the previous section, Fernandez is subject to FINRA Rule 8210 by operation of FINRA Funding Portal Rules 100(a) and 100(b). Under FINRA Funding Portal Rule 100(a), Fernandez has “the same duties and obligations as a funding portal member under the [f]unding [p]ortal [r]ules.” Cf. FINRA Rule 140(a). Based on FINRA Funding Portal Rule 100(a), Fernandez must comply with FINRA Funding Portal Rule 800(a), which incorporates by reference FINRA Rule 8210.

FINRA Funding Portal Rule 100(b) also subject Fernandez to the requirements of FINRA Rule 8210. FINRA Funding Portal Rule 100(b)(1) states that an “associated person of a funding portal member” or a “person associated with a funding portal member” is “any sole proprietor, partner, officer, director or manager of a funding portal, or other natural person occupying a similar status or performing similar functions, or any natural person directly or indirectly controlling or controlled by a funding portal member, or any employee of a funding portal member, and, for purposes of FINRA Rule 8210, any other person listed in Schedule A of SEC Form Funding Portal.” Fernandez falls within a number of the categories in FINRA Funding Portal Rule 100(b)(1) as DreamFunded Marketplace’s founder, chief executive officer, chief financial officer, and chief compliance officer. The Schedule A of DreamFunded Marketplace’s SEC Form Funding Portal also lists Fernandez as the funding portal’s “direct owner,” “executive officer,” and “control person,” which, under FINRA Funding Portal Rule 100(b)(1), subjects him to the requirements of FINRA Rule 8210. Accordingly, we find that Fernandez is an associated person of DreamFunded Marketplace, and that he is required to comply with the requirements of FINRA Rule 8210 based on FINRA Funding Portal Rule 100(a) and 100(b).

(3) FINRA Properly Requested Information and Documents Related to the Parent Company’s Finances and DreamFunded Marketplace’s Source Funding

On appeal, DreamFunded Marketplace and Fernandez argue that FINRA exceeded the scope of its examination authority under SEC Regulation Crowdfunding Rule 403(c) by requesting information and documents related to the Parent Company’s finances and DreamFunded Marketplace’s source funding. We disagree. The JOBS Act, the SEC’s crowdfunding rules, and FINRA’s funding portal rules authorized FINRA’s request for the subject information and documents.

SEC Regulation Crowdfunding Rule 403 focuses on a funding portal’s “compliance” and applies to the SEC’s and FINRA’s “inspection and examination[]” of funding portals. SEC Regulation Crowdfunding Rule 403, 17 C.F.R. § 227.403 (2021). Under SEC Regulation Crowdfunding Rule 403(c), “[a] funding portal shall permit the examination and inspection of all of its business and business operations that relate to its activities as a funding portal, such as its premises, systems, platforms, and records by representatives of the [SEC] and of the registered

national securities association of which it is a member.”<sup>33</sup> SEC Regulation Crowdfunding Rule 403(c), 17 C.F.R. § 227.403(c) (2021). DreamFunded Marketplace and Fernandez assert that FINRA’s information and document request exceeded the scope of its authority under SEC Regulation Crowdfunding Rule 403(c) because the request did not “relate to [DreamFunded Marketplace’s] activities as a funding portal.” DreamFunded Marketplace and Fernandez argue that FINRA’s examination of the Parent Company’s finances was improper because it was directed to an entity other than a funding portal, and they assert that FINRA’s examination of DreamFunded Marketplace’s source funding was improper because it predated Fernandez’s establishment of the funding portal, and, consequently, was not related to DreamFunded Marketplace’s activities as a funding portal. DreamFunded Marketplace and Fernandez selectively highlight one part of SEC Regulation Crowdfunding Rule 403(c) and interpret that part of the rule as a limitation on FINRA’s examination authority of funding portals. But nothing in the JOBS Act, SEC Regulation Crowdfunding, or FINRA’s funding portal rules endorses DreamFunded Marketplace’s and Fernandez’s narrow reading of SEC Regulation Crowdfunding Rule 403(c).

The JOBS Act, SEC Regulation Crowdfunding, and FINRA’s funding portal rules establish a balance between efforts to raise capital through securities-based crowdfunding transactions on the one hand, and the protection of investors who participate in those transactions on the other hand. This balanced regulatory framework only works in the presence of a rigorous examination and inspection process. Without oversight, the balance of the regulatory framework tilts decidedly toward capital-raising at the expense of investor protection. And that is not what the JOBS Act intended. To the contrary, the JOBS Act intended that a “funding portal would remain subject to the full range of . . . examination and enforcement authority, even though it is not registered as a broker[-dealer].” *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*509. The JOBS Act made it clear that “[a]s a condition to exempting funding portals from the requirement to register as broker-dealers under Exchange Act Section 15(a)(1), Exchange Act Section 3(h)(1)(A) requires that registered funding portals remain subject to, among other things, . . . examination authority.” *Id.* at \*588.

Where the JOBS Act speaks of funding portal examinations and inspections broadly, SEC Regulation Crowdfunding adds specificity and enacts SEC Regulation Crowdfunding Rule 403(c) “to implement the [JOBS Act] and retain examination authority over funding portals.” *Id.* The mandate in this area is precise, and, in response to commenters who opposed SEC Regulation Crowdfunding Rule 403(c) as “unnecessary,” the SEC explained that “inspections and examinations are an important aspect of [the] oversight function of funding portals as they will

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<sup>33</sup> FINRA Funding Portal Rule 300(a)(2) is modeled after SEC Regulation Crowdfunding Rule 403(c) and contains nearly identical language to the rule. In addition, another part of SEC Regulation Crowdfunding Rule 403, SEC Regulation Crowdfunding Rule 403(a), 17 C.F.R. § 227.403(a) (2021), is the subject of cause ten. We will discuss SEC Regulation Crowdfunding Rule 403(a), and the various provisions of FINRA Funding Portal Rule 300(a), under cause ten in Part III.H. (DreamFunded Marketplace and Fernandez Failed to Implement Policies and Procedures Reasonably Designed to Supervise the Funding Portal’s Activities and Associated Persons).

assist . . . in monitoring the activities of funding portals in light of applicable statutory and regulatory requirements.”<sup>34</sup> *Id.*

Beyond enacting SEC Regulation Crowdfunding Rule 403(c), the SEC has also approved FINRA funding portal rules that specifically authorize FINRA to examine and inspect a funding portal’s records. For example, under FINRA Funding Portal Rule 110(a), FINRA must consider the “the public interest and the protection of investors” to determine whether funding portals and their associated persons have met certain “standards.” *See FINRA Crowdfunding Approval Order*, 2016 SEC LEXIS 262, at \*13. Among the standards, FINRA must examine the funding portal’s records to determine whether the funding portal “has fully disclosed and established through documentation all direct and indirect sources of funding.” *Id.* (citing FINRA Funding Portal Rule 110(a)(10)(D)).

The SEC also approved FINRA Funding Portal Rule 800(a). *See FINRA Crowdfunding Approval Order*, 2016 SEC LEXIS 262, at \*26. When the SEC approved FINRA Funding Portal Rule 800(a), it stated that “Funding Portal Rule 800(a) is designed to provide that funding portal members will be subject to specified FINRA rules governing investigations and sanctions.” *Id.* The SEC’s approval of FINRA Funding Portal Rule 800(a) endorses, in an explicit manner, the applicability of FINRA Rule 8210 to funding portals. *See id.* (stating that “all funding portal members shall be subject to the FINRA Rule 8000 Series, unless the context requires otherwise”).

The SEC’s endorsement of FINRA’s examination authority under FINRA Rule 8210 is established, and, when describing FINRA’s examination authority under FINRA Rule 8210, the SEC has used terms such as “unequivocal” and “unqualified.” *Michael Nicholas Romano*, Exchange Act Release No. 76011, 2015 SEC LEXIS 3980, at \*19 (Sept. 29, 2015) (“The language of [FINRA] Rule 8210 is unequivocal regarding an associated person’s responsibility to cooperate with FINRA information requests”); *Marcos A. Santana*, Exchange Act Release No. 74138, 2015 SEC LEXIS 312, at \*10 (Jan. 26, 2015) (explaining that responses under FINRA Rule 8210 must be “full, prompt, and unqualified”). The SEC has emphasized that recipients of FINRA’s request under FINRA Rule 8210 “may not second guess [the] request[] . . . or take it upon [themselves] to determine whether information is material to a FINRA investigation of [the] conduct.” *Goldstein*, 2014 SEC LEXIS 1350, at \*16. The SEC has also stressed that “[FINRA] Rule 8210[] has no requirement that FINRA explain its reasons for making the information request or justify its relevance.” *Id.*

In short, the JOBS Act, SEC Regulation Crowdfunding, and FINRA’s funding portal rules do not support DreamFunded Marketplace’s and Fernandez’s interpretation of SEC Regulation Crowdfunding Rule 403(c). Accordingly, on appeal, we find that SEC Regulation Crowdfunding

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<sup>34</sup> Other parts of SEC Regulation Crowdfunding inform our interpretation of FINRA’s examination authority under SEC Regulation Crowdfunding Rule 403(c). For example, under SEC Regulation Crowdfunding Rule 404(e), “[a]ll records of a funding portal are subject at any time, or from time to time, to reasonable periodic, special, or other examination by the representatives of” the SEC and FINRA. SEC Regulation Crowdfunding Rule 404(e), 17 C.F.R. § 227.404(e) (2021). SEC Regulation Crowdfunding Rule 404(e) stresses that a funding portal’s furnishing of records to the SEC and FINRA should be “prompt[] . . . true, correct, complete and current.” *Id.*

Rule 403(c) requires only that FINRA's request for information and documents relate to DreamFunded Marketplace's business and business operations as a funding portal, and FINRA's request for information and documents meets that standard.<sup>35</sup>

When Fernandez provided his on-the-record testimony to FINRA in October 2017, he testified that he raised \$1 million to establish DreamFunded Marketplace, that those investments flowed through the Parent Company, and that there may not have been a proper accounting of the investments. Fernandez testified that he spent \$350,000 of the investments on legal and marketing, and, in response to FINRA's questions concerning the remaining investments being used to fund DreamFunded Marketplace's operations, Fernandez only responded "sure." Fernandez also testified that he paid independent contractors with cash, made payments pursuant to verbal agreements, and paid his wife and daughter for social media and online marketing work.

In response to Fernandez's testimony concerning his use of DreamFunded Marketplace's source funding, FINRA requested that DreamFunded Marketplace and Fernandez provide FINRA with copies of the Parent Company's and DreamFunded Marketplace's bank account statements and accounting and bookkeeping records between January 2014 and October 2017. This period is limited and represents the two years leading up to Fernandez's founding of the funding portal and the funding portal's first year of operation. FINRA's request included documents related to the Parent Company's finances because Fernandez testified that DreamFunded Marketplace's source funding flowed through the Parent Company. Based on these facts, we find that FINRA properly requested information and documents related to the Parent Company's finances and DreamFunded Marketplace's source funding.<sup>36</sup> See *Goldstein*, 2014 SEC LEXIS 1350, at \*14-16 (finding that

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<sup>35</sup> Definition of "relate," <https://www.dictionary.com/browse/relate?s=t> (last visited Sept. 27, 2021) (explaining that the term "relate" means "to bring into or establish association, connection, or relation").

<sup>36</sup> Citing *Fiero v. FINRA*, 660 F.3d 569 (2d Cir. 2011), DreamFunded Marketplace and Fernandez argue that the Hearing Panel's interpretation of FINRA Funding Portal Rule 800 and FINRA Rule 8210 constitutes an improper rule change to SEC Regulation Crowdfunding Rule 403(c). DreamFunded Marketplace's and Fernandez's argument is legally flawed. As an initial matter, *Fiero* examined whether FINRA had authority for the judicial enforcement of its fines in the absence of a specific, duly promulgated rule that was subject to the Exchange Act's notice and comment requirements. See *id.* at 577-79. *Fiero* does not apply here. FINRA Funding Portal Rule 800 and FINRA Rule 8210 are rules that were promulgated in accordance with the Exchange Act's notice and comment requirements. See *FINRA Crowdfunding Approval Order*, 2016 SEC LEXIS 262, at \*1, 26 (approving FINRA Funding Portal Rule 800(a)); *Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment Nos. 1 and 2, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, Relating to FINRA Rule 8210 (Provision of Information and Testimony and Inspection and Copying of Books)*, Exchange Act Release No. 68386, 2012 SEC LEXIS 3798, at \*1 (Dec. 7, 2012) (approving FINRA Rule 8210, as amended). Moreover, as we explained above, SEC Regulation Crowdfunding Rule 403(c), FINRA Funding Portal Rule 800(a), and FINRA Rule 8210 are not at odds with each other. The three rules are complementary and permit

[Footnote continued on next page]

FINRA properly requested information and documents of a broker-dealer's parent company where the "possible illegal activity" involved both entities).<sup>37</sup>

b. DreamFunded Marketplace Failed to Respond Fully and Completely to FINRA's Request for Information and Documents

DreamFunded Marketplace and Fernandez argue that they complied with the information and document request. They did not.<sup>38</sup>

In October 2017, FINRA staff sent DreamFunded Marketplace and Fernandez the request for information and documents. Among the 11 categories of information and documents sought, FINRA staff requested DreamFunded Marketplace's, the Parent Company's, and Fernandez's monthly bank account statements between January 2014 and October 2017, and they asked for DreamFunded Marketplace's and the Parent Company's accounting and bookkeeping records for that same period. Despite four extensions of time over a four-month period, DreamFunded Marketplace and Fernandez failed to respond fully and completely to FINRA's request for information and documents.

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the SEC and FINRA to examine and inspect all funding portal records that relate to its business and business operations as a funding portal. Consequently, based on the facts presented here, the Parent Company's finances and DreamFunded Marketplace's source funding fall within the scope of FINRA's examination authority under SEC Regulation Crowdfunding Rule 403(c), FINRA Funding Portal Rule 800(a), and FINRA Rule 8210.

<sup>37</sup> DreamFunded Marketplace and Fernandez assert that "[t]he SEC cannot delegate to a national securities exchange or self-regulatory organization . . . powers or authorization which the Congress of the United States did not grant to the SEC itself." They also note that "the [United States] Constitution, federal law[,], and the limits of authority of federal agencies imposed . . . precludes FINRA from broadening the interpretation of [SEC Regulation Crowdfunding Rule 403(c)]." But FINRA is not a government agency or state actor subject to constitutional restrictions. See *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at \*37 n.52 (Mar. 15, 2016) (holding that FINRA is not a state actor and could not violate the applicant's due process rights), *aff'd*, 672 F. App'x 865 (10th Cir. 2016); *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) ("The NASD is a private actor, not a state actor."). When FINRA requested that DreamFunded Marketplace and Fernandez produce information and documents related to the Parent Company's finances and DreamFunded Marketplace's source funding, it did so as a self-regulatory organization, not a "[g]overnment-created, [g]overnment-appointed entit[y]." *Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911, at \*43 (Apr. 3, 2020).

<sup>38</sup> DreamFunded Marketplace's liability for each cause of action discussed in this decision is based on Fernandez's intentional acts. See *SEC v. Sells*, No. C 11-4941 CW, 2012 U.S. Dist. LEXIS 112450, at \*24 (N.D. Cal. Aug. 10, 2012) (concluding that an officer's "knowledge may be imputed to [his firm] by application of the doctrine of respondeat superior under which wrongful acts of an employee undertaken within the scope of employment can be imputed to the employer").

DreamFunded Marketplace and Fernandez produced 40 bank account statements for DreamFunded Marketplace, the Parent Company, and two entities affiliated with the Parent Company.<sup>39</sup> The 40 bank account statements represent only 14 percent of the bank account statements that FINRA staff requested for DreamFunded Marketplace and the Parent Company. We also note that DreamFunded Marketplace and Fernandez produced no bank account statements for Fernandez, no accounting or bookkeeping records for DreamFunded Marketplace, and no accounting or bookkeeping records for the Parent Company. DreamFunded Marketplace's and Fernandez's failure to respond fully and completely to FINRA's request for information and documents violated FINRA Funding Portal Rules 800(a) and 200(a) and FINRA Rule 8210. *See Kent M. Houston*, Exchange Act Release No. 71589A, 2014 SEC LEXIS 4611, at \*5, 10-11 (Feb. 20, 2014) (finding that the applicant's failure to respond fully and completely to FINRA's request violated the predecessor to FINRA's ethical standards rule and FINRA Rule 8210).

c. DreamFunded Marketplace's and Fernandez's Explanations Do Not Rectify Their Failure to Produce the Documents

DreamFunded Marketplace and Fernandez raise several defenses to liability. We reject each of them.

First, DreamFunded Marketplace and Fernandez argue that they are not liable for failing to respond fully and completely to FINRA's request for information and documents because they did not "act willfully" or with "any scienter." To the extent DreamFunded Marketplace and Fernandez proffer a "state of mind" defense to liability for their partial and incomplete response to FINRA's information and document request, it does not exist.<sup>40</sup> *See David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at \*20 (July 27, 2015). "[S]cienter is not an element of a [FINRA] Rule 8210 violation."<sup>41</sup> *Id.*

Second, DreamFunded Marketplace and Fernandez argue that they are not liable for failing to respond fully and completely to FINRA's request for information and documents because they provided the documents to the MAP Group as part of the new membership application process. In connection with this argument, DreamFunded Marketplace and Fernandez also note that they "fully complied with numerous and lengthy [FINRA Rule] 8210 requests from early 2017 through September 2017." We acknowledge that DreamFunded Marketplace and Fernandez provided

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<sup>39</sup> We counted the 24 bank account statements that they provided to the MAP Group as they navigated the new membership application process throughout May 2016 and June 2016. We did not limit our examination of the completeness of DreamFunded Marketplace's and Fernandez's response only to those bank account statements that they produced in response to FINRA's information and document request, which was an option.

<sup>40</sup> In support of their argument, DreamFunded Marketplace and Fernandez point to FINRA's By-Laws and an SEC decision, *vFinance Invs., Inc.*, Exchange Act Release No. 62448, 2010 SEC LEXIS 2216, at \*1 (July 2, 2010). But these legal materials concern the definition of willfulness as a trigger for a statutory disqualification and do not apply here.

<sup>41</sup> We will consider whether DreamFunded Marketplace's and Fernandez's conduct under cause one was intentional, reckless, or negligent as part of our sanctions analysis.

*some* of the subject bank account statements to the MAP Group when it sought funding portal membership with FINRA, and that they responded to *other* information and document requests that FINRA sent as part of the investigation. But DreamFunded Marketplace's and Fernandez's cooperation with the new membership application process, and other parts of FINRA's investigation, does not negate their failure to respond fully and completely to FINRA's request for information and documents from October 2017.<sup>42</sup> See *Houston*, 2014 SEC LEXIS 4611, at \*18-19 (explaining that the applicant's response to prior requests for information and documents in the investigation was a consideration for sanctions, not liability); *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at \*55 (June 14, 2013) (same).

Third, DreamFunded Marketplace and Fernandez argue that they are not liable for failing to respond fully and completely to FINRA's request for information and documents because FINRA staff did not "specifically identify . . . documents missing from [their FINRA Rule] 8210 production" and did not give them "a fair opportunity to produce any missing items." But DreamFunded Marketplace and Fernandez never told FINRA staff that they had questions about the request or the documents that FINRA sought. For example, when Fernandez requested additional time to respond to the request, he did not ask questions about the categories of documents; rather, he explained that he needed additional time because the "banking records and bookkeeping data [was] with [his accountant] and bookkeeper." In addition, at the hearing, when Enforcement asked Fernandez whether he "ever [told] FINRA staff that [he] did not understand the language of any of the[] requests . . .," he responded, "I don't believe so." DreamFunded Marketplace and Fernandez cannot blame FINRA staff for their failure to respond fully and completely to the information and document request. See *Joseph J. Fox*, Exchange Act Release No. 80308, 2017 SEC LEXIS 969, at \*17 (Mar. 24, 2017) (rejecting applicant's attempt to blame FINRA for the misconduct).

Fourth, DreamFunded Marketplace and Fernandez argue that they are not liable for failing to respond fully and completely to FINRA's request for information and documents because "all of the responsive records" were in DreamFunded Marketplace's and Fernandez's cloud-based storage, and they gave FINRA staff "unfettered access" to that storage. The record does not support DreamFunded Marketplace's and Fernandez's claims. The only document in the record that relates to the cloud-based storage is an email from Fernandez to his then-attorney, SA. The email, which is dated December 16, 2017, contains links to two files in the cloud-based storage. Assuming that the links contain what the email purports,<sup>43</sup> the links contain files with 18 bank account statements for the Parent Company for the period between June 2014 and November 2015. SA produced 10 of these bank account statements to FINRA as part of the response provided on January 19, 2018. FINRA received copies of the other eight bank account statements as part of

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<sup>42</sup> We have counted the bank account statements that DreamFunded Marketplace and Fernandez provided to the MAP Group as part of the funding portal application. And we will consider DreamFunded Marketplace's and Fernandez's submission of bank account statements to the MAP Group, and their compliance with other aspects of FINRA's investigation, as part of our sanctions analysis under cause one. See *Houston*, 2014 SEC LEXIS 4611, at \*18-19; *Plunkett*, 2013 SEC LEXIS 1699, at \*55.

<sup>43</sup> The copy of the email in the record does not include any attachments, such as copies of the documents contained in the links to the cloud-based storage.

DreamFunded Marketplace's new membership application, and, as we noted, we counted these statements in our assessment of DreamFunded Marketplace's and Fernandez's responsiveness. We also note that the Hearing Panel considered Fernandez's representations concerning the production of documents via the cloud-based storage, and the Hearing Panel found that Fernandez was not a credible witness on this issue. *See Murphy & Co.*, 2020 SEC LEXIS 5218, at \*28-29. DreamFunded Marketplace's and Fernandez's claims about the cloud-based storage do not resolve their liability for failing to respond fully and completely to FINRA's request for information and documents.

Fifth, DreamFunded Marketplace and Fernandez argue that they are not liable for failing to respond fully and completely to FINRA's request for information and documents because Fernandez "instructed" certain third parties, including his accountant and attorneys, "to fully comply with all discovery requests[,] and [he] reasonably believed that his instructions were carried out." DreamFunded Marketplace and Fernandez misunderstand the role of funding portal members and their associated persons in responding to FINRA's information and document requests. As the Hearing Panel explained, DreamFunded Marketplace and Fernandez cannot "blame[] [their] lawyers for failing to make documents available to FINRA staff, as though [they] had nothing to do with the process." *See Justine Susan Fischer*, 53 S.E.C. 734, 741 & n.4 (1998) (holding that a "broker has responsibility for his or her own actions and cannot blame others for his own failings"). It was incumbent on DreamFunded Marketplace and Fernandez, not their accountant or attorneys, to respond to FINRA's request for information and documents. DreamFunded Marketplace and Fernandez neglected their compliance obligations under FINRA Funding Portal Rule 800(a) and FINRA Rule 8210, and we reject their attempts to blame others for those shortcomings.

Finally, DreamFunded Marketplace and Fernandez argue that they are not liable for failing to respond fully and completely to FINRA's request for information and documents because their obligation to respond shifted to ValueSetters as the entity positioned to acquire the funding portal in January 2018. DreamFunded Marketplace and Fernandez assert that the Hearing Panel "failed to recognize that by ValueSetters'[s] purchase of DreamFunded [Marketplace], [ValueSetters] had acquired the responsib[ility] to respond to the [FINRA Rule] 8210 request." We disagree. Although ValueSetters agreed to acquire DreamFunded Marketplace in January 2018, we note that FINRA staff sent the request for information and documents to DreamFunded Marketplace and Fernandez three months earlier, in October 2017, and that DreamFunded Marketplace and Fernandez had already violated FINRA Funding Portal Rule 800(a) and FINRA Rule 8210 by failing to respond fully and completely to FINRA's request by the required deadline.

As part of our analysis for this issue, the parties have asked us to make a determination concerning the transferability of compliance obligations under FINRA Funding Portal Rule 800(a) and FINRA Rule 8210 from a predecessor entity, like DreamFunded Marketplace, to a successor entity, like ValueSetters. We decline to do so because the facts do not require it. FINRA staff issued the request for information and documents in October 2017, months before the acquisition was scheduled to occur in January 2018. DreamFunded Marketplace and Fernandez did not respond fully and completely to the information and document request by the deadline. DreamFunded Marketplace and Fernandez did not even disclose the acquisition until February

2018, after it was supposed to occur.<sup>44</sup> And, ultimately, ValueSetters did not acquire DreamFunded Marketplace.<sup>45</sup> Based on these facts, liability for the failure to respond fully and completely to FINRA’s request for information and documents rests, and remains, with DreamFunded Marketplace and Fernandez.

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Under cause one, we find that DreamFunded Marketplace and Fernandez failed to respond fully and completely to FINRA’s request for information and documents, in violation of FINRA Funding Portal Rules 800(a) and 200(a) and FINRA Rule 8210.

C. Cause Two: DreamFunded Marketplace and Fernandez Failed to Deny Issuer A’s Access to the Funding Portal When Issuer A’s Offering Raised Investor Protection Concerns

Under cause two, Enforcement alleged that DreamFunded Marketplace and Fernandez violated SEC Regulation Crowdfunding Rule 301(c)(2) and FINRA Funding Portal Rules 200(c)(3) and 200(a) because they failed to deny Issuer A’s and Issuer B’s access to the funding portal when the circumstances surrounding their offerings suggested that they do so. Enforcement provided two bases for its argument. First, Enforcement argued that DreamFunded Marketplace and Fernandez should have denied Issuer A’s and Issuer B’s access to the funding portal because the circumstances surrounding Issuer A’s and Issuer B’s offerings “indicated investor protection concerns such that a reasonable person would have denied access to its platform to these issuers.” Second, Enforcement argued that DreamFunded Marketplace and Fernandez should have denied Issuer A’s and Issuer B’s access to the funding portal because DreamFunded Marketplace and Fernandez “knew or had reason to know that [Issuer] A and [Issuer] B had unrealistic and unwarranted valuations and oversimplified and overly-optimistic financial forecasts.”

The Hearing Panel agreed with only the first part of Enforcement’s charge under cause two. The Hearing Panel found that DreamFunded Marketplace and Fernandez violated SEC Regulation Crowdfunding Rule 301(c)(2) and FINRA Funding Portal Rule 200(a) because they failed to deny Issuer A’s access to the funding portal when the circumstances surrounding Issuer A’s offering “were such that a reasonable person would have had, at a minimum, investor protection concerns.”<sup>46</sup> The Hearing Panel, however, found that DreamFunded Marketplace and Fernandez

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<sup>44</sup> Fernandez’s first mention of the ValueSetters acquisition to FINRA staff was in an email dated February 6, 2018. Fernandez sent the email in response to the fourth, and final, postponement that he had received from the staff. *See* Part III.B.2.e.(6) (Enforcement Files the Complaint).

<sup>45</sup> DreamFunded Marketplace and ValueSetters executed an “agreement to rescind contract of sale” in April 2018.

<sup>46</sup> The Hearing Panel did not discuss FINRA Funding Portal Rule 200(c)(3) under this part of cause two. The Hearing Panel also did not discuss whether DreamFunded Marketplace and

[Footnote continued on next page]

did not violate SEC Regulation Crowdfunding Rule 301(c)(2) because they “were not required to deny [Issuer A’s and Issuer B’s] access to the [funding] portal solely because of its projections and forecasts.” As part of this dismissal, the Hearing Panel found that DreamFunded Marketplace and Fernandez did not violate FINRA Funding Portal Rule 200(c)(3) because they “did not know or have reason to know that [Issuer A’s and Issuer B’s] projections and forecasts were false and misleading.” DreamFunded Marketplace and Fernandez appealed the Hearing Panel’s liability findings under cause two, while Enforcement cross-appealed on the parts of cause two that the Hearing Panel dismissed. On appeal, we affirm the Hearing Panel’s finding that DreamFunded Marketplace and Fernandez violated SEC Regulation Crowdfunding Rule 301(c)(2) and FINRA Funding Portal Rule 200(a) because they failed to deny Issuer A’s access to the funding portal when Issuer A’s offering raised investor protection concerns. But that is all.

As it relates to Enforcement’s allegations concerning DreamFunded Marketplace’s and Fernandez’s failure to deny access to the funding portal based on Issuer A’s and Issuer B’s projections and forecasts, we affirm the Hearing Panel’s dismissal. Under SEC Regulation Crowdfunding Rule 301(c)(1), which we discuss under cause five in Part III.F. (Cause Five: DreamFunded Marketplace and Fernandez Failed to Conduct Issuer Background Checks and Securities Enforcement Regulatory Histories), an intermediary must conduct a background check and securities enforcement regulatory history on each issuer and each issuer’s officer, director, or beneficial owner. SEC Regulation Crowdfunding Rule 301(c)(1), 17 C.F.R. § 227.301(c)(1) (2021). When we read SEC Regulation Crowdfunding Rule 301(c)(2), which is the basis of Enforcement’s allegations for cause two, in concert with SEC Regulation Crowdfunding Rule 301(c)(1), we note that SEC Regulation Crowdfunding Rule 301(c)(2) does not impose specific, additional due diligence obligations on intermediaries. *See* SEC Regulation Crowdfunding Rule 301(c)(2), 17 C.F.R. § 227.301(c)(2) (2021).

Under SEC Regulation Crowdfunding Rule 301(c)(2), an intermediary must deny access to the funding portal when an issuer or an issuer’s offering presents the potential for fraud or raises investor protection concerns. *Id.* In this case, DreamFunded Marketplace and Fernandez did not review Issuer A’s or Issuer B’s Forms C or accompanying documents. As a consequence, DreamFunded Marketplace and Fernandez did not know about Issuer A’s and Issuer B’s projections and forecasts and had no basis to deny their access to the funding portal.<sup>47</sup> As explained below, under cause two, we find that DreamFunded Marketplace and Fernandez violated SEC Regulation Crowdfunding Rule 301(c)(2) and FINRA Funding Portal Rule 200(a) by failing

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Fernandez violated SEC Regulation Crowdfunding Rule 301(c)(2) and FINRA Funding Portal Rule 200(a) by allowing Issuer B’s continued access to the funding portal when its offering may have raised investor protection concerns. We also do not reach this issue on appeal.

<sup>47</sup> We acknowledge that reviewing Issuer A’s and Issuer B’s projections and forecasts would be consistent with several other obligations of a funding portal, including, for example, the obligation to conduct a background check and securities enforcement regulatory history on each issuer’s officer, director, or beneficial owner and to monitor an issuer’s offering for material changes. In this case, however, we note that, even if DreamFunded Marketplace and Fernandez had reviewed Issuer A’s and Issuer B’s projections and forecasts, these particular projections and forecasts would not establish a reasonable basis for the funding portal to believe that the issuers’ offerings presented the potential for fraud or raised investor protection concerns.

to deny Issuer A's access to the funding portal when Issuer A's offering raised investor protection concerns.

1. SEC Regulation Crowdfunding Rule 301(c)(2)

SEC Regulation Crowdfunding Rule 301 addresses “measures to reduce risk of fraud” in securities-based crowdfunding transactions. SEC Regulation Crowdfunding Rule 301, 17 C.F.R. § 227.301 (2021). Under SEC Regulation Crowdfunding Rule 301(c)(2), an intermediary must deny an issuer's access to the funding portal if the intermediary “[h]as a reasonable basis for believing that the issuer or the offering presents the potential for fraud or otherwise raises concerns about investor protection.” SEC Regulation Crowdfunding Rule 301(c)(2), 17 C.F.R. § 227.301(c)(2) (2021). The rule stresses that an intermediary must deny an issuer's access to the funding portal “if [the intermediary] reasonably believes that it is unable to adequately or effectively assess the risk of fraud of the issuer or its potential offering.” *Id.* The rule also states that “the intermediary must promptly remove the offering from its platform, cancel the offering, and return (or, for funding portals, direct the return of) any funds that have been committed by investors in the offering” if the intermediary “becomes aware of information after it has granted access that causes it to reasonably believe that the issuer or the offering presents the potential for fraud or otherwise raises concerns about investor protection . . . .” *Id.*

2. Facts for Cause Two

For purposes of our review, the facts for cause two focuses only on Issuer A and its offering. *See* Part II.B. (Other Relevant Entities).

a. Issuer A's Form C

Issuer A was a “social networking” company that developed an application that allowed users to “share media on other social networks” simultaneously. Issuer A filed the Form C with the SEC in October 2016, one month after its date of incorporation. DA was Issuer A's co-founder, chief executive officer, and only director. Fernandez testified that he had socialized with DA and known him for several years. All Issuer A communications in the record are between DA and Fernandez.<sup>48</sup>

Issuer A planned to offer 100,000 shares for a target amount of \$10,000 and maximum funding amount of \$100,000. Issuer A's Form C stated that the issuer intended to use the proceeds of the offering to “develop[] and complete [its] mobile application,” “complete [its] transition to a

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<sup>48</sup> Another co-founder of Issuer A was the company's chief executive officer, chairman, and director when it filed the Form C with the SEC in October 2016. At that time, DA was Issuer A's chief marketing officer and “principal security holder.” Addenda to the Form C define a principal security holder as any individual who beneficially owns 20 percent or more of an issuer's “outstanding voting equity securities, calculated on the basis of voting power.” Although DA was a principal security holder of Issuer A's common stock in October 2016, he had no voting power in Issuer A at that time because all “voting power prior to the offering” rested with the then-chief executive officer. Around January 2017, DA purchased the then-chief executive officer's shares of Issuer A and became Issuer A's chief executive officer and only director.

full mobile platform strategy,” and “pay officers, app[lication] marketing, and social advertising.”<sup>49</sup>

Issuer A’s Form C reported that it had no employees or operating history. Issuer A’s Form C noted that the issuer did “not foresee generating any profits in the near future” and entered “0” for every financial category listed on the Form C.<sup>50</sup> Issuer A, however, claimed a valuation of \$1 million, represented that it would have 100 million active users by its fifth year of operation, and asserted that it could achieve a \$900 million market capitalization.

Issuer A’s Form C included a number of caveats for investors participating in the offering. For example, Issuer A cautioned that investors could not obtain a return on their investments unless a “strategic partner” acquired the issuer at a target price of \$500 million. Issuer A’s Form C also explained that the amount sought in the offering would not be enough to sustain its business plan. Issuer A’s Form C attached no financial statements.<sup>51</sup>

b. DreamFunded Marketplace and Fernandez Do Not Review Issuer A’s Form C Before Posting It to the Funding Portal’s Website

During his on-the-record testimony, Fernandez stated that he did not review the Forms C for all the issuers listed on DreamFunded Marketplace’s website prior to uploading them, and that Issuer A’s Form C was one of those that he reviewed after uploading it. At the hearing, Fernandez attempted to distance himself from the statements made during his on-the-record testimony. For example, at the hearing, Fernandez testified that Issuer A had many versions of the Form C, that he reviewed one of the versions, but he did not know which one.

The Hearing Panel considered Fernandez’s statements during his on-the-record and hearing testimony and credited his on-the-record testimony over his hearing testimony. The Hearing Panel explained that “Fernandez’s testimony at his [on-the-record testimony] on the lack of review is more consistent with events than his hearing testimony.” The Hearing Panel specifically found

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<sup>49</sup> The SEC’s instructions for the Form C requires that issuers “provide a reasonably detailed description of any intended use of proceeds.” If there are a “range of possible uses,” the issuer should “identify and describe each probable use and the factors the issuer may consider in allocating proceeds among the potential uses.” If the issuer will accept proceeds in excess of the target offering amount, the issuer should “describe the purpose, method for allocating oversubscriptions, and intended use of the excess proceeds . . . .” Issuer A’s Form C provided no concrete details concerning its use of offering proceeds, and it did not discuss the factors that the issuer would consider in allocating the proceeds among its uses.

<sup>50</sup> The financial categories on the Form C included cash and cash equivalents, accounts receivable, short-term debt, long-term debt, revenue and sales, cost of goods sold, taxes paid, and net income.

<sup>51</sup> The importance of the absence of the financial statement is part of Enforcement’s allegations under cause four, which is discussed in Part III.E. (Cause Four: Enforcement Failed to Prove That DreamFunded Marketplace and Fernandez Did Not Have a Reasonable Basis to Believe That Issuer A and Issuer B Had Complied with the Securities Act).

that Fernandez “sought to make it appear that he had done some checking on the issuer’s disclosures [while], at the same time, . . . avoid[ing] responsibility for any defects in the Form C,” “did not regularly review issuers’ Forms C before posting them to . . . DreamFunded [Marketplace’s] website,” and “did little, if anything, to satisfy himself that the issuers were in compliance with the applicable law and regulations before giving them access to the [funding portal’s] platform.”<sup>52</sup>

c. Issuer A’s First and Second Amendments to the Form C

In January 2017, Issuer A filed two amendments to the Form C.<sup>53</sup> The amendments announced that Issuer A’s former chief executive officer sold his interest in Issuer A to DA, and that DA had been installed to serve as Issuer A’s current chief executive officer. Both amendments checked the box for amendments that are “material,” and those that require “investors [to] reconfirm within five business days.”<sup>54</sup>

Issuer A’s Form C amendments contained a number of items that were inconsistent with the issuer’s initial Form C. For example, the amendments changed the target number of shares from 100,000 to 10,000, but it left the target offering amount unchanged at \$10,000 without any explanation. The amendments reported that DA had purchased the prior chief executive officer’s interest in Issuer A, and that DA held 85 percent of Issuer A’s voting power prior to the offering. Issuer A’s initial Form C, however, noted that the previous chief executive officer had 100 percent of Issuer A’s voting power prior to the offering. The amendments provided no explanation of what, if anything, happened to the remaining 15 percent of Issuer A’s voting power. The amendments listed Issuer A’s date of organization as September 26, 2016, instead of September 20, 2016, and they reported that the offering deadline was September 20, 2017, instead of September 26, 2017. The amendments did not explain these inconsistencies, and it is unclear whether they were intentional changes or typographical errors. The amendments, like Issuer A’s initial Form C, contained no financial statements.

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<sup>52</sup> At the hearing, Fernandez also testified that MT reviewed and approved Issuer A’s Form C before it was posted to DreamFunded Marketplace’s website around October or November 2016. But the Hearing Panel found that Fernandez’s testimony concerning MT’s review of Issuer A’s Form C was not credible because Fernandez did not retain MT as counsel until early-2017. *See Murphy & Co.*, 2020 SEC LEXIS 5218, at \*28-29.

<sup>53</sup> Issuer A filed the first Form C amendment on January 12, 2017, but it was unsigned. On January 24, 2017, Issuer A filed the second Form C amendment. DA signed the second Form C amendment as Issuer A’s chief executive officer.

<sup>54</sup> DreamFunded Marketplace’s and Fernandez’s handling of material change notices to offering investors is discussed under cause six in Part III.G.1. (DreamFunded Marketplace and Fernandez Failed to Provide Investors with a Material Change Notice for Issuer A’s Offering).

d. Issuer A’s Chief Executive Officer Asks to Lower the Target Offering Amount, Then Asks for the Deposit of the Offering Proceeds in His Personal Bank Account

On May 6, 2017, DA emailed Fernandez to ask him to lower Issuer A’s target offering amount from \$10,000 to \$4,500. DA asked Fernandez to lower the target offering amount “at [his] earliest convenience,” but he did not explain why he wanted the target offering amount lowered. By this time, MT was serving as DreamFunded Marketplace’s and Fernandez’s counsel. On May 16, 2017, Fernandez wrote to MT to ask whether Issuer A’s target offering amount could be lowered, and, if so, how it could be accomplished. MT responded that Issuer A would have to file an amended Form C with the SEC, and that the disclosures on DreamFunded Marketplace’s website would have to be updated to reflect the change.

On May 20, 2017, two weeks after DA emailed Fernandez to ask him to lower Issuer A’s target offering amount to \$4,500, DA emailed Fernandez to close out Issuer A’s offering with a target of \$4,000.<sup>55</sup> DA’s email included a picture of a “voided check for the funds to be wired to [his personal bank] account” when the offering closed.<sup>56</sup> DA’s email did not indicate whether the offering funds were being directed to Issuer A or being used for the purposes disclosed in Issuer A’s initial Form C.<sup>57</sup>

e. Issuer A’s Third Amendment to the Form C

In June 2017, Issuer A filed a third amendment to the Form C. The amendment disclosed that Issuer A had decreased its target offering amount to \$4,000, but it provided no explanation for the change in the target offering amount. The offering deadline listed in the amendment remained September 20, 2017, despite the fact that Fernandez and DA had discussed closing the offering throughout May 2017. Issuer A’s third Form C amendment checked the box for amendments that are material and require investors to reconfirm their investment within five business days.

While Issuer A’s third Form C amendment updated the target offering amount, it also addressed a separate issue that MAP Group examiner, Stephanie Volkell, had raised with DreamFunded Marketplace and Fernandez in April or May 2017. As part of the MAP Group cause examination, Volkell informed Fernandez that Issuer A’s Form C was missing a separate

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<sup>55</sup> Issuer A’s close-out offering amount of \$4,000 was \$500 less than the lower target offering amount that DA discussed in his email to Fernandez on May 6, 2017.

<sup>56</sup> The voided check that DA emailed to Fernandez only had DA’s name on it. There was nothing on the voided check to indicate that the bank account belonged to Issuer A.

<sup>57</sup> Issuer A’s initial Form C stated that the issuer intended to use the offering’s proceeds to complete its mobile application, implement its business strategy, and pay officers and marketing costs. Under the “Use of Proceeds” section of Issuer A’s amended Forms C, however, the issuer directed potential investors to “see budget.” But no budget was attached to the amended Forms C.

financial statement.<sup>58</sup> Issuer A’s third Form C amendment contained an unaudited financial statement prepared by an unidentified independent accountant as of April 24, 2017.<sup>59</sup> The financial statement was basically a balance sheet, which showed that Issuer A had no cash, no assets, a “subscription receivable” of \$4,345, and “members equity” in the same amount.<sup>60</sup>

f. DreamFunded Marketplace’s and Fernandez’s Early Closing of Issuer A’s Offering

Issuer A’s offering closed on June 26, 2017,<sup>61</sup> seven days after the issuer filed the third Form C amendment with the SEC, about one month after the issuer sought to decrease the target offering amount to \$4,000, and three months before the offering was originally scheduled to close. DreamFunded Marketplace and Fernandez closed Issuer A’s offering by disbursing offering proceeds of \$4,345 to DA.

3. Legal Conclusions for Cause Two

Under SEC Regulation Crowdfunding Rule 301(c)(2), a funding portal must deny an issuer’s access to its platform if the funding portal has a reasonable basis for believing that an issuer’s offering presents the potential for fraud or raises investor protection concerns. SEC Regulation Crowdfunding Rule 301(c)(2), 17 C.F.R. § 227.301(c)(2) (2021). “Under this standard, an intermediary may not ignore facts about an issuer that indicate fraud or investor protection concerns such that a reasonable person would have denied access to the platform or cancelled the offering.” *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*339. SEC Regulation Crowdfunding Rule 301(c)(2) provides an “objective standard” where an intermediary “must act to

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<sup>58</sup> Volkell’s discussion of Issuer A’s lack of a financial statement was not an issuer-compliance concern because the Form C does not require the attachment of a financial statement. Under the “financial information required” section of the Form C, the form states that the issuer should provide “[f]inancial statements of the issuer and its predecessors, *if any*.” Form C, SEC Form 2930, <https://www.sec.gov/files/formc.pdf> (last visited Sept. 27, 2021) (emphasis added). The form also directs issuers to provide financial statements “[i]f financial statements are available . . . .” *Id.* If an issuer opts to provide a financial statement, however, the Form C details a number of requirements, such as a “principal executive officer” certification and an independent public accountant audit. *Id.*

<sup>59</sup> The financial statement did not identify the independent accountant who prepared it, and it was not signed or certified.

<sup>60</sup> The “subscription receivable” and “members equity” constitute the investments raised from investors during Issuer A’s offering, and, as explained later in this decision, it is the amount that DreamFunded Marketplace and Fernandez gave to DA at the close of Issuer A’s offering. As such, the subscription receivable and members equity were not receivables to which Issuer A was entitled because, at this juncture in Issuer A’s offering, investors still had the right to cancel their investments and have their investments returned.

<sup>61</sup> Issuer A’s offering was removed from DreamFunded Marketplace’s website two months earlier, in April 2017.

protect its investors from potentially fraudulent issuers or ones that otherwise present red flags concerning investor protection.” *Id.* at \*340. The circumstances surrounding Issuer A’s offering presented a number of red flags that raised investor protection concerns. In response, DreamFunded Marketplace and Fernandez had an obligation to deny Issuer A’s access to the funding portal, cancel Issuer A’s offering, and return the investments in Issuer A to the investors. DreamFunded Marketplace and Fernandez failed to execute their gatekeeper responsibilities. *Id.* at \*382 (stating that an “intermediary plays an important gatekeeper function” in the regulatory framework for securities-based crowdfunding transactions).

Specifically, we note that the actions of Issuer A’s then-current chief executive officer, DA, raised sufficient red flags to deny Issuer A’s access to the funding portal, cancel Issuer A’s offering, and return the investments to investors. Over the course of a two-week period in May 2017, DA asked DreamFunded Marketplace and Fernandez to lower the target offering amount, asked them to close the offering more than three months early, and asked them to deposit the investors’ funds into his personal bank account. DA made each of these requests without providing DreamFunded Marketplace and Fernandez with any explanation or business reason, and DreamFunded Marketplace and Fernandez obliged DA, despite the fact that the red flags suggested that DA was going to use Issuer A’s investments for purposes other than developing and marketing Issuer A’s business. Under SEC Regulation Crowdfunding Rule 301(c)(2), the actions of DA, standing alone,<sup>62</sup> raised sufficient red flags to direct DreamFunded Marketplace and Fernandez to discontinue Issuer A’s access to the funding portal, cancel the offering, and return investors’ funds.<sup>63</sup> By failing to do so, DreamFunded Marketplace and Fernandez violated SEC Regulation Crowdfunding Rule 301(c)(2) and FINRA Funding Portal Rule 200(a).<sup>64</sup>

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<sup>62</sup> Issuer A’s initial Form C, and three subsequent Form C amendments, contained a number of red flags, including inconsistencies in Issuer A’s ownership and voting power, the number of shares to be sold in the offering, and the offering deadline. But, as we noted earlier in this decision, DreamFunded Marketplace and Fernandez did not review Issuer A’s initial Form C or Form C amendments, and they probably did not know the inconsistencies even existed.

<sup>63</sup> We note that DreamFunded Marketplace and Fernandez removed Issuer A from the funding portal in April 2017. We, nevertheless, consider events after the date of removal from the funding portal because DreamFunded Marketplace and Fernandez not only should have removed Issuer A from the funding portal website (which they did in April 2017), they also should have “cancel[ed] the offering . . . and . . . direct[ed] the return of . . . any funds that have been committed by investors in the offering.” SEC Regulation Crowdfunding Rule 301(c)(2), 17 C.F.R. § 227.301(c)(2) (2021). DreamFunded Marketplace and Fernandez did not cancel Issuer A’s offering. They closed it. And they did not return funds to investors. They disbursed the offering proceeds to DA.

<sup>64</sup> On appeal, DreamFunded Marketplace and Fernandez do not address the Hearing Panel’s liability findings related to the red flags in Issuer A’s offering and Issuer A’s continued access to the funding portal. Rather, DreamFunded Marketplace and Fernandez focus on the Hearing Panel’s findings concerning Issuer A’s and Issuer B’s projections and forecasts, an issue on which they prevailed.

D. Cause Three: DreamFunded Marketplace and Fernandez Made False, Exaggerated, Unwarranted, Promissory, and Misleading Statements About an Investment in Issuer C, Their Issuer Due Diligence, and Certain Real Estate Investments

Under cause three, the Hearing Panel found that DreamFunded Marketplace and Fernandez violated FINRA Funding Portal Rules 200(a), 200(b), and 200(c)(2) because they made false, exaggerated, unwarranted, promissory, and misleading statements about an investment in Issuer C, the due diligence that they conducted on issuers, and certain real estate investments. As explained below, we affirm each of these findings.

1. Rules for Cause Three

The rules related to cause three are FINRA Funding Portal Rules 200(a), 200(b), and 200(c)(2). The FINRA Funding Portal Rule 200 Series governs “funding portal conduct.” The rule series includes FINRA Funding Portal Rule 200(a), which is the ethical standards rule as applied to funding portals, FINRA Funding Portal Rule 200(b), which is an antifraud provision, and FINRA Funding Portal Rule 200(c), which establishes the content standards for funding portal communications with investors.

a. FINRA Funding Portal Rule 200(b)

FINRA Funding Portal Rule 200(b) prohibits a funding portal’s “use of manipulative, deceptive, or other fraudulent devices” and states that “[n]o funding portal member shall effect any transaction in, or induce the purchase or sale of, any security by means of, or by aiding or abetting, any manipulative, deceptive or other fraudulent device or contrivance.” FINRA Funding Portal Rule 200(b) is modeled after Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rule 2020, and, like those rules, requires a showing of scienter to prove the rule violation.<sup>65</sup> See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 require a showing of scienter for liability to attach);

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<sup>65</sup> Section 10(b) of the Exchange Act is the SEC’s antifraud rule. Section 10(b) of the Exchange Act makes it “unlawful for any person . . . [t]o use or employ . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.” Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (2021).

Exchange Act Rule 10b-5 makes it “unlawful for any person . . . [t]o employ any device, scheme, or artifice to defraud[;] [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading[;] or [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.” 17 C.F.R. § 240.10b-5 (2021).

FINRA Rule 2020 is FINRA’s antifraud rule and prohibits FINRA member firms and persons associated with FINRA member firms from “effect[ing] any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.”

*Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at \*13 (Sept. 30, 2016) (explaining that FINRA Rule 2020 requires a showing of scienter); *J.S. Oliver Cap. Mgmt., L.P.*, Exchange Act Release No. 78098, 2016 SEC LEXIS 2157, at \*1 n.11 (June 17, 2016) (explaining that Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 require a showing of scienter).

b. FINRA Funding Portal Rule 200(c)(2)

FINRA Funding Portal Rule 200(c)(2) lists the content standards for funding portal communications.<sup>66</sup> Under FINRA Funding Portal Rule 200(c)(2)(A), funding portal communications must not:

- include any false, exaggerated, unwarranted, promissory or misleading statement or claim;
- omit any material fact or qualification if the omission would cause the communication to be misleading;
- state or imply that FINRA, or any other corporate name or facility owned by FINRA, endorses, indemnifies, or guarantees the funding portal member's business practices; or
- predict or project performance, imply that past performance will recur, or make any exaggerated or unwarranted claim, opinion, or forecast.

FINRA Funding Portal Rule 200(c)(2)(B) establishes the general standards for funding portal communications and states that “[a]ll funding portal member communications must be based on principles of fair dealing and good faith and must be fair and balanced.” Finally, FINRA Funding Portal Rule 200(c)(2)(C) requires that all funding portal communications “prominently disclose the name of the funding portal member, or the name under which the funding portal member primarily conducts business . . . .”

FINRA Funding Portal Rule 200(c)(2) is modeled after FINRA Rule 2210(d)(1),<sup>67</sup> and, like that rule, only requires a showing of negligence, not scienter, to prove a rule violation. *See Dep't*

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<sup>66</sup> FINRA Funding Portal Rule 200(c)(1) defines “funding portal communication” as “any electronic or other written communication that is distributed or made available by a funding portal member to one or more investors.” FINRA Funding Portal Rule 200(c)(1).

<sup>67</sup> FINRA Rule 2210(d)(1) covers the content standards of FINRA member firm communications. Under FINRA Rule 2210(d)(1)(A), for example, “[a]ll member communications must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service.” Under FINRA Rule 2210(d)(1)(B), “[n]o member may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication” or “publish, circulate or distribute any communication that the member knows or

[Footnote continued on next page]

*of Enforcement v. Beloyan*, Complaint No. 2005001988201, 2011 FINRA Discip. LEXIS 44, at \*50 (FINRA NAC Dec. 20, 2011) (finding that a showing of negligence was sufficient to establish a violation of the content standards of Rule 2210); *Dep't of Enforcement v. Asensio Brokerage Servs., Inc.*, Complaint No. CAF030067, 2006 NASD Discip. LEXIS 20, at \*32 (NASD NAC July 28, 2006) (rejecting respondent's argument that "gross negligence . . . is required to find that a respondent has violated Conduct Rule [] . . . 2210," rejecting respondent's argument that "Rule 2210(d)(1)(B) requires a showing of motive," and finding that "Rule 2210(d)(1)(B) precludes the making of misleading statements for any reason").

There are three categories of misrepresentations under cause three – those related to DreamFunded Marketplace's and Fernandez's offer to invest in Issuer C, those related to DreamFunded Marketplace's and Fernandez's due diligence on issuers, and those contained in real estate advertisements that appeared on DreamFunded Marketplace's website. Although Enforcement alleged that each category of misrepresentation violated FINRA Funding Portal Rules 200(b) and 200(c)(2), the Hearing Panel separated the rule violations based on whether DreamFunded Marketplace's and Fernandez's misrepresentations were made with negligence or scienter. Specifically, the Hearing Panel found that DreamFunded Marketplace's and Fernandez's statements about the investment in Issuer C, and the issuer due diligence, were fraudulent misrepresentations made with scienter, in violation of FINRA Funding Portal Rule 200(b), and they determined that DreamFunded Marketplace's and Fernandez's statements contained in the real estate advertisements were negligent misrepresentations, in violation of FINRA Funding Portal Rule 200(c)(2). We agree with the Hearing Panel's approach, and, on appeal, we affirm the Hearing Panel's findings that: (1) FINRA Funding Portal Rule 200(b) applies to fraudulent misrepresentations upon a showing of reckless or intentional conduct, i.e., scienter; (2) FINRA Funding Portal Rule 200(c)(2) applies to negligent misrepresentations; (3) DreamFunded Marketplace's and Fernandez's misrepresentations about the investment in Issuer C, and the due diligence that they conducted on issuers, rose to the level of fraudulent conduct that violated FINRA Funding Portal Rule 200(b); and (4) DreamFunded Marketplace's and Fernandez's misrepresentations in the real estate advertisements on the funding portal's website involved negligent conduct that violated FINRA Funding Portal Rule 200(c)(2).

2. DreamFunded Marketplace's and Fernandez's Purported Investment in Issuer C

As discussed under cause one in connection with DreamFunded Marketplace's and Fernandez's failure to respond fully and completely to FINRA's request for information and documents, the facts for cause three begin in October 2016, when MAP Group examiner, Stephanie Volkell, saw a video clip of Fernandez making an offer to invest in Issuer C.

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has reason to know contains any untrue statement of a material fact or is otherwise false or misleading." Under FINRA Rule 2210(d)(1)(F), "[c]ommunications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast . . . ."

a. Facts Related to DreamFunded Marketplace's and Fernandez's Purported Investment in Issuer C

Issuer C filed the Form C in January 2017. Issuer C's Form C disclosed that it was organized in April 2016, and that its primary product was a new type of fire hose that was designed with a harness to lessen fatigue and decrease injuries to firefighters. Issuer C's Form C disclosed that, as of December 2016, the issuer had no assets, no cash or cash equivalents, no accounts receivables, and no revenues. Issuer C's Form C reported that the issuer planned to offer 10,000 shares for a target amount of \$10,000 and maximum funding amount of \$100,000. Issuer C's target closing date was in September 2017. Issuer C's offering did not reach its target amount, and, in April 2017, DreamFunded Marketplace removed Issuer C's offering from the funding portal.

(1) The Video Clip Contents

The subject video clip, which is about seven minutes long, is part of a full-length television docuseries that connects inventors and potential investors. The goal of that connection is to influence investors to purchase shares in the inventor's business. In January 2016, Fernandez participated in the filming of the show with the chief executive officer of Issuer C. The video clip shows Fernandez making a \$1 million offer to the chief executive officer of Issuer C, and the chief executive officer of Issuer C accepting Fernandez's offer. During the show, the host introduces Fernandez as the chief executive officer of DreamFunded.com, "a crowdfunding platform that's invested over \$100 million in startups."

(2) Fernandez Posts the Video Clip on Social Media

The docuseries episode featuring Fernandez and Issuer C's chief executive officer aired on October 6, 2016. In anticipation of the airing, Fernandez posted a press release announcing "Manny Fernandez Featured as an Investor on [ ] TV Show" to DreamFunded Marketplace's website. Fernandez also held a viewing event the night that the episode aired. A couple of days after the episode aired, Fernandez posted the video clip of his appearance to a social media platform. Fernandez explained that he posted the video clip to social media to generate publicity for himself and DreamFunded Marketplace.

Fernandez testified that Volkell called him a few hours after he posted the video clip to the social media platform, and that she told him that the video "wasn't a good thing to put up there." Fernandez claimed that he immediately removed the video from social media in response to Volkell's call. At the hearing, however, Volkell testified that she would not have told Fernandez to remove the video clip from social media based on her first viewing it because the MAP Group would have to investigate the video clip, its content, and its context to determine whether there was an issue.

(3) Fernandez's Video Clip Offer to Invest in Issuer C Leads the MAP Group to Open a Cause Examination

Volkell testified that she saw the video clip for the first time around October 24, 2016, about two weeks after the episode aired. She explained that she saw the video clip posted on DreamFunded Marketplace's website and on a social media platform. Volkell testified that the video clip raised concerns because of the prohibitions against an intermediary's financial interest in an issuer. In response, in late-2016, the MAP Group opened a cause examination for DreamFunded Marketplace and Fernandez to focus on the potential violations that the video clip raised.

(4) Fernandez Denies Investing in Issuer C

On November 15, 2016, Volkell sent Fernandez an email asking him to provide information as part of the cause examination. Among other questions, Volkell asked Fernandez whether DreamFunded Marketplace "or any of its directors, officers[,] or partners[] have invested (or have plans to invest) [in] any potential offerings?" Although Volkell testified that she asked this question based on the video clip showing Fernandez's offer to invest in Issuer C, her email did not reference the video clip.

On November 29, 2016, Volkell sent Fernandez a follow-up email to check on the status of his response to her inquiry from earlier that month. Fernandez responded by email later that day. In response to Volkell's question concerning investments in offerings, Fernandez wrote, "[w]e have not invested, however, two have been given a verbal non-binding agreement that once they close the round, and[,] if we like the traction[,] [w]e would be invested [sic] in investing."

On December 28, 2016, Volkell sent Fernandez an email asking Fernandez to identify the two offerings that had been given verbal non-binding agreements, and she asked Fernandez to describe the terms of the agreements. Fernandez responded by email on January 10, 2017. Fernandez identified Issuer C as one of the recipients of the verbal non-binding agreements to invest. Fernandez explained that Issuer C received the verbal non-binding agreement in connection with the filming of a television show before DreamFunded Marketplace registered with FINRA for funding portal membership. Fernandez, however, stated that he had decided against investing in Issuer C after conducting due diligence on the issuer, and he noted that he had invited Issuer C to post its offering to DreamFunded Marketplace's website when he declined to make the investment.<sup>68</sup>

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<sup>68</sup> The second issuer to receive the verbal non-binding agreement was Issuer B. For Issuer B, Fernandez's email stated, "I verbally commit[ted] . . . for a \$50,000 personal investment. After future research, I felt this [] business was not a fit for me personally. I invited them to apply for DreamFunded.com."

(5) The Video Clip Circulates on DreamFunded Marketplace’s Website, and Various Social Media Platforms, Through May 2018

Volkell testified that, as the cause examination unfolded and she continued her surveillance of DreamFunded Marketplace, she saw the video clip multiple times in multiple locations, including the funding portal’s website and at least two social media platforms. When Volkell saw the video clip, she took a screenshot of it.<sup>69</sup> The record contains screenshots of the video clip on: (1) a social media platform on February 15, 2017;<sup>70</sup> (2) DreamFunded Marketplace’s website on September 8, 2017;<sup>71</sup> and (3) a second social media platform on May 16, 2018.<sup>72</sup>

b. Legal Conclusions Related to DreamFunded Marketplace’s and Fernandez’s Purported Investment in Issuer C

The Hearing Panel found that the video clip of Fernandez’s offer to invest \$1 million in Issuer C was “false and misleading,” that DreamFunded Marketplace and Fernandez acted with scienter when Fernandez posted the video clip, and that DreamFunded Marketplace’s and Fernandez’s posting of the video clip rose to the level of fraud and violated FINRA Funding Portal Rule 200(b), and, by extension, FINRA Funding Portal Rule 200(a). We agree.

FINRA Funding Portal Rule 200(b) is based on the antifraud provisions of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rule 2020. That connection suggests that the elements necessary to establish fraud under those rules also should apply to FINRA Funding Portal Rule 200(b). Accordingly, in order to establish fraud under FINRA Funding Portal Rule 200(b), a preponderance of the evidence must prove that a respondent has: (1) misrepresented or omitted; (2) a material fact; (3) with scienter; (4) in connection with the purchase or sale of a

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<sup>69</sup> The record does not contain a screenshot of the video clip from Volkell’s first viewing of it on DreamFunded Marketplace’s website and the social media platform in October 2016.

<sup>70</sup> Volkell also saw the video clip on DreamFunded Marketplace’s website in March 2017, and she asked Fernandez about it in an email. About one month later, on April 28, 2017, Fernandez’s then-attorney, MT, responded by letter. MT wrote that “[t]he video has been removed and is no longer present on the [funding] portal website.” MT did not say when the video was removed. Despite MT’s representations, Volkell saw the video clip on DreamFunded Marketplace’s website in September 2017.

<sup>71</sup> The press release that Fernandez posted to DreamFunded Marketplace’s website to publicize the appearance was also on the website in September 2017.

<sup>72</sup> When the hearing began in September 2018, the Hearing Panel conducted an internet search and found that the video clip was still posted to one of the two social media platforms noted above. The Hearing Panel did not take official notice of the post, and, in an abundance caution, we have decided to exclude that later posting from our consideration.

security.<sup>73</sup> *Cf. Dep't of Enforcement v. Akindemowo*, Complaint No. 2011029619301, 2014 FINRA Discip. LEXIS 15, at \*14-15 (FINRA OHO Jan. 23, 2014) (“To establish a violation of FINRA Rule 2020, the Hearing Panel must find that Respondent made material misrepresentations or omissions in connection with the purchase or sale of a security and acted with scienter.”), *aff'd*, 2015 FINRA Discip. LEXIS 58, at \*1 (FINRA NAC Dec. 29, 2015), *aff'd*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at \*1 (Sept. 30, 2016). Each of the four elements is present here.

First, the video clip misrepresented two facts. The video clip gave the impression that DreamFunded Marketplace and Fernandez had “invested over \$100 million in startups,” and that they intended to invest \$1 million in Issuer C. Both facts were false. DreamFunded Marketplace and Fernandez did not invest over \$100 million in new companies, and they did not invest \$1 million, or any funds for that matter, in Issuer C.

Second, the two misrepresentations contained in the video clip were material. Misstated or omitted facts are “material” if there is a substantial likelihood that a reasonable investor would have considered the misrepresentation or omission important in making an investment decision, and if disclosure of the misstated or omitted fact “would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.” *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). The video clip greatly inflated Fernandez’s wealth, exaggerated Fernandez’s ability to raise capital, overstated Fernandez’s investment savvy, and implied that Issuer C was a quality investment. Any reasonable investor would consider these facts in deciding whether to invest in Issuer C or participate in a crowdfunding offering facilitated through DreamFunded Marketplace and Fernandez. *See Louis Ottimo*, Exchange Act Release No. 83555, 2018 SEC LEXIS 1588, at \*33 (June 28, 2018) (finding that respondent’s misrepresentations about his “management abilities” were material).

Third, DreamFunded Marketplace and Fernandez acted with scienter. Scienter is defined as “a mental state embracing an intent to deceive, manipulate, or defraud.” *Hochfelder*, 425 U.S. at 193 n.12. Scienter is also established through a heightened showing of recklessness. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 319 n.3 (2007). Reckless conduct includes “a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.” *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977).

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<sup>73</sup> To prove fraud under Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5, a fifth element also must be present. That fifth element is a jurisdictional element that is satisfied through the use of interstate commerce. *See SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996). FINRA Rule 2020 does not require proof of a jurisdictional element, and we conclude that FINRA Funding Portal Rule 200(b) also should not require proof of one. *Cf. Dep't of Market Regulation v. Singh*, Complaint No. 2010022691102, 2016 FINRA Discip. LEXIS 48, at \*71 n.175 (FINRA OHO Aug. 24, 2016) (“The elements of a FINRA Rule 2020 violation are the same as for a securities fraud violation, except that a [FINRA] Rule 2020 violation, unlike a federal securities violation, does not require interstate commerce to establish jurisdiction.”).

DreamFunded Marketplace’s and Fernandez’s conduct in posting the video clip to the funding portal’s website and social media was, at a minimum, reckless.<sup>74</sup> In October 2016, when the docuseries episode featuring Fernandez aired, he held a viewing event and uploaded a video clip of his appearance to DreamFunded Marketplace’s website and at least two social media platforms. The video clip contained two misrepresentations, and Fernandez knew it. Fernandez knew that he had not invested \$100 million in startups, and he knew that he had not invested \$1 million in Issuer C. Despite the misrepresentations that the video clip contained, DreamFunded Marketplace and Fernandez allowed the video clip to remain on the funding portal website until at least September 2017, and on social media platforms until at least May 2018. Based on these facts, we conclude that DreamFunded Marketplace and Fernandez acted with scienter in posting the misleading video clip to the funding portal website and social media platforms because they “either knew that . . . [the] statements . . . were materially misleading or . . . [were] reckless in not recognizing that investors would likely be misled about material information.” *Ottimo*, 2018 SEC LEXIS 1588, at \*41 (finding that respondent acted with scienter when he misrepresented his management experience in private placement memoranda).

Finally, DreamFunded Marketplace’s and Fernandez’s misrepresentations were in connection with the purchase or sale of a security. When interpreting this provision under Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5, the Supreme Court has determined that it is sufficient for the material misrepresentation or omission to “touch” or “coincide” with the purchase or sale of a security. *See SEC v. Zandford*, 535 U.S. 813, 822 (2002) (“It is enough that the scheme to defraud and the sale of securities coincide.”); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85 (2006) (“Under our precedents, it is enough that the fraud alleged ‘coincide’ with a securities transaction.”). The facts of this case satisfy this standard because, as Fernandez testified, he posted the video clip to the funding portal’s website and the social media platforms to promote himself and DreamFunded Marketplace to issuers and investors that wanted to participate in crowdfunded offerings.<sup>75</sup> *Cf. SEC v. Gibson*, Litigation Release No. 22018, 2011 SEC LEXIS 2259, at \*45-48 (June 30, 2011) (alleging that falsified testimonials on respondent’s website violated the antifraud provisions of the Exchange Act).

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<sup>74</sup> DreamFunded Marketplace acted with scienter based on Fernandez’s acts. *See Sells*, 2012 U.S. Dist. LEXIS 112450, at \*24 (concluding that an officer’s “knowledge may be imputed to [his firm] by application of the doctrine of respondeat superior under which wrongful acts of an employee undertaken within the scope of employment can be imputed to the employer”); *Kirk A. Knapp*, 50 S.E.C. 858, 860 n.7 (1992) (explaining that FINRA properly attributed scienter of the firm’s owner to the firm and thereby found a primary antifraud violation by the firm based on the owner’s conduct).

<sup>75</sup> Aside from using the video clip to promote DreamFunded Marketplace to issuers of crowdfunded offerings, we note that the posting of the video clip to the funding portal website, standing alone, was sufficient to connect the video clip, with its material misrepresentations, to the purchase or sale of a security.

c. DreamFunded Marketplace’s and Fernandez’s Arguments Related to the Purported Investment in Issuer C

On appeal, DreamFunded Marketplace and Fernandez proffer several explanations to persuade us that the posts of the video clip to the funding portal website and social media platforms are not fraudulent. We are not so persuaded.

First, DreamFunded Marketplace and Fernandez assert that a “very skilled computer hacker” “planted” the video clip, and that “[t]he television show was doctored to make it look like” he made the offer, when, in fact, he did not. The Hearing Panel found that Fernandez’s testimony concerning the hacker and the doctored and planted video clip was not credible, and there is no basis to overturn the Hearing Panel’s credibility determination on appeal. *See Murphy & Co.*, 2020 SEC LEXIS 5218, at \*28-29. To the contrary, the evidence supports that Fernandez appeared in the docuseries episode, made the offer to Issuer C’s chief executive officer knowing that he would not consummate the investment, and used the video clip of the episode to promote himself, DreamFunded Marketplace, and Issuer C’s offering while it was on the funding portal website.<sup>76</sup>

Second, DreamFunded Marketplace and Fernandez state that they posted a “truncated” version of the video clip, which cuts out the \$1 million offer to invest in Issuer C. They assert that the video clip does not contain misrepresentations if it does not contain the offer. While a video clip without the offer would alleviate one of the two misrepresentations at issue,<sup>77</sup> the Hearing Panel, once again, found that “Fernandez’s uncorroborated story of taking down the initial posting with the offer in it and reposting a truncated version without the offer . . . [was] inconsistent with [Volkell’s] testimony, which we find credible.” *See id.* Volkell testified, and the documentary evidence in the record corroborates,<sup>78</sup> that whenever she saw the video clip on DreamFunded

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<sup>76</sup> The following facts support our conclusions in this area: (1) Fernandez posted the video clip to a social media platform within days of the episode airing; (2) after posting the video clip to one social media platform, Fernandez posted the clip to DreamFunded Marketplace’s website and an additional social media platform; (3) Fernandez informed Volkell that he made the offer, but declined to proceed with the investment; (4) the record contains three news articles reporting on Fernandez’s offer to invest in Issuer C; and (5) the video clip remained available through DreamFunded Marketplace’s website or social media platforms until May 2018.

<sup>77</sup> The misrepresentation concerning DreamFunded Marketplace’s and Fernandez’s \$100 million in startup investments would remain.

<sup>78</sup> Two of the three screenshots contained in the record show that the length of the video clip is 6 minutes, 44 seconds, which is the length of the video clip contained in the record. Video clip lengths are contained on the screenshots from February 15, 2017 and May 16, 2017. The screenshot from September 8, 2017 does not contain a video clip length.

Marketplace's website or on social media platforms, the video clip always included the scene of Fernandez making the \$1 million offer to invest in Issuer C.<sup>79</sup>

Third, DreamFunded Marketplace and Fernandez state that the docuseries episode featuring Fernandez was recorded in late-2015 or early-2016, and that they cannot be liable for fraud because DreamFunded Marketplace did not exist when the show was recorded. In connection with this argument, DreamFunded Marketplace and Fernandez quibble with the Hearing Panel's findings concerning the timing of the removal of video clip from DreamFunded Marketplace's website and from social media platforms. DreamFunded Marketplace's and Fernandez's chronology-based arguments miss the point of a fraud-based analysis under FINRA Funding Portal Rule 200(b). It does not matter when Fernandez recorded the docuseries episode. Nor does it matter when the video clip was posted to, or removed from, DreamFunded Marketplace's website and social media platforms. The relevant inquiry under FINRA Funding Portal Rule 200(b) is whether DreamFunded Marketplace and Fernandez misrepresented or omitted a material fact with scienter in connection with the purchase or sale of a security. *Cf. First Jersey Sec., Inc.*, 101 F.3d at 1467. We have resolved that inquiry, answering in the affirmative and finding that DreamFunded Marketplace's and Fernandez's posting of the false and misleading video clip violated FINRA Funding Portal Rule 200(b).

\* \* \*

Under cause three, as it relates to the video clip, we find that DreamFunded Marketplace and Fernandez effected and induced the purchase of securities by means of manipulative, deceptive, and fraudulent devices and contrivances, in violation of FINRA Funding Portal Rules 200(b) and 200(a).

3. DreamFunded Marketplace's and Fernandez's Misrepresentations Related to the Funding Portal's Due Diligence on Issuers

The second part of the Hearing Panel's findings under cause three involve DreamFunded Marketplace's and Fernandez's representations concerning the due diligence that they conducted on issuers. The Hearing Panel found that DreamFunded Marketplace's and Fernandez's "description of their [issuer] due diligence on the [funding] [p]ortal's website was false and misleading," and they "either knew that the description of their due diligence was likely to mislead investors or they recklessly disregarded the risk that it would, in violation of FINRA Funding Portal 200(b)." We agree.

a. DreamFunded Marketplace's and Fernandez's Representations Related to Issuer Due Diligence

DreamFunded Marketplace and Fernandez made a number of representations concerning their issuer due diligence. For example, they represented that they conducted a "detailed and time consuming" screening process for issuers and "thoroughly vet[ted] startups prior to featuring them on [the] platform." DreamFunded Marketplace and Fernandez explained that their issuer due

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<sup>79</sup> Volkell testified that she was unaware of any truncated version of the video clip until DreamFunded Marketplace's and Fernandez's attorney mentioned it to her during her cross-examination at the hearing.

diligence consisted of “interviews and background checks on all company team members, validation of market size and customer acceptance, evaluation of product and technology, analysis of the competitive environment, and assurance that [the] terms of investments meet exacting standards.” DreamFunded Marketplace and Fernandez claimed that the funding portal had a “due diligence and deal flow screening team” and a “world-class investment committee” who “screen[] each company that is applying to be featured on the [] platform.” They stressed that the screening team and investment committee “review[ed] the due diligence previously completed by angel groups and [venture capital] partners to assure each deal sourced from a third party meets DreamFunded [Marketplace’s] standards for anticipated investment performance.” DreamFunded Marketplace and Fernandez also noted that the screening team and investment committee “recognize[] the best practices guide as outlined by the Angel Capital Association” and followed the Angel Capital Association’s “due diligence guidelines.”<sup>80</sup> DreamFunded Marketplace and Fernandez posted these misrepresentations concerning their issuer due diligence to DreamFunded Marketplace’s website.

b. Legal Conclusions Related to DreamFunded Marketplace’s and Fernandez’s Due Diligence Misrepresentations

Now that we have detailed DreamFunded Marketplace’s and Fernandez’s representations concerning the funding portal’s due diligence on issuers, we apply the factors necessary to determine if the representations rise to the level of fraud under FINRA Funding Portal Rule 200(b). *Cf. Akindemowo*, 2014 FINRA Discip. LEXIS 15, at \*14-15. They do.

As an initial matter, DreamFunded Marketplace’s and Fernandez’s representations concerning the funding portal’s due diligence were false and misleading. There is no evidence that DreamFunded Marketplace and Fernandez conducted due diligence to vet issuers,<sup>81</sup> and there is no evidence that the funding portal had a due diligence and deal flow screening team or an investment committee. For example, Fernandez testified that he followed a checklist from the Angel Capital Association to conduct due diligence on issuers. But there is no documentary evidence to corroborate Fernandez’s claim. Although DreamFunded Marketplace and Fernandez produced a

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<sup>80</sup> The Angel Capital Association “is a collective of accredited angel investors.” *The Angel Capital Association – About ACA Home*, [https:// www.angelcapitalassociation.org/about-aca](https://www.angelcapitalassociation.org/about-aca) (last visited Sept. 27, 2021). It states that it is “the largest angel professional development organization in the world.” *Id.*

<sup>81</sup> Funding portals are not required to conduct due diligence on issuers. *See SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*316 (“While some commenters argued for . . . requiring intermediaries to conduct due diligence on issuers . . . , we believe that a reasonable basis standard is appropriate, particularly in view of the issuer’s own obligation to comply with the requirements in Section 4A(b) [of the Securities Act] and the related requirements in [SEC] Regulation Crowdfunding.”). But, at the point that DreamFunded Marketplace and Fernandez represented that they had conducted due diligence on the issuers with offerings on the funding portal platform, they had an obligation to speak truthfully. *Cf. Richmark Cap. Corp.*, 57 S.E.C. 1, 9 (2003) (explaining that a fundamental purpose of the federal securities laws is to “substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities business”), *aff’d*, 86 F. App’x 744 (5th Cir. 2004).

generic template of a due diligence list, they provided nothing to evidence its actual use. Fernandez also testified that he took notes of issuer due diligence. But there is no evidence to corroborate Fernandez's claims because, as he testified, he discarded the notes. Finally, Fernandez testified that "everyone" at DreamFunded Marketplace was a member of the due diligence team, and that he led the due diligence efforts at the funding portal. But there is no evidence to document the occurrence of due diligence meetings or identify the members of the due diligence and deal flow screening team or investment committee.

Second, the misrepresentations about the funding portal's due diligence were material. *See Basic, Inc.*, 485 U.S. at 231-32. DreamFunded Marketplace and Fernandez claimed that the funding portal's due diligence on issuers was "detailed and time consuming," and that the funding portal had a due diligence and deal flow screening team and investment committee that ensured that issuers and offerings featured on the funding portal met "exacting standards." But DreamFunded Marketplace had no team or committee to vet issuers, and DreamFunded Marketplace's and Fernandez's due diligence on issuers, if they conducted any at all, was far from what they represented to investors. "[M]isstatements regarding due diligence [a]re clearly material . . ." *Total Wealth Mgmt., Inc.*, Initial Decisions Release No. 860, 2015 SEC LEXIS 3367, \*92 (Aug. 17, 2015) (finding that respondent's misrepresentations about the extent of his due diligence violated the antifraud provisions of the Securities Act and Exchange Act).

Third, DreamFunded Marketplace and Fernandez acted with scienter. *See Hochfelder*, 425 U.S. at 193 n.12 (explaining that scienter is based on an "an intent to deceive, manipulate, or defraud"); *Tellabs, Inc.*, 551 U.S. at 319 n.3 (scienter may be based on recklessness). During his on-the-record testimony, Fernandez testified that he did three things to vet issuers with offerings on the funding portal platform. He testified that he had an in-person meeting with the issuer's officer if the issuer's officer was local; he conducted online research about the issuer and officer; and he searched the internet to review any social media profile that the officer may have publicly available. But, as the Hearing Panel explained, "the undocumented and unsystematic way in which Fernandez actually reviewed issuers and their [officers], [his] description of the[] due diligence on the [funding] [p]ortal's website was false and misleading. [DreamFunded Marketplace and Fernandez] either knew that the description of their due diligence was likely to mislead investors or they recklessly disregarded the risk that it would . . ." Based on the record before us, we find that DreamFunded Marketplace's and Fernandez's misrepresentations about the funding portal's due diligence on issuers were, at a minimum, reckless. *See Total Wealth Mgmt.*, 2015 SEC LEXIS 3367, \*99 ("Because he was heavily involved in performing the due diligence, [respondent] knew, or was reckless in not knowing, that it did not remotely measure up to the level of due diligence that had been promised to investors.").

Finally, as explained in the context of the video clip, DreamFunded Marketplace's and Fernandez's misrepresentations about the funding portal's issuer due diligence were in connection with the purchase or sale of a security. *See Zandford*, 535 U.S. at 822; *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 547 U.S. at 85. DreamFunded Marketplace and Fernandez used the misrepresentations about the funding portal's due diligence on issuers to promote themselves to

individuals and entities that wanted to participate in crowdfunding transactions.<sup>82</sup> *See Total Wealth Mgmt.*, 2015 SEC LEXIS 3367, \*101 (“[Respondent’s] misstatements and omissions were, in part, contained in sales literature and . . . relied upon by investors in the offer, sale, or purchase of securities.”).

\* \* \*

Under cause three, we find that DreamFunded Marketplace and Fernandez misrepresented the funding portal’s due diligence on issuers, acted with scienter, and effected and induced the purchase of securities by means of manipulative, deceptive, and fraudulent devices and contrivances, in violation of FINRA Funding Portal Rules 200(b) and 200(a).

4. DreamFunded Marketplace’s and Fernandez’s Real Estate Advertisements

OFDMI investigator, Patrick Devero, began investigating DreamFunded Marketplace and Fernandez in August 2016. In June 2017, as the investigation progressed, Devero noticed significant changes on DreamFunded Marketplace’s website. Devero testified that, when he examined DreamFunded Marketplace’s website in June 2017, it showed no crowdfunded offerings, only real estate advertisements.

a. Facts Related to DreamFunded Marketplace’s and Fernandez’s Real Estate Advertisements

DreamFunded Marketplace and Fernandez removed the last of the crowdfunded offerings from DreamFunded Marketplace’s website at the end of April 2017. At the hearing, Fernandez testified that he ended the crowdfunded offerings and was no longer “in business” at that point.<sup>83</sup> Fernandez explained that he posted the real estate advertisements to DreamFunded Marketplace’s website as a placeholder while he revamped DreamFunded Marketplace’s business model and determined whether FINRA would “green light” a different line of business for the funding portal.

The real estate advertisements were from investments from an earlier period, before DreamFunded Marketplace became a FINRA funding portal member. Each advertisement showed a photograph of a single-family house and the profits earned in connection with the investment in that house. The advertisements suggested that investors in the real estate transactions earned 10 percent interest annually. The advertisements compared the profits returned on the real estate

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<sup>82</sup> On appeal, DreamFunded Marketplace and Fernandez assert that Fernandez applied the Angel Capital Association’s due diligence standards to “weed[] down the number of issuers seeking to be listed on the DreamFunded [Marketplace’s] website from over 800 to just 15.” But the Hearing Panel addressed this issue in the proceedings below, found that “[t]here is no documentation in the record of any of these activities,” and determined that Fernandez was not a credible witness on this point. We have no basis to overturn the Hearing Panel’s credibility determination. *See Murphy & Co.*, 2020 SEC LEXIS 5218, at \*28-29.

<sup>83</sup> But, in April 2017, DreamFunded Marketplace was still a FINRA funding portal member, and Fernandez was still working to close Issuer A’s offering.

investments to those from the purchase of certificates of deposit and stated, “Tired of low CD rates? Put your money to work.”

b. Legal Conclusions Related to DreamFunded Marketplace’s and Fernandez’s Real Estate Advertisements

In the proceedings below, the Hearing Panel found that the real estate advertisements were misleading, but DreamFunded Marketplace and Fernandez did not act with requisite level of scienter to make posting the advertisements to the funding portal website fraudulent under FINRA Funding Portal Rule 200(b). The Hearing Panel therefore concluded that DreamFunded Marketplace’s and Fernandez’s conduct was negligent and violated FINRA Funding Portal Rule 200(c)(2). We agree.

FINRA Funding Portal Rule 200(c)(2)(A) prohibits funding portal communications from including “any false, exaggerated, unwarranted, promissory or misleading statement or claim . . . .” The real estate advertisements posted to DreamFunded Marketplace’s website were misleading in three ways. First, the advertisements made it appear that the real estate investments were part of DreamFunded Marketplace’s crowdfunding business when they were not. The real estate transactions occurred before FINRA registered DreamFunded Marketplace to serve as an intermediary in crowdfunded offerings. Second, the advertisements made it appear that investors could expect a high rate of return when no such guarantee could be made. Finally, the advertisements made it appear that investing in real estate was comparable to purchasing certificates of deposit. That, however, was not true because the real estate transactions depicted in the advertisements were not federally insured. Based on these facts, we find that DreamFunded Marketplace’s and Fernandez’s posting of the real estate advertisements to the funding portal website violated FINRA Funding Portal Rule 200(c)(2), and, consequently, FINRA Funding Portal Rule 200(a).<sup>84</sup>

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Under cause three, as it relates to the real estate advertisements posted to the funding portal website, we find that DreamFunded Marketplace and Fernandez made false, exaggerated, unwarranted, promissory or misleading statements or claims, in violation of FINRA Funding Portal Rules 200(c)(2) and 200(a).

E. Cause Four: Enforcement Failed to Prove That DreamFunded Marketplace and Fernandez Did Not Have a Reasonable Basis to Believe That Issuer A and Issuer B Had Complied with the Securities Act

Under cause four, Enforcement alleged that DreamFunded Marketplace and Fernandez violated SEC Regulation Crowdfunding Rule 301(a) and FINRA Funding Portal Rule 200(a) because they did not have a reasonable basis to believe that Issuer A and Issuer B had complied

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<sup>84</sup> On appeal, DreamFunded Marketplace and Fernandez do not proffer any arguments in response to the Hearing Panel’s findings about the real estate advertisements.

with the requirements of Section 4A(b) of the Securities Act.<sup>85</sup> Enforcement’s allegations had two parts. First, Enforcement alleged that “[Issuer] A falsely claimed in its Form C that it provided financial statements to potential investors that were true and complete in all material respects;” “[Issuer] A’s Form C did not include any financial statements;” and “[Issuer A’s] certification was objectively false.” Second, Enforcement alleged that “[Issuer] B failed to include in its Form C any discussion on whether or how its historical results were representative of, and provided reasonable support or basis for, the exponential revenue growth projected in the [issuer’s] financial information supplied to potential investors.”

The Hearing Panel dismissed the entirety of Enforcement’s allegations under cause four. In response to Enforcement’s allegations concerning Issuer A, the Hearing Panel found that: (1) Issuer A had no operating history or prior financial statements to disclose; (2) the absence of a financial statement did not mean that Issuer A had failed to comply with the SEC’s crowdfunding rules; (3) the certification, without the inclusion of a financial statement, was not a sign of noncompliance; and (4) DreamFunded Marketplace and Fernandez “were not required to leap to the conclusion that [Issuer] A was out of compliance solely” based on the failure to include a financial statement with the Form C. In response to Enforcement’s allegations concerning Issuer B, the Hearing Panel found that: (1) “[h]ow historical results might relate to what investors could expect in the future involves projections and forecasts and would be difficult to evaluate;” (2) “a funding portal [does not have] a duty to analyze and evaluate a crowdfunding issuer’s projections and forecasts;” and (3) “a funding portal [is not required to] deny access to its platform solely because of the absence of such a discussion.” Enforcement’s cross-appeal requests that we overturn the Hearing Panel’s dismissal of cause four.<sup>86</sup> On appeal, we affirm the Hearing Panel’s dismissal.

Under SEC Regulation Crowdfunding Rule 301(a), an intermediary must have a reasonable basis to believe that an issuer is complying with the requirements of the Securities Act. SEC Regulation Crowdfunding Rule 301(a), 17 C.F.R. § 227.301(a) (2021). In forming that reasonable basis, an intermediary “may rely on the representations of the issuer concerning compliance with these requirements unless the intermediary has reason to question the reliability of those representations.” *Id.* When the SEC proposed SEC Regulation Crowdfunding Rule 301(a), “several commenters suggested an intermediary should be required to conduct some type of due diligence on the issuer, as opposed to relying on issuer representations.” *SEC Crowdfunding Final*

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<sup>85</sup> SEC Regulation Crowdfunding Rule 301(a), 17 C.F.R. § 227.301(a) (2021), requires that intermediaries in securities-based crowdfunding transactions “[h]ave a reasonable basis for believing that an issuer seeking to offer and sell securities in reliance on [the Crowdfunding Exemption] through the intermediary’s platform complies with the requirements in [S]ection 4A(b) of the [Securities] Act . . . and the related requirements in this part.” Section 4A(b) of the Securities Act, 15 U.S.C. § 77d-1(b) (2021), provides a list of “requirements for issuers” that “offer[] or sell[] securities” in crowdfunding transactions.

<sup>86</sup> Although DreamFunded Marketplace and Fernandez prevailed on cause four before the Hearing Panel, in their appellate briefs, they nevertheless state that the “Hearing Panel[’s] . . . holding that [DreamFunded Marketplace and Fernandez] are liable for oversights by issuers is unwarranted and misplaced.” DreamFunded Marketplace’s and Fernandez’s arguments under cause four are moot.

*Rule*, 2015 SEC LEXIS 5486, at \*313. But the SEC rejected this approach, noting the “associated costs of a potentially higher standard.” *Id.* Here, DreamFunded Marketplace and Fernandez were allowed to rely on Issuer A’s and Issuer B’s representations concerning their compliance with the Securities Act. To find otherwise would be to impose a higher standard, an approach that the SEC intentionally avoided. Based on the facts presented, we find that there is not sufficient evidence to demonstrate that DreamFunded Marketplace or Fernandez had reason to question Issuer A’s and Issuer B’s representations. Accordingly, we dismiss Enforcement’s allegations against DreamFunded Marketplace and Fernandez under cause four.

F. Cause Five: DreamFunded Marketplace and Fernandez Failed to Conduct Issuer Background Checks and Securities Enforcement Regulatory Histories

Under cause five, the Hearing Panel found that DreamFunded Marketplace and Fernandez failed to conduct required issuer background checks, failed to obtain securities enforcement regulatory histories on issuers, and failed to have a third party handle the background checks and regulatory histories on their behalf. The Hearing Panel determined that DreamFunded Marketplace’s and Fernandez’s failure to conduct the background checks, and obtain the regulatory histories, prevented them from having a reasonable basis for believing that the issuers featured on the funding portal platform were not disqualified from participating in a crowdfunded securities offerings. The Hearing Panel therefore concluded that DreamFunded Marketplace and Fernandez violated SEC Regulation Crowdfunding Rule 301(c)(1) and FINRA Funding Portal Rule 200(a). We affirm these findings.

1. SEC Regulation Crowdfunding Rule 301(c)(1)

We discussed SEC Regulation Crowdfunding Rule 301, generally, and SEC Regulation Crowdfunding Rule 301(c)(2), specifically, in the context of cause two (DreamFunded Marketplace and Fernandez Failed to Deny Issuer A’s Access to the Funding Portal When Issuer A’s Offering Raised Investor Protection Concerns). SEC Regulation Crowdfunding Rule 301 addresses “measures to reduce risk of fraud” in securities-based crowdfunding transactions, and, under SEC Regulation Crowdfunding Rule 301(c)(1), an intermediary must deny an issuer’s access to the funding portal if the intermediary “[h]as a reasonable basis for believing that the issuer or any of its officers, directors[,] . . . or beneficial owners . . . is subject to a disqualification under [SEC Regulation Crowdfunding Rule 503], 17 C.F.R. § 227.503 (2021).”<sup>87</sup> SEC Regulation Crowdfunding Rule 301(c)(1), 17 C.F.R. § 227.301(c)(1) (2021). SEC Regulation Crowdfunding Rule 301(c)(1) emphasizes that, “[i]n satisfying this requirement, an intermediary must, *at a minimum*, conduct a background and securities enforcement regulatory history check on each issuer whose securities are to be offered by the intermediary and on each officer, director or beneficial owner . . . .” *Id.* (emphasis added).

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<sup>87</sup> SEC Regulation Crowdfunding Rule 503, 17 C.F.R. § 227.503 (2021), identifies a variety of “disqualifying events.” Disqualifying events include misdemeanor or felony convictions within the last 10 years in connection with a securities transaction or securities business as a broker, dealer, or funding portal; SEC suspensions or revocations of a broker, dealer, or funding portal registration; SEC bars of a person’s association with a registered entity; and any FINRA issuer or principal suspension, expulsion, or bar.

## 2. Legal Conclusions for Cause Five

At the hearing, Fernandez testified that he conducted background checks in connection with every offering, and that he outsourced background checks to a private investigator and an escrow agent that he had retained. But there is no evidence to corroborate Fernandez's claims. The absence of documentary evidence, such as copies of issuer background checks and regulatory histories, is particularly compelling, while Fernandez's explanation for the lack of documentation is not. Fernandez testified that he documented some, but not all, online searches, and that he retained only some of what he documented.<sup>88</sup> Fernandez underscored the point, "[i]f it wasn't important[,] I didn't keep it." But the issuer background checks and regulatory histories required under SEC Crowdfunding Regulation 301(c)(1) are "important tool[s] for intermediaries to employ when determining whether or not they have a reasonable basis to allow issuers on their platforms." *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*336. DreamFunded Marketplace's and Fernandez's failure to conduct the required background checks,<sup>89</sup> failure to obtain securities enforcement regulatory histories on issuers, and failure to have a third party handle the background checks and regulatory histories on their behalf violated SEC Regulation Crowdfunding Rule 301(c)(1) and FINRA Funding Portal Rule 200(a).<sup>90</sup>

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<sup>88</sup> In contrast, during his on-the-record testimony, in response to a question about whether DreamFunded Marketplace and Fernandez conducted background checks on issuers, Fernandez responded, "I don't believe so." The Hearing Panel found that Fernandez's on-the-record testimony was "more candid," "less guarded," and "more consistent with the facts," and that Fernandez's hearing testimony about the background checks and regulatory histories was not credible. We defer to the Hearing Panel's credibility determination. *See Murphy & Co.*, 2020 SEC LEXIS 5218, at \*28-29.

<sup>89</sup> There is evidence that DreamFunded Marketplace and Fernandez began conducting background checks on issuers in response to FINRA's request to produce documentary evidence of the funding portal's due diligence. For example, when OFDMI investigator, Patrick Devero, sent DreamFunded Marketplace and Fernandez a request for information and documents about the funding portal's due diligence on Issuer A and Issuer B in July 2017, DreamFunded Marketplace and Fernandez produced a screenshot of a profile of Issuer B's chief executive officer and founder, which also was dated July 2017. In another instance, in response to a FINRA information and document request, DreamFunded Marketplace and Fernandez produced a company profile for Issuer A. The company profile contained a copyright date in 2017, despite the fact that DreamFunded Marketplace and Fernandez posted Issuer A's offering to the funding portal platform in 2016.

<sup>90</sup> In response to the Hearing Panel's liability findings under cause five, DreamFunded Marketplace's and Fernandez's appellate argument states, in its entirety, "[e]vidence that background checks were not preformed simply ignores the evidence as presented." We will not make DreamFunded Marketplace's and Fernandez's case for them on appeal.

G. Causes Six Through Nine: DreamFunded Marketplace and Fernandez Failed to Provide Investors with Notice of Material Changes, Early Closings, Investment Cancellations, and Investment Confirmations

Under causes six through nine, the Hearing Panel found that DreamFunded Marketplace and Fernandez failed to provide investors with a material change notice for Issuer A’s offering and early closing notices, investment cancellation notices, and investment confirmation notices for Issuer A’s and Issuer B’s offerings. We affirm these findings as explained below.

1. Cause Six: DreamFunded Marketplace and Fernandez Failed to Provide Investors with a Material Change Notice for Issuer A’s Offering

Cause six focuses on the three Form C amendments that Issuer A filed with the SEC in January 2017 and June 2017, respectively.<sup>91</sup> Under cause six, Enforcement alleged that DreamFunded Marketplace and Fernandez violated SEC Regulation Crowdfunding Rule 304(c)(1) and FINRA Funding Portal Rule 200(a) because they failed to provide investors with material change notices based on the three Form C amendments. The Hearing Panel found that DreamFunded Marketplace and Fernandez engaged in the rule violations as Enforcement had alleged, but it determined that DreamFunded Marketplace and Fernandez were liable for failing to provide a material change notice for only one of Issuer A’s Form C amendments – the one filed in June 2017. The Hearing Panel explained that the record contained no evidence that Issuer A’s offering had investors as of January 2017, and, without investors, there was no obligation for DreamFunded Marketplace and Fernandez to provide material change notices for the two Form C amendments that Issuer A filed in January 2017. We agree with the Hearing Panel’s determination and affirm their findings under cause six.

a. SEC Regulation Crowdfunding Rule 304(c)(1)

SEC Regulation Crowdfunding Rule 304(c) provides investors with the opportunity to “[c]ancel[] and reconfirm[]” their participation in an offering “based on material changes.” SEC Regulation Crowdfunding Rule 304(c), 17 C.F.R. § 227.304(c) (2021). Under SEC Regulation Crowdfunding Rule 304(c)(1), “[i]f there is a material change to the terms of an offering or to the information provided by the issuer, the intermediary must give or send to any investor who has made an investment commitment notice of the material change . . . .”<sup>92</sup> SEC Regulation

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<sup>91</sup> Issuer A filed two Form C amendments with the SEC in January 2017. Issuer A filed the third Form C amendment with the SEC in June 2017. We discussed Issuer A’s three Form C amendments under cause two in Parts III.C.2.c. (Issuer A’s First and Second Amendments to the Form C) and III.C.2.e. (Issuer A’s Third Amendment to the Form C).

<sup>92</sup> In the context of a securities-based crowdfunded offering, an “investment commitment” is an investor’s obligation to participate in an offering unless the investor cancels the commitment within a prescribed period of time. *Updated Investor Bulletin: Crowdfunding for Investors*, [https://www.sec.gov/oiea/investor-alerts-bulletins/ib\\_crowdfunding-.html](https://www.sec.gov/oiea/investor-alerts-bulletins/ib_crowdfunding-.html) (last visited Sept. 27, 2021) (“[o]nce you make an investment commitment for a crowdfunding offering, you will be committed to make that investment (unless you cancel your commitment within a specified period of time).”).

Crowdfunding Rule 304(c)(1), 17 C.F.R. § 227.304(c)(1) (2021). The rule requires the intermediary to cancel the investor’s investment “unless the investor reconfirms his or her investment commitment within five business days of receipt of the notice.” *Id.* If the investor fails to reconfirm the investment within the five business days, “the intermediary within five business days thereafter must: (i) [g]ive or send the investor a notification disclosing that the commitment was cancelled, the reason for the cancellation[,] and the refund amount that the investor is expected to receive; and (ii) [d]irect the refund of investor funds.” SEC Regulation Crowdfunding Rule 304(c)(1)(i), (ii), 17 C.F.R. § 227.304(c)(1)(i), (ii) (2021).

b. Legal Conclusions for Cause Six

Issuer A filed the third amendment to the Form C in June 2017.<sup>93</sup> The amendment disclosed that Issuer A had decreased its target offering amount to \$4,000, and, in response to that change, Issuer A checked the box for an amendment that “is material and investors must reconfirm within five business days.”<sup>94</sup> Under SEC Regulation Crowdfunding Rule 304(c)(1), DreamFunded Marketplace and Fernandez had an obligation to provide Issuer A’s investors with a material change notice about the decreased target offering amount. *See SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*456-57 (“[W]hen material changes arise during the course of an offering, an investor who had made a prior investment commitment should have a reasonable period during which to review the new information and to decide whether to invest by reconfirming the investment commitment.”). But they did not do so.<sup>95</sup> We therefore find that DreamFunded Marketplace and Fernandez failed to provide investors with the material change notice for Issuer A’s decreased target offering amount, in violation of SEC Regulation Crowdfunding Rule 304(c)(1) and FINRA Funding Portal Rule 200(a).<sup>96</sup>

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<sup>93</sup> We focus only on Issuer A’s third Form C amendment because, as the Hearing Panel noted, there is no evidence that Issuer A’s offering had investors when it filed the first two Form C amendments in January 2017, and, without investors, DreamFunded Marketplace and Fernandez had no material change notice obligations. By the time that Issuer A filed the third Form C amendment, however, Issuer A’s offering had 13 or 14 investors.

<sup>94</sup> Although Issuer A’s identification of the decreased target offering amount as a material change is a persuasive factor in our analysis, we also find that, as a general matter, changes to an issuer’s target offering amount satisfies the test for materiality under *Basic, Inc.*, 485 U.S. at 231-32. *Cf. Report of Investigation in the Matter of County of Orange, California as It Relates to the Conduct of the Members of the Board of Supervisors*, 52 S.E.C. 681 (1996) (finding that the board of supervisors misrepresented a material fact when they failed to disclose that the increase in the county’s interest income was connected to the county’s increased municipal securities offerings).

<sup>95</sup> When Devero sent DreamFunded Marketplace and Fernandez an information and document request asking for copies of material change notices in July 2017, DreamFunded Marketplace’s and Fernandez’s then-attorney, MT, responded that “[t]he notices of material change were not provided by [DreamFunded Marketplace].”

<sup>96</sup> As the hearing for this case approached, Fernandez attempted to address the issues with the material change notices. In September 2017, three months after Issuer A’s offering had closed,

[Footnote continued on next page]

2. Cause Seven: DreamFunded Marketplace and Fernandez Failed to Provide Investors with Early Closing Notices for Issuer A’s and Issuer B’s Offering

Under cause seven, the Hearing Panel found that DreamFunded Marketplace and Fernandez violated SEC Regulation Crowdfunding Rule 304(b)(2) and FINRA Funding Portal Rule 200(a) because they failed to notify investors when Issuer A’s and Issuer B’s offerings closed early. We affirm these findings.

a. SEC Regulation Crowdfunding Rule 304(b)(2)

If an issuer reaches the target offering amount prior to the deadline identified in its offering materials, SEC Regulation Crowdfunding Rule 304(b) allows the issuer to close the offering prior to the identified deadline. SEC Regulation Crowdfunding Rule 304(b)(2), 17 C.F.R. § 227.304(b) (2021). The rule, however, only allows for the early closing of the offering in the presence of four specified conditions. *Id.* First, the offering must remain open for a minimum of 21 days. SEC Regulation Crowdfunding Rule 304(b)(1), 17 C.F.R. § 227.304(b)(1) (2021). Second, the issuer must continue to meet, or exceed, the target offering amount on the date of the new offering deadline. SEC Regulation Crowdfunding Rule 304(b)(4), 17 C.F.R. § 227.304(b)(4) (2021). Third, the intermediary must provide notice of the early closing to potential investors and those investors who have already made investments. SEC Regulation Crowdfunding Rule 304(b)(2), 17 C.F.R. § 227.304(b)(2) (2021). Finally, the new offering deadline must be scheduled for, and occur, at least five business days after the intermediary provides the investors with the required notice. SEC Regulation Crowdfunding Rule 304(b)(3), 17 C.F.R. § 227.304(b)(3) (2021). The intermediary’s early closing notice should identify the new, anticipated deadline of the offering, inform investors of their right to cancel investments for any reason until 48 hours prior to the new offering deadline, and disclose whether the issuer will continue to accept investments during the 48-hour period prior to the new offering deadline. SEC Regulation Crowdfunding Rule 304(b)(2)(i)-(iii), 17 C.F.R. § 227.304(b)(2)(i)-(iii) (2021).

b. Legal Conclusions for Cause Seven

Issuer A’s Form C stated that the issuer’s offering would remain open until September 2017. Issuer A’s offering closed three months early, in June 2017, when Fernandez disbursed the offering proceeds to Issuer A’s chief executive officer, DA. Issuer B’s Form C disclosed that the issuer’s offering would remain open until June 2017, but it closed two months early, in April 2017.

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Fernandez sent an email to Issuer A’s investors. The email informed investors that Issuer A had decreased the target offering amount from \$10,000 to \$4,000. The email also asked investors to tell Fernandez whether they were “ok with this change,” or if they wanted the return of their investments from escrow. Fernandez advised investors that they should respond to his email within five business days, or he would release the funds to Issuer A’s chief executive officer. Most of the investors reconfirmed their investments by email. One investor asked for a refund of the investment. Fernandez agreed to return that investor’s funds and told the investor that the refund had been “processed.” The record does not disclose whether the investor actually received the refund. These emails do not affect our liability findings for cause six because they are not material change notices and do not satisfy the requirements of SEC Crowdfunding Rule 304(c)(1). Nevertheless, we will consider these emails in our assessment of sanctions.

Under SEC Regulation Crowdfunding Rule 304(b)(2), DreamFunded Marketplace and Fernandez had an obligation to provide Issuer A’s and Issuer B’s investors with early closing notices for the offerings. But DreamFunded Marketplace and Fernandez did not provide the required early closing notices to Issuer A’s and Issuer B’s investors,<sup>97</sup> and, in so doing, they deprived Issuer A’s and Issuer B’s investors of their right to cancel their investments up until 48 hours of the closing. *See SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*454 (“[W]e continue to believe that allowing investors to cancel any investment commitments for any reason until 48 hours prior to the deadline identified in the issuer’s offering materials is an appropriate cancellation period because it is consistent with the requirement . . . that investors have a ‘reasonable opportunity’ to rescind investment commitments . . .”). DreamFunded Marketplace’s and Fernandez’s failure to provide early closing notices to Issuer A’s and Issuer B’s investors violated SEC Regulation Crowdfunding Rule 304(b)(2) and FINRA Funding Portal Rule 200(a).

3. Cause Eight: DreamFunded Marketplace and Fernandez Failed to Provide Issuer A’s and Issuer B’s Investors with Investment Cancellation Notices

Under cause eight, the Hearing Panel found that DreamFunded Marketplace and Fernandez violated SEC Regulation Crowdfunding Rule 303(d) and FINRA Funding Portal Rule 200(a) because they failed to provide Issuer A’s and Issuer B’s investors with investment cancellation notices. We affirm these findings.

a. SEC Regulation Crowdfunding Rule 303(d)

SEC Regulation Crowdfunding Rule 303, 17 C.F.R. § 227.303 (2021), covers the notices that intermediaries must provide to investors with respect to certain transactions. Under SEC Regulation Crowdfunding Rule 303(d), intermediaries must provide investors with “notice[s] of investment commitment[s].”<sup>98</sup> SEC Regulation Crowdfunding Rule 303(d), 17 C.F.R. § 227.303(d) (2021) (“[a]n intermediary must promptly, upon receipt of an investment commitment from an investor . . .”). The investment cancellation notice must disclose: “(1) [t]he dollar amount of the investment commitment; (2) [t]he price of the securities, if known; (3) [t]he name of the issuer; and (4) [t]he date and time by which the investor may cancel the investment commitment.” SEC Regulation Crowdfunding Rule 303(d)(1)-(4), 17 C.F.R. § 227.303(d)(1)-(4) (2021).

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<sup>97</sup> At the hearing, when asked for an example of an early closing notice, Fernandez testified that he examined an early closing notice and could confirm that it contained the required information to satisfy SEC Regulation Crowdfunding Rule 304(b)(2). DreamFunded Marketplace and Fernandez did not produce a written example of an early closing notice, and the Hearing Panel found that Fernandez’s testimony about the early closing notices was not credible. We have no basis to disturb the Hearing Panel’s credibility determination. *See Murphy & Co.*, 2020 SEC LEXIS 5218, at \*28-29.

<sup>98</sup> In this decision, we refer to the “notice of investment commitment” as the “investment cancellation notice” or “notice of investment cancellation” because the cancellation option is the “important” feature of the notice. *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*418.

b. Legal Conclusions for Cause Eight

In early-August 2017, Devero sent DreamFunded Marketplace and Fernandez a request for information and documents, which sought, among other documents, copies of investment cancellation notices that the funding portal had sent to investors in Issuer A's and Issuer B's offerings. MT responded on behalf of DreamFunded Marketplace and Fernandez in late-August 2017. The response included two examples of investment cancellation notices. The record contains copies of the exemplative documents. But the investment cancellation notices that DreamFunded Marketplace and Fernandez proffered were deficient in the information that they provided to investors. For example, while the notices confirmed the receipt of investor funds, and that the investors' funds would be held in escrow, the notices did not inform investors of the investment cancellation deadline. That failure deprived investors of the "written record of the basic terms of the transaction, as well as a reminder of [their] ability to cancel the investment . . . ." *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*417-18 ("the adopted notification requirements will be useful to investors and provide transparency . . . [and] an important reminder about the ability to cancel the investment commitment."). DreamFunded Marketplace's and Fernandez's failure to provide investment cancellation notices to the investors in Issuer A's and Issuer B's offerings violated SEC Regulation Crowdfunding Rule 303(d) and FINRA Funding Portal Rule 200(a).

4. Cause Nine: DreamFunded Marketplace and Fernandez Failed to Provide Issuer A's and Issuer B's Investors with Investment Confirmation Notices

Under cause nine, the Hearing Panel found that DreamFunded Marketplace and Fernandez violated SEC Regulation Crowdfunding Rule 303(f) and FINRA Funding Portal Rule 200(a) because they failed to provide Issuer A's and Issuer B's investors with investment confirmation notices. We affirm these findings.

a. SEC Regulation Crowdfunding Rule 303(f)

Under SEC Regulation Crowdfunding Rule 303(f), intermediaries must provide investors with confirmations of crowdfunding transactions. SEC Regulation Crowdfunding Rule 303(f), 17 C.F.R. § 227.303(f) (2021). The intermediary must "give or send" the investment confirmation notice "at or before the completion of [the] transaction . . . ." SEC Regulation Crowdfunding Rule 303(f)(1), 17 C.F.R. § 227.303(f)(1) (2021). The investment confirmation notice must provide investors with the following information: "(i) [t]he date of the transaction; (ii) [t]he type of security that the investor is purchasing; (iii) [t]he identity, price, and number of securities purchased by the investor, as well as the number of securities sold by the issuer in the transaction and the price(s) at which the securities were sold; (iv) [i]f a debt security, the interest rate and the yield to maturity calculated from the price paid and the maturity date; (v) [i]f a callable security, the first date that the security can be called by the issuer; and (vi) [t]he source, form and amount of any remuneration received or to be received by the intermediary in connection with the transaction, including any remuneration received or to be received by the intermediary from persons other than the issuer." SEC Regulation Crowdfunding Rule 303(f)(1)(i)-(vi), 17 C.F.R. § 227.303(f)(1)(i)(vi) (2021).

b. Legal Conclusions for Cause Nine

When Devero sent the information and document request to DreamFunded Marketplace and Fernandez in August 2017, he asked them to provide “[c]opies of the confirmations of transactions given or sent to each investor.” In response, DreamFunded Marketplace and Fernandez provided emails that the escrow agent had generated. The record contains a sample of the escrow agent-generated email.

The sample email is directed to the investor, with an issuer representative blind carbon copied on it. The subject of the email is “Offering Escrow Successful.” The email identifies the issuer, the offering, the type of securities presented in the offering, the amount of the investment, the date of the investment, and the investor’s name and contact information. In its entirety, the email states, “Congratulations, your investment is now official. Your signed subscription agreement is attached. This email is your investment confirmation, all securities are held in book entity form (there will not be a paper confirmation or stock certificate mailed to you).”

To the extent the sample email is indicative of the investment confirmations that DreamFunded Marketplace provided to investors, it is inadequate for compliance with SEC Regulation Crowdfunding Rule 303(f). The email did not disclose the identity, price, and number of securities that the investor purchased. The email did not report the number of securities that the issuer sold in the transaction or identify the price at which the issuer sold the securities to the investor. The email also did not disclose whether DreamFunded Marketplace received remuneration from the issuer or a third party connected to the transaction, and, if it did receive such remuneration, the source, form, and amount of it.<sup>99</sup> In effect, the email confirms that the investor participated in the offering, and that the investor’s escrowed investment had been disbursed to the issuer. The email provides none of the information necessary to protect the investors or enforce their rights under the JOBS Act or the SEC’s crowdfunding rules.

“[T]ransaction confirmations serve an important and basic investor protection function by, among other things, conveying information and providing a reference document that allows investors to verify the terms of their transactions, acting as a safeguard against fraud and providing investors a means by which to evaluate the costs of their transactions.” *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*440 (“Each of the required items of information is intended to assist investors in memorializing and assessing their transactions.”). DreamFunded Marketplace’s and Fernandez’s failure to provide investment confirmation notices to the investors in Issuer A’s and Issuer B’s offerings violated SEC Regulation Crowdfunding Rule 303(f) and FINRA Funding Portal Rule 200(a).

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<sup>99</sup> “[T]he requirement that an intermediary disclose to an investor the source, form and amount of any remuneration received or to be received is designed to help to highlight potential conflicts of interest if, for example, an intermediary has a financial interest in an issuer using its services.” *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*439.

5. DreamFunded Marketplace’s and Fernandez’s Arguments Concerning the Material Change Notice, Early Closing Notices, Investment Cancellation Notices, and Investment Confirmation Notices

On appeal, as it relates to causes six through nine, DreamFunded Marketplace and Fernandez assert a single argument. DreamFunded Marketplace and Fernandez state that “the documentary evidence presented at the hearing as well as the substantial and unrefuted proof [demonstrate] that the requisite notices were sent out to investors by [DreamFunded Marketplace’s escrow agent].” But, aside from their self-serving and unsubstantiated assertion, DreamFunded Marketplace and Fernandez offer no basis to overturn the Hearing Panel’s findings of liability under causes six through nine. As an initial matter, the record contains no material change notices or early closing notices.<sup>100</sup> Second, as explained above, the sample investment cancellation notices and investment confirmation notices that DreamFunded Marketplace and Fernandez provided were inadequate to inform the investors of their rights under the JOBS Act or the SEC’s crowdfunding rules. Finally, the Hearing Panel found that Fernandez’s claims that the escrow agent sent the notices to investors were not credible, and there is no evidence that supports overturning that credibility determination. *See Murphy & Co.*, 2020 SEC LEXIS 5218, at \*28-29.

H. Cause Ten: DreamFunded Marketplace and Fernandez Failed to Implement Policies and Procedures Reasonably Designed to Supervise the Funding Portal’s Activities and Associated Persons

Under cause ten, the Hearing Panel found that DreamFunded Marketplace and Fernandez violated SEC Regulation Crowdfunding Rule 403(a) and FINRA Funding Portal Rules 300(a) and 200(a) because they failed “to establish written policies and procedures to review issuer filings and to issue notices to investors . . .” In connection with this finding, the Hearing Panel also determined that DreamFunded Marketplace and Fernandez failed “to implement [the] appropriate policies and procedures” necessary to supervise the funding portal’s activities, monitor the funding portal’s associated persons, and ensure the funding portal’s compliance with the federal securities laws, the SEC’s crowdfunding rules, and FINRA’s funding portal rules. We affirm these findings.

1. Rules for Cause Ten

The rules related to cause ten are SEC Regulation Crowdfunding Rule 403(a) and FINRA Funding Portal Rule 300(a).<sup>101</sup>

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<sup>100</sup> We do not find that the emails that Fernandez sent to Issuer A’s investors in September 2017, after Issuer A’s offering had closed, qualify as material change notices under SEC Regulation Crowdfunding Rule 304(c)(1).

<sup>101</sup> We note, as is the case with the other nine causes of action, that cause ten also implicates FINRA Funding Portal Rule 200(a). We identified FINRA Funding Portal Rule 200(a) as the ethical standards rule for funding portals, and, for purposes of this case, we determined that FINRA Funding Portal Rule 200(a) is triggered only in the presence of another rule violation.

a. SEC Regulation Crowdfunding Rule 403(a)

We discussed SEC Regulation Crowdfunding Rule 403, generally, and SEC Regulation Crowdfunding Rule 403(c), specifically, under cause one in Part III.B.3.a.(3) (FINRA Properly Requested Information and Documents Related to the Parent Company’s Finances and DreamFunded Marketplace’s Source Funding). As previously explained, SEC Regulation Crowdfunding Rule 403, 17 C.F.R. § 227.403 (2021), addresses a funding portal’s “compliance.” Under SEC Regulation Crowdfunding Rule 403(a), a funding portal must “implement written policies and procedures reasonably designed to achieve compliance with the federal securities laws and the rules and regulations thereunder relating to its business as a funding portal.” SEC Regulation Crowdfunding Rule 403(a), 17 C.F.R. § 227.403(a) (2021).

b. FINRA Funding Portal Rule 300(a)

FINRA Funding Portal Rule 300 also covers “funding portal compliance,” and, under FINRA Funding Portal Rule 300(a), a funding portal must “establish and maintain a system to supervise the activities of each associated person of the funding portal member” and must “permit the examination and inspection of all of its business and business operations that relate to its activities as a funding portal . . . .” FINRA Funding Portal Rule 300(a)(1), (2). For purposes of cause ten, we focus on the supervisory provisions of FINRA Funding Portal Rule 300(a), which fall under FINRA Funding Portal Rule 300(a)(1).

FINRA Funding Portal Rule 300(a)(1) “is a streamlined version of FINRA’s supervision rule[] [FINRA Rule 3110(a)].” *FINRA Crowdfunding Approval Order*, 2016 SEC LEXIS 262, at \*19. Under FINRA Funding Portal Rule 300(a)(1), “[e]ach funding portal member shall establish and maintain a system to supervise the activities of each associated person of the funding portal member that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with [FINRA’s] [f]unding [p]ortal [r]ules.”<sup>102</sup>

FINRA Funding Portal Rule 300(a)(1) also provides the “minimum” requirements for a funding portal’s supervisory system.<sup>103</sup> “At a minimum,” a funding portal member’s supervisory system must provide for: “(A) the establishment and maintenance of written procedures to supervise the activities of the funding portal member and its associated persons; (B) the designation of a person with authority to carry out the supervisory responsibilities of the funding portal member; and (C) reasonable efforts to determine that all supervisory personnel are qualified by virtue of experience or training to carry out their assigned responsibilities.” FINRA Funding Portal Rule 300(a)(1)(A), (B), (C); *see FINRA Crowdfunding Approval Order*, 2016 SEC LEXIS 262, at \*19-20 (explaining that FINRA Funding Portal Rule 300(a)(1) “is designed to permit funding portal members flexibility to tailor their supervisory systems to their business models.”).

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<sup>102</sup> FINRA’s supervision rule, FINRA Rule 3110(a), states, “[e]ach member shall establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. Final responsibility for proper supervision shall rest with the member.”

<sup>103</sup> FINRA Rule 3110(a)(1)-(7) provides seven “minimum” requirements for a broker-dealer’s supervisory system.

## 2. Legal Conclusions for Cause Ten

Under cause ten, the final cause of action in this case, we find that DreamFunded Marketplace and Fernandez failed to implement policies and procedures reasonably designed to achieve compliance with the federal securities laws, the SEC's crowdfunding rules, and FINRA's funding portal rules. We make three specific findings in this area. First, we find that Fernandez was responsible for establishing and implementing DreamFunded Marketplace's supervisory system, including the funding portal's WSPs,<sup>104</sup> and that Fernandez was liable for DreamFunded Marketplace's supervisory failures. Second, we find that DreamFunded Marketplace's supervisory system, including the funding portal's WSPs, were not tailored to address the risks associated with a funding portal business. Finally, we find that, in the instances that DreamFunded Marketplace had policies and procedures to address crowdfunding transactions, Fernandez did not implement them.

We begin with Fernandez's responsibility for DreamFunded Marketplace's supervisory system and WSPs. We find that Fernandez was responsible for DreamFunded Marketplace's supervisory system and WSPs because the WSPs identified him, by name, as the "responsible person." See *Thaddeus J. North*, Exchange Act Release No. 84500, 2018 SEC LEXIS 3001, at \*3-4 (Oct. 29, 2018) (finding that the applicant was liable for certain supervisory failures because the firm's WSPs identified him as the individual responsible for those categories of supervision). DreamFunded Marketplace's WSPs had nine sections, including an introductory section and sections focused on supervision, communications with the public, disclosure requirements, and due diligence. For each of the eight substantive sections, DreamFunded Marketplace's WSPs identified Fernandez as the responsible person. As it relates specifically to supervision, DreamFunded Marketplace's WSPs stressed that Fernandez was responsible for "[o]versight of associated persons; [r]eviews of business activity; [c]ustomer reviews[; and] [e]mployment/experience review[s]." As explained below, Fernandez, and, through Fernandez's conduct, DreamFunded Marketplace, failed to supervise the funding portal's activities and associated persons.

One source of DreamFunded Marketplace's and Fernandez's supervisory failures comes from the general nature of the funding portal's supervisory system and WSPs. DreamFunded Marketplace's supervisory system and WSPs were not tailored to address the risks associated with

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<sup>104</sup> DreamFunded Marketplace's WSPs are contained in the record in a document titled "supervisory procedures manual." The record contains two versions of the WSPs: (1) the MAP Group version, which DreamFunded Marketplace and Fernandez provided to Volkell as part of the new member application process; and (2) the OFDMI version, which DreamFunded Marketplace and Fernandez provided to Devero in response to a request for information and documents in July 2017. There are four differences between the versions of the WSPs provided to the MAP Group and those provided subsequently to OFDMI. First, the OFDMI version is signed and dated, while the MAP Group version is not dated or signed. Second, the MAP Group and OFDMI versions of the WSPs contain different "home office address[es]" for DreamFunded Marketplace. Third, the OFDMI version contains additional information (one or two sentences) about issuer disclosures. Finally, the OFDMI version contains an additional section titled "SEC Form C: Issuer Filing Requirements." As we cite to "DreamFunded Marketplace's WSPs" throughout decision, we reference the signed and dated version provided to OFDMI in July 2017.

a funding portal business. As Fernandez testified, an attorney prepared the WSPs as part of a “package deal,” the WSPs were based on “a boilerplate document,” and the WSPs were “more like brokerage firms or something.”<sup>105</sup> As we reviewed DreamFunded Marketplace’s WSPs, we noted that they are based, in large part, on quoted sections of the SEC’s crowdfunding rules, and FINRA’s funding portal rules, without any explanation of how those rules, or the WSPs more broadly, should apply to the funding portal’s issuers and offerings.

Our findings under cause two are illustrative of the general nature of DreamFunded Marketplace’s supervisory system and WSPs. Under cause two, we found that DreamFunded Marketplace and Fernandez violated SEC Regulation Crowdfunding Rule 301(c)(2) and FINRA Funding Portal Rule 200(a) because they failed to deny Issuer A’s access to the funding portal when Issuer A’s offering raised investor protection concerns. DreamFunded Marketplace’s WSPs had a section titled “Due Diligence,” which quoted the entirety of SEC Regulation Crowdfunding Rule 301. The due diligence section of the WSPs also contained an objective – “[w]hile [the] platform does not have an obligation to, and does not undertake to, conduct a substantive due diligence investigation, it shall take reasonable steps to reduce the risk of fraud and otherwise promote full disclosure and investor protection.” But that is it. DreamFunded Marketplace’s WSPs provided no criteria to evaluate whether an issuer or offering presented indicia of fraud, and it offered no guidance on what the funding portal or its associated persons should do when an issuer or offering raised investor protection concerns.

A second source of DreamFunded Marketplace’s and Fernandez’s supervisory failures comes from Fernandez’s failure to implement the funding portal’s WSPs. For example, Fernandez claimed that he conducted the supervisory reviews of the funding portal’s activities as outlined in the WSPs. But he produced no documentation to support his claims. Fernandez acknowledged that the WSPs should be distributed to each of the funding portal’s associated persons. But he admitted that he only distributed the WSPs to one employee during DreamFunded Marketplace’s operation as a funding portal. Fernandez also testified that he kept the WSPs in electronic format in his email and on a cloud-based storage platform. But he could not produce the documents when asked to do so. As Fernandez acknowledged when Enforcement asked how often he “used” the WSPs, “I think infrequently is a pretty good answer.”

Funding portals have “discretion to establish, implement, maintain and enforce its policies and procedures based on its relevant facts and circumstances.” *SEC Crowdfunding Final Rule*, 2015 SEC LEXIS 5486, at \*575. But the facts of this case establish that DreamFunded Marketplace and Fernandez did not establish or implement the necessary policies and procedures to supervise the funding portal’s activities or associated persons. Based on these facts, we find that DreamFunded Marketplace and Fernandez violated SEC Regulation Crowdfunding Rule 403(a) and FINRA Funding Portal Rules 300(a) and 200(a). *See id.* (“[T]he requirement to implement written policies and procedures will provide important investor protections as it will necessitate

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<sup>105</sup> On appeal, DreamFunded Marketplace and Fernandez argue that the funding portal’s supervisory system and WSPs were adequate, narrowly tailored to the funding portal’s business, and reasonably designed to achieve compliance with the federal securities laws, the SEC’s crowdfunding rules, and FINRA’s funding portal rules. We disagree. As Fernandez testified at the hearing, DreamFunded Marketplace’s WSPs were “boilerplate,” and he didn’t “think [the WSPs] really appl[y] here.”

that funding portals remain aware of the various regulatory requirements to which they are subject and take appropriate steps for complying with such requirements.”).

#### IV. Sanctions

In the proceedings below, the Hearing Panel expelled DreamFunded Marketplace from funding portal membership, and barred Fernandez from associating with any FINRA funding portal member in any capacity, for failing to respond fully and completely to FINRA’s request for information and documents under cause one and for making false, exaggerated, unwarranted, promissory, and misleading statements about Fernandez’s investment in an issuer and the funding portal’s due diligence on issuers under cause three.

The Hearing Panel also assessed, but declined to impose, the following sanctions on DreamFunded Marketplace: (1) four 30-calendar day suspensions under cause two, cause five, causes six through nine as an aggregate sanction, and cause ten; (2) a letter of caution for the remaining liability under cause three; and (3) the submission and creation of a supervisory plan to address the funding portal’s deficiencies under cause ten. For Fernandez, the Hearing Panel assessed, but declined to impose, the following sanctions: (1) a six-month suspension and \$10,000 fine under cause two; (2) three 30-calendar day suspensions under cause five, causes six through nine as an aggregate sanction, and cause ten; (3) a letter of caution for the remaining liability under cause three; and (4) the submission and creation of a supervisory plan to address the funding portal’s deficiencies under cause ten.

As discussed below, we modify these sanctions. Although we affirm DreamFunded Marketplace’s two expulsions, and Fernandez’s two bars, under causes one and three, we are modifying the Hearing Panel’s remaining sanctions to impose a third expulsion on DreamFunded Marketplace and third bar on Fernandez. The Hearing Panel’s per violation approach to sanctioning DreamFunded Marketplace and Fernandez, while typical for our disciplinary cases, misses the point here.

The misconduct, resulting in the Hearing Panel’s assessment of the multitude of sanctions noted above, are not technical rule violations. Under cause two and causes five through ten, DreamFunded Marketplace and Fernandez failed to deny an issuer’s access to the funding portal when the issuer’s offering raised investor protection concerns, failed to provide investors with important notices, and failed to implement policies and procedures to supervise the funding portal’s activities and associated persons. These violations demonstrate DreamFunded Marketplace’s and Fernandez’s abandonment of their gatekeeper, investor protection, and supervisory obligations for the crowdfunded offerings and transactions that they facilitated through their funding portal. And, as explained below, we expel DreamFunded Marketplace, and bar Fernandez, for these failures.

##### A. Applicability of FINRA’s Sanction Guidelines

As we analyze DreamFunded Marketplace’s and Fernandez’s violations of the SEC’s crowdfunding rules and FINRA’s funding portal rules, we must resolve the issue of whether we

should apply FINRA’s Sanction Guidelines to the violations discussed here.<sup>106</sup> The Hearing Panel provides a number of factors favoring, and opposing, the application of the Sanction Guidelines to funding portal cases. And, while that analysis is accurate, and thorough, our response is simple. Yes, the Sanction Guidelines should apply to disciplinary cases involving FINRA funding portal members and their associated persons.

FINRA published the Sanction Guidelines in 1993.<sup>107</sup> When FINRA published the Sanction Guidelines, there were 40 violation-specific guidelines.<sup>108</sup> Now, there are nearly 80.<sup>109</sup> The Sanction Guidelines “do not prescribe fixed sanctions for particular violations.”<sup>110</sup> FINRA adjudicators “have wide discretion in determining appropriate sanctions.”<sup>111</sup> The Sanction Guidelines are tools, “benchmarks,”<sup>112</sup> that “provide direction for adjudicators in imposing sanctions consistently and fairly.”<sup>113</sup> Over 28 years, the Sanction Guidelines have adjusted to address a variety of circumstances and violations that were not considered when initially published. And now, they do so again to address violations in the funding portal context.

We understand that the Sanction Guidelines may not fit every instance of funding portal misconduct. But that is also true for disciplinary cases involving broker-dealers, and we apply the Sanction Guidelines in those instances. We also understand that the relationships among funding portals, associated persons, investors, and issuers in crowdfunding transactions differ from the relationships among broker-dealers, registered representatives, and customers in ordinary securities transactions. But the Sanction Guidelines are sufficiently flexible for us to tailor sanctions for

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<sup>106</sup> See *FINRA Sanction Guidelines* (Oct. 2020), [http://www.finra.org/sites/default/files/Sanctions\\_Guidelines.pdf](http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf) [hereinafter, “Guidelines”].

<sup>107</sup> See *NASD Notice to Members 93-32*, 1993 NASD LEXIS 72, at \*1 (May 1993).

<sup>108</sup> See *id.*

<sup>109</sup> See *Guidelines*, at 109-13.

<sup>110</sup> *May 2018 Revisions to the Sanction Guidelines – FAQ*, <https://www.finra.org/rules-guidance/oversight-enforcement/may-2018-revisions-sanction-guidelines-faq> (last visited Sept. 27, 2021).

<sup>111</sup> *Id.*

<sup>112</sup> *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at \*35 (Mar. 31, 2016), *aff’d sub nom.*, *Harris v. SEC*, 712 F. App’x 46 (2d Cir. 2017).

<sup>113</sup> *May 2018 Revisions to the Sanction Guidelines – FAQ*, <https://www.finra.org/rules-guidance/oversight-enforcement/may-2018-revisions-sanction-guidelines-faq> (last visited Sept. 27, 2021); see *Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at \*32 n.32 (Jan. 9, 2015) (“FINRA adopted the Sanction Guidelines to ensure greater consistency, uniformity, and fairness in the sanctions that are imposed for violations.”), *aff’d*, *West v. SEC*, 641 F. App’x 27 (2d Cir. 2016).

funding portal cases, as we do in cases involving small broker-dealers.<sup>114</sup> Finally, we note that the Sanction Guidelines “encourage[] [adjudicators] to look to the [Sanction] [G]uidelines for analogous violations,”<sup>115</sup> that adjudicators routinely apply analogous guidelines in broker-dealer disciplinary cases,<sup>116</sup> and that FINRA’s funding portal rules are based on a number of existing FINRA rules that have violation-specific guidance currently contained in the Sanction Guidelines. Accordingly, to assess the appropriate sanctions for DreamFunded Marketplace’s and Fernandez’s misconduct across all 10 causes of action, we will apply: (1) the Sanction Guidelines in place at the time of this decision;<sup>117</sup> (2) any violation-specific guidelines that are analogous to the SEC crowdfunding rule and FINRA funding portal rule at issue; and (3) “the General Principles Applicable to All Sanction Determinations and Principal Considerations in Determining Sanctions, which adjudicators consult in every [broker-dealer] disciplinary case.”<sup>118</sup>

B. Sanctions for Cause One

Under cause one, we found that DreamFunded Marketplace and Fernandez violated FINRA Funding Portal Rules 800(a) and 200(a) and FINRA Rule 8210 because they failed to respond fully and completely to FINRA’s request for information and documents. The violation-specific guidelines related to the “Failure to Respond, Failure to Respond Truthfully or in a Timely Manner, or Providing a Partial but Incomplete Response to Requests Made Pursuant to FINRA Rule 8210” will guide our sanctions analysis for cause one.<sup>119</sup>

Where an individual does not respond in any manner, or does not respond truthfully, to a FINRA request for information and documents, the Sanction Guidelines state that a bar should be standard.<sup>120</sup> When an individual provides a partial, but incomplete, response, the Sanction

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<sup>114</sup> See *Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 1) (advising adjudicators to consider a “firm’s size with a view toward ensuring that the sanctions imposed are remedial . . .”).

<sup>115</sup> *Id.* at 1 (Overview).

<sup>116</sup> *Cf. Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at \*31 (Feb. 24, 2012) (endorsing FINRA’s use of analogous guidelines in broker-dealer disciplinary cases involving member firms and associated persons).

<sup>117</sup> See *Guidelines*, at 8 (Applicability) (“These guidelines are effective as of the date of publication, and *apply to all disciplinary matters, including pending matters.*”) (emphasis added).

<sup>118</sup> *Dep’t of Enforcement v. Mehringer*, Complaint No. 2014041868001, 2020 FINRA Discip. LEXIS 27 \*38 n.38 (FINRA NAC June 15, 2020).

<sup>119</sup> See *Guidelines*, at 33 (Failure to Respond, Failure to Respond Truthfully or in a Timely Manner, or Providing a Partial but Incomplete Response to Requests Made Pursuant to FINRA Rule 8210).

<sup>120</sup> *Id.* The Sanction Guidelines also recommend a fine between \$25,000 and \$77,000 for failing to respond in any manner, or truthfully, to a FINRA information and document request.

Guidelines, again, advise adjudicators that a bar should be the standard sanction “unless the [individual] can demonstrate that the information provided substantially complied with all aspects of the request.”<sup>121</sup> Where mitigation exists, or the individual did not respond in a timely manner, the Sanction Guidelines suggest that adjudicators consider a fine of \$2,500 to \$39,000, and a suspension of the individual in any or all capacities for up to two years.<sup>122</sup> For a firm, the Sanction Guidelines recommend that adjudicators expel the firm in egregious cases, and, if mitigation exists, consider suspending the firm with respect to any or all activities or functions for up to two years.<sup>123</sup>

This case focuses on the one request for information and documents that FINRA staff, specifically, Patrick Devero, sent to DreamFunded Marketplace and Fernandez in October 2017. The request sought 11 categories of information and documents, including DreamFunded Marketplace’s, the Parent Company’s, and Fernandez’s monthly bank account statements, and DreamFunded Marketplace’s and the Parent Company’s accounting and bookkeeping records, for a three-year period. In response to FINRA’s request for information and documents, throughout January 2018, DreamFunded Marketplace and Fernandez provided information and documents to FINRA staff. To date, however, DreamFunded Marketplace and Fernandez have produced only 14 percent of the bank account statements that FINRA staff requested, and, when they produced those bank account statements, they only provided them for DreamFunded Marketplace and the Parent Company. DreamFunded Marketplace and Fernandez produced no bank account statements for Fernandez, no accounting or bookkeeping records for DreamFunded Marketplace, and no accounting or bookkeeping records for the Parent Company.

In light of these facts, we apply the Sanction Guidelines for a partial, but incomplete, response to a request made pursuant to FINRA Rule 8210. Specifically, we review DreamFunded Marketplace’s and Fernandez’s conduct under cause one to determine whether they substantially complied with all aspects of FINRA’s request and whether there is any evidence of mitigation. To assist us with this determination, we consider the following factors: (1) the importance of the information requested that was not provided as viewed from FINRA’s perspective, and whether the information provided was relevant and responsive to the request; (2) the number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response; and (3) whether the respondents thoroughly explained valid reasons for the deficiencies in the response.<sup>124</sup> After a careful application of these factors, we conclude that

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<sup>121</sup> *Id.* For providing a partial, but incomplete, response to a FINRA request for information and documents, the Sanction Guidelines also recommend a fine of \$10,000 to \$77,000.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* In cases involving a firm’s failure to respond in a timely manner, the Sanction Guidelines advise adjudicators to consider suspending the firm with respect to any or all activities or functions for a period of up to 30 business days.

<sup>124</sup> *Id.*

DreamFunded Marketplace and Fernandez did not substantially comply with all aspects of FINRA's request for information and documents.<sup>125</sup>

As an initial matter, the information and documents that FINRA sought were important. FINRA staff asked DreamFunded Marketplace and Fernandez to provide the bank account statements, accounting records, and bookkeeping records because Fernandez's on-the-record testimony raised questions about the Parent Company's finances and Fernandez's use of \$878,000 of DreamFunded Marketplace's source funding. For example, when FINRA staff asked how the source funding had been allocated during Fernandez's on-the-record testimony, Fernandez stated that he did not "have the exact numbers" with him, and that \$50,000 went toward legal, about \$300,000 to marketing, "and the rest in operations." When FINRA staff questioned whether "the rest in operations" equaled \$650,000, Fernandez only replied, "[s]ure." DreamFunded Marketplace's and Fernandez's failure to produce bank account statements for Fernandez, accounting and bookkeeping records for DreamFunded Marketplace, and accounting and bookkeeping records for the Parent Company made it impossible for FINRA staff to resolve the issues concerning the Parent Company's finances or trace DreamFunded Marketplace's source funding through the funding portal, the Parent Company, and Fernandez.<sup>126</sup>

Second, even DreamFunded Marketplace's and Fernandez's partial response to FINRA's request for information and documents required an extraordinary amount of time and regulatory pressure from FINRA staff. The number of communications among FINRA staff, Fernandez, and Fernandez's attorneys, for what is a straightforward information and document request, is absurd. FINRA staff sent multiple requests and provided DreamFunded Marketplace and Fernandez with multiple extensions of time. But DreamFunded Marketplace and Fernandez did not respond to FINRA's request for months, and, when they did respond, their response was piecemeal and did not include much of what FINRA had asked.

Third, we consider whether DreamFunded Marketplace and Fernandez have provided valid reasons for the deficiencies in their response. They have not. Fernandez's explanations ranged from personal illness, and not having access to the documents, to the onboarding of a new attorney to represent him and the funding portal before FINRA. The Hearing Panel found that

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<sup>125</sup> We also consulted the Sanction Guidelines for an untimely response to a FINRA information and document request, noting that there is substantial overlap between the Principal Considerations in Determining Sanctions for a partial, but incomplete, response and those for an untimely response. *See id.*

<sup>126</sup> The second part of this consideration asks us to examine "whether the information provided was relevant and responsive to the request." *Id.* It was. DreamFunded Marketplace and Fernandez produced 40 bank account statements, which equates to 14 percent of those that FINRA requested. Those 40 bank account statements were responsive to FINRA's information and document request, and we credit DreamFunded Marketplace and Fernandez with producing those bank account statements and with responding to other parts of FINRA's investigation of the Parent Company's finances and Fernandez's use of DreamFunded Marketplace's source funding. *See Plunkett*, 2013 SEC LEXIS 1699, at \*55-57 (considering whether applicant should receive mitigation credit for prior responses to FINRA's information and document requests that were part of the same investigation).

DreamFunded Marketplace's and Fernandez's explanations about the deficiencies in their response were not credible, and we find that DreamFunded Marketplace and Fernandez did not provide a valid reason for failing to respond fully and completely to FINRA's request for information and documents.

On appeal, DreamFunded Marketplace and Fernandez argue for a reduction in sanctions based on a single factor,<sup>127</sup> the de minimis amount that DreamFunded Marketplace earned from its funding portal activities.<sup>128</sup> But DreamFunded Marketplace's limited revenues is not mitigating here. As the Hearing Panel explained, "the failure to respond fully and completely to a [FINRA] Rule 8210 request is significant beyond the money involved. A [FINRA] Rule 8210 violation damages the integrity of the markets and the ability of FINRA to protect the public." We agree. In cases like this one, the harm is to the self-regulatory process and to investors' confidence in that process. FINRA cannot fulfill its regulatory mission if associated persons and FINRA members, funding portals and broker-dealers alike, refuse to provide the information, documents, and testimony necessary for FINRA to determine whether a violation has occurred. As we consider the importance of the information that FINRA requested, the length of time it took to obtain DreamFunded Marketplace's and Fernandez's partial response, the degree of regulatory pressure required for that partial response, DreamFunded Marketplace's and Fernandez's lack of valid reasons for the deficiencies in the response, and the fact that FINRA did not obtain the information and documents needed to complete its investigation, we conclude that DreamFunded Marketplace should be expelled, and Fernandez should be barred, for failing to respond fully and completely to FINRA's request for information and documents.<sup>129</sup>

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<sup>127</sup> This is DreamFunded Marketplace's and Fernandez's only statement concerning sanctions on appeal. DreamFunded Marketplace and Fernandez state, "And, let us not overlook the most damning proof that the outcome was preconceived, that the penalties imposed are grossly excessive and unwarranted, given that [DreamFunded Marketplace] raised a total of less than Fifteen Thousand Dollars (\$15,000)."

<sup>128</sup> See *Guidelines*, at 8 (Principal Considerations in Determining Sanctions, No. 16) (considering whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain). While monetary gain, and the potential for monetary gain may be an aggravating factor for purposes of sanctions, its absence is not mitigating. See *Dep't of Enforcement v. Griffith*, Complaint No. 2010025350001, 2015 FINRA Discip. LEXIS 55, at \*19 (FINRA NAC Dec. 22, 2015).

<sup>129</sup> For cause one, the Hearing Panel applied the Sanction Guidelines for violations of FINRA Rule 8210, expelled DreamFunded Marketplace, and barred Fernandez. We acknowledge that any bar imposed on Fernandez may result in a "bad actor disqualification" under SEC Rule 506 of Regulation D of the Securities Act. See SEC Rule 506(d)(1)(vi), 17 C.F.R. § 230.506(d)(1)(vi) (2021) (stating that "any director, executive officer, other officer participating in the offering" is subject to a bad actor disqualification if the individual "[i]s suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade . . .").

[Footnote continued on next page]

C. Sanctions for Cause Three

Under cause three, we found that DreamFunded Marketplace and Fernandez violated FINRA Funding Portal Rules 200(b) and 200(a) because they made fraudulent misrepresentations about an investment in Issuer C and the funding portal's due diligence on issuers. We also found that DreamFunded Marketplace and Fernandez violated FINRA Funding Portal Rules 200(c)(2) and 200(a) because they made negligent misrepresentations in real estate advertisements posted to the funding portal's website. FINRA Funding Portal Rule 200(b) is modeled after Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rule 2020. FINRA Funding Portal Rule 200(c)(2) is modeled after FINRA Rule 2210(d)(1). The Sanction Guidelines provide violation-specific guidance for fraudulent misrepresentations that violate Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rule 2020 and for negligent misrepresentations that violate FINRA Rule 2210. We will use those violation-specific guidelines here.

For fraudulent misrepresentations, the Sanction Guidelines advise adjudicators to strongly consider barring an individual.<sup>130</sup> Where mitigating factors predominate, however, the Sanction Guidelines suggest that adjudicators consider suspending an individual in any or all capacities for a period of six months to two years.<sup>131</sup> The Sanction Guidelines direct adjudicators to apply the Principal Considerations in Determining Sanctions to determine the duration of a suspension or whether to impose a bar.<sup>132</sup> For a firm's fraudulent misrepresentations, the Sanction Guidelines advise adjudicators to consider suspending the firm with respect to any or all activities for up to two years.<sup>133</sup> The Sanction Guidelines, however, note that, where aggravating factors predominate the firm's misconduct, adjudicators should "strongly consider expelling the firm."<sup>134</sup>

For negligent misrepresentations, in violation of FINRA Rule 2210, the Sanction Guidelines advise adjudicators to consider imposing a fine of \$1,000 to \$31,000 and suspending

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The bad actor disqualification, however, would be a collateral consequence of the bar we impose on Fernandez for his misconduct, and, as such, has no bearing on our analysis as an aggravating or mitigating factor for sanctions. *See Lonny S. Bernath*, Initial Decisions Release No. 993, 2016 SEC LEXIS 1222, at \*15-18 (Apr. 4, 2016) (explaining that the applicant's "Rule 506 ban[] under Regulation D" was a "collateral consequence[] of the bar").

<sup>130</sup> *See Guidelines*, at 89 (Fraud, Misrepresentations or Material Omissions of Fact).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* For fraudulent misrepresentations, the Sanction Guidelines also recommend a fine between \$10,000 and \$155,000.

the responsible individual in any or all capacities for up to 60 days.<sup>135</sup> For firms, the Sanction Guidelines recommend suspending the firm with respect to any or all activities or functions for up to six months.<sup>136</sup> In egregious cases, the Sanction Guidelines suggest that adjudicators consider suspending the firm with respect to any or all activities or functions for up to one year.<sup>137</sup> To assess sanctions for an individual's or firm's negligent misrepresentations, the Sanction Guidelines advise adjudicators to consider whether the violative communications with the public were circulated widely.<sup>138</sup>

Taken together, DreamFunded Marketplace's and Fernandez's misrepresentations about the investment in Issuer C, the funding portal's due diligence on issuers, and the quality of the real estate investments posted on the funding portal's website solidify that this is an egregious case. In October 2016, Fernandez appeared in a video clip, which gave the false impression that he had invested \$100 million in startups and \$1 million in Issuer C. Fernandez knew that the video clip contained the misrepresentations, but, he nevertheless uploaded the video clip to DreamFunded Marketplace's website, posted it to at least two social media platforms, and allowed the video clip to remain on the funding portal's website and social media platforms for nearly two years, until May 2018.<sup>139</sup>

The facts surrounding DreamFunded Marketplace's and Fernandez's misrepresentations about their issuer due diligence are equally troubling. DreamFunded Marketplace and Fernandez

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<sup>135</sup> See *id.* at 80 (Communications with the Public – Late Filing; Failing to File; Failing to Comply with Rule Standards or Use of Misleading Communications). The Sanction Guidelines related to Fraud, Misrepresentations or Material Omissions of Fact also contain guidance for negligent misrepresentations. See *id.* at 89. These guidelines recommend a fine of \$2,500 to \$77,000, an individual suspension in any or all capacities for 31 calendar days to two years, and a firm suspension with respect to a limited set of activities for up to 90 days. *Id.* We consulted the Sanction Guidelines for Fraud, Misrepresentations or Material Omissions of Fact for our analysis of DreamFunded Marketplace's and Fernandez's negligent misrepresentations under cause three.

<sup>136</sup> *Id.* at 80 (Communications with the Public – Late Filing; Failing to File; Failing to Comply with Rule Standards or Use of Misleading Communications).

<sup>137</sup> In egregious and non-egregious cases involving negligent misrepresentations, the Sanction Guidelines also recommend that adjudicators consider “imposing, for a definite period, a ‘pre-use’ filing requirement to obtain a FINRA Regulation staff ‘no objection’ letter on proposed communications with the public.” *Id.*

<sup>138</sup> The Hearing Panel did not apply any violation-specific guidelines for its sanctions analysis under cause three. For the fraudulent misrepresentations concerning the investment in Issuer C and the funding portal's due diligence on issuers, the Hearing Panel expelled DreamFunded Marketplace and barred Fernandez. For the negligent misrepresentations in the real estate advertisements on the funding portal's website, the Hearing Panel found that a letter of caution for DreamFunded Marketplace and Fernandez would be sufficient.

<sup>139</sup> See *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 9) (considering whether the respondent engaged in the misconduct over an extended period of time).

misrepresented that they conducted the same type of due diligence as venture capitalists in private offerings, and that the funding portal had an experienced due diligence and deal flow screening team and investment committee to review the issuers and offerings posted to the funding portal's website. In fact, DreamFunded Marketplace had no due diligence and deal flow screening team, had no investment committee, had no records of any due diligence that it had conducted, and was not conducting the same type of due diligence as venture capitalists. DreamFunded Marketplace's and Fernandez's misrepresentations concerning the funding portal's issuer due diligence promoted Fernandez, the funding portal, and the funding portal's issuers at the expense of investors who left the funding portal platform with an inflated sense of investment quality and safety.

Although they are less serious than the misrepresentations about the investment in Issuer C, the investments in startups, and the issuer due diligence, DreamFunded Marketplace's and Fernandez's misrepresentations in the real estate advertisements on the funding portal's website remain problematic.<sup>140</sup> The real estate advertisements made it appear that the real estate investments were part of the funding portal's crowdfunding business when they were not, that investors could expect a high rate of return when no such guarantee could be made, and that investing in real estate was comparable to purchasing certificates of deposit when that is not the case.

DreamFunded Marketplace's and Fernandez's misrepresentations about the investment in Issuer C, issuer due diligence, and quality and safety of the real estate investments, whether fraudulently or negligently made, present a disturbing pattern of misconduct. And it is a pattern of misconduct that seems singularly focused on presenting Fernandez as a wealthy, savvy investor that other investors should seek to emulate.<sup>141</sup> The self-aggrandizing and self-serving nature of DreamFunded Marketplace's and Fernandez's fraudulent and negligent misrepresentations under cause three is powerful evidence that supports expelling DreamFunded Marketplace and barring Fernandez.

#### D. Sanctions for Causes Two and Five Through Ten

Under cause two, we found that DreamFunded Marketplace and Fernandez failed to deny Issuer A's access to the funding portal when Issuer A's offering raised investor protection concerns. Under cause five, we found that DreamFunded Marketplace and Fernandez failed to conduct issuer background checks and securities enforcement regulatory histories. Under causes six through nine, we found that DreamFunded Marketplace and Fernandez failed to provide investors with a material change notice, early closing notices, investment cancellation notices, and

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<sup>140</sup> For negligent misrepresentations that violate FINRA Rule 2210, the Sanction Guidelines direct us to consider whether the violative communications with the public were widely circulated. *See id.* at 80 (Communications with the Public – Late Filing; Failing to File; Failing to Comply with Rule Standards or Use of Misleading Communications). We find that all of the misrepresentations under cause three were posted to DreamFunded Marketplace's website or social media platforms, that these communications were widely circulated, and that this is an aggravating factor for purposes of sanctions.

<sup>141</sup> *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 8) (considering whether the respondent engaged in numerous acts or a pattern of misconduct).

investment confirmation notices. Under cause ten, we found that DreamFunded Marketplace and Fernandez failed to implement policies and procedures reasonably designed to supervise the funding portal's activities and associated persons.

We have decided to aggregate the sanctions that we impose on DreamFunded Marketplace and Fernandez under cause two and causes five through ten because the violations under cause two and causes five through nine stem from DreamFunded Marketplace's and Fernandez's supervisory failures under cause ten.<sup>142</sup> We will apply the Sanction Guidelines for systemic supervisory failures to our analysis because DreamFunded Marketplace's and Fernandez's supervisory failures were "significant," "widespread,"<sup>143</sup> "occur[ed] over an extended period of time," and "involve[d] [a] supervisory system[] that ha[d] both ineffectively designed procedures and procedures that [were] not implemented."<sup>144</sup>

For systemic supervisory failures, the Sanction Guidelines recommend a fine of \$10,000 to \$77,000 for the responsible individual and a fine of \$10,000 to \$310,000 for the firm.<sup>145</sup> Where aggravating factors predominate the individual's or firm's misconduct, the Sanction Guidelines

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<sup>142</sup> The Sanction Guidelines provide adjudicators with the discretion to aggregate, or batch, violations for purposes of sanctions where the "violations result[] from a single systemic problem." *Id.* at 4 (General Principles Applicable to All Sanction Determinations, No. 4).

<sup>143</sup> *Id.* at 105 (Supervision – Systemic Supervisory Failures). DreamFunded Marketplace's and Fernandez's supervisory failures were widespread because the failures had the potential to affect all investors who participated in crowdfunding transactions through the funding portal.

<sup>144</sup> *Id.* We also decided to apply the Sanction Guidelines for systemic supervisory failures because, as we explained earlier in this decision, one of the funding portal rules implicated for cause ten, FINRA Funding Portal Rule 300(a)(1), is based on FINRA's supervision rule for broker-dealers, FINRA Rule 3110(a). *See FINRA Crowdfunding Approval Order*, 2016 SEC LEXIS 262, at \*19. Other applicable Sanction Guidelines for DreamFunded Marketplace's and Fernandez's supervisory failures include Supervision – Failure to Supervise and Supervisory Procedures – Deficient Written Supervisory Procedures. *See Guidelines*, at 104, 107. For DreamFunded Marketplace's and Fernandez's failure to provide the investors notices under causes six through nine, we also consulted the Sanction Guidelines for customer confirmations, in violation of FINRA Rule 2332. *See id.* at 26 (Customer Confirmations – Failure to Comply with Rule Requirements). The Sanction Guidelines for customer confirmations recommend a fine between \$1,000 and \$155,000 based on whether the violation is the respondent's first, second, or subsequent action. *Id.* The Sanction Guidelines for customer confirmations also advise adjudicators to consider suspending the firm or responsible individual for up to 30 business days. *Id.* In egregious cases, the Sanction Guidelines for customer confirmations recommend a lengthier suspension of up to two years, expulsion of the firm, or a bar of the responsible individual. *Id.* We identified no analogous Sanction Guidelines for DreamFunded Marketplace's and Fernandez's misconduct under cause two or cause five.

<sup>145</sup> *Id.* at 105 (Supervision – Systemic Supervisory Failures).

direct adjudicators to “consider a higher fine.”<sup>146</sup> “Where the deficiency persists,” the Sanction Guidelines suggest suspending the responsible individual in any or all capacities for a period of 10 business days to six months.<sup>147</sup> Where aggravating factors predominate that individual’s misconduct, however, the Sanction Guidelines recommend suspending the responsible individual in any or all capacities for a period of 10 business days to two years, or a bar of the individual.<sup>148</sup> For a firm, where aggravating factors predominate the misconduct, the Sanction Guidelines suggest a suspension of the firm with respect to any or all relevant activities or functions for a period of 10 business days to two years, or an expulsion of the firm.<sup>149</sup>

The Sanction Guidelines for systemic supervisory failures provide eight Principal Considerations in Determining Sanctions for an adjudicator’s assessment of sanctions: (1) whether the deficiencies allowed violative conduct to occur or to escape detection; (2) whether the firm or individual failed to timely correct or address deficiencies once identified, failed to respond reasonably to prior warnings from FINRA or another regulator, or failed to respond reasonably to other “red flag” warnings; (3) whether the firm appropriately allocated its resources to prevent or detect the supervisory failure, taking into account the potential impact on customers or markets; (4) the number and type of customers, investors, or market participants affected by the deficiencies; (5) the number and dollar value of the transactions not adequately supervised as a result of the deficiencies; (6) the nature, extent, size, character, and complexity of the activities or functions not adequately supervised as a result of the deficiencies; (7) the extent to which the deficiencies affected market integrity, market transparency, the accuracy of regulatory reports, or the dissemination of trade or other regulatory information; and (8) the quality of controls or procedures available to the supervisors and the degree to which the supervisors implemented them.<sup>150</sup> The application of these principal considerations demonstrate that aggravating factors predominate DreamFunded Marketplace’s and Fernandez’s supervisory failures.

From WSPs based on quoted sections of the SEC’s crowdfunding rules and FINRA’s funding portal rules to Fernandez’s failure to provide the WSPs to funding portal employees and failure to implement the WSPs to protect investors in crowdfunding transactions, DreamFunded Marketplace’s and Fernandez’s system of supervision was a farce. DreamFunded Marketplace and Fernandez could not produce evidence of supervisory reviews of the implementation of the funding portal’s policies and procedures and could not even produce a copy of the WSPs when asked to do so. DreamFunded Marketplace’s and Fernandez’s violations under cause two and causes five through nine are the inevitable culmination of their supervisory failures. DreamFunded

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> For a firm, the Sanction Guidelines also recommend that adjudicators consider imposing undertakings, ordering the firm to revise its supervisory systems and procedures, or ordering the firm to engage an independent consultant to recommend changes to the firm’s supervisory systems and procedures. *Id.* at 106 (Supervision – Systemic Supervisory Failures).

<sup>150</sup> *Id.* at 105-06.

Marketplace and Fernandez did not deny Issuer A's access to the funding portal when Issuer A's offering raised serious investor protection concerns, and they failed to provide investors with the important notices necessary to protect the investors' interests in crowdfunding transactions.<sup>151</sup>

The record in this case is substantial, and, after a thorough review of the entirety of it, DreamFunded Marketplace and Fernandez emerge as an entity and individual focused on gallivanting in the crowdfunding space without regard for the rules, regulations, or basic work of serving as the intermediary between issuers and investors. Basically, DreamFunded Marketplace and Fernandez took the risks inherent in crowdfunded offerings and transactions and made them riskier. "[P]roper supervision serves such an important role in protecting investors, [and] egregious violations of supervisory rules often warrant the most severe sanctions."<sup>152</sup> We agree, and, for the utter abdication of their gatekeeper, investor protection, and supervisory obligations, we expel DreamFunded Marketplace and bar Fernandez.<sup>153</sup>

## V. Conclusion

We affirm the Hearing Panel's findings that DreamFunded Marketplace and Fernandez: (1) failed to respond fully and completely to FINRA's request for information and documents (cause one); (2) failed to deny Issuer A's access to the funding portal when Issuer A's offering raised investor protection concerns (cause two, in part); (3) made false, exaggerated, unwarranted, promissory, and misleading statements about their investment in an issuer, the due diligence that they conducted on issuers, and certain real estate investments (cause three); (4) failed to conduct issuer background checks and securities enforcement regulatory histories (cause five); (5) failed to provide investors with a material change notice for Issuer A's offering (cause six, in part); (6) failed to provide investors with early closing notices for Issuer A's and Issuer B's offering (cause seven); (7) failed to provide investors with investment cancellation notices (cause eight); (8) failed to provide investors with investment confirmation notices (cause nine); and (9) failed to implement

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<sup>151</sup> We considered the emails that Fernandez sent to Issuer A's investors to notify them of the material change resulting from Issuer A's decreased target offering amount. We determined that the emails have no mitigative effect. Fernandez sent the emails three months after the event prompting the material change notice occurred and after he already had disbursed the offering proceeds to Issuer A's chief executive officer, DA.

<sup>152</sup> *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at \*112 (July 2, 2013).

<sup>153</sup> For cause two and causes five through ten, the Hearing Panel assessed, but did not impose the following sanctions on DreamFunded Marketplace: (1) four 30-calendar day suspensions under cause two, cause five, causes six through nine as an aggregate sanction, and cause ten; and (2) the submission and creation of a supervisory plan to address the funding portal's deficiencies under cause ten. For Fernandez, the Hearing Panel assessed, but did not impose: (1) a six-month suspension and \$10,000 fine under cause two; (3) three 30-calendar day suspensions under cause five, causes six through nine as an aggregate sanction, and cause ten; and (3) the submission and creation of a supervisory plan to address the funding portal's deficiencies under cause ten. The Hearing Panel declined to impose these sanctions on DreamFunded Marketplace and Fernandez because of the expulsions and bars imposed on them under causes one and three.

policies and procedures reasonably designed to supervise the funding portal's activities and associated persons (cause ten).

We dismiss: (1) the parts of Enforcement's allegations under cause two, concerning whether DreamFunded Marketplace and Fernandez failed to deny Issuer A's and Issuer B's access to the funding portal based on their projections and forecasts; (2) the entirety of Enforcement's allegations under cause four, concerning whether DreamFunded Marketplace and Fernandez had a reasonable basis for believing that Issuer A and Issuer B had complied with the Securities Act; and (3) the parts of Enforcement's allegations under cause six, concerning whether DreamFunded Marketplace and Fernandez failed to provide investors with two additional material change notices for Issuer A's offering.

For sanctions, we impose three separate expulsions on DreamFunded Marketplace and three separate bars on Fernandez. First, we expel DreamFunded Marketplace from funding portal membership, and bar Fernandez from associating with any FINRA funding portal member in any capacity, for failing to respond fully and completely to FINRA's request for information and documents under cause one. Second, we expel DreamFunded Marketplace from funding portal membership, and bar Fernandez from associating with any FINRA funding portal member in any capacity, for making false, exaggerated, unwarranted, promissory, and misleading statements about their investment in an issuer, the due diligence that they conducted on issuers, and certain real estate investments under cause three. Third, we expel DreamFunded Marketplace from funding portal membership, and bar Fernandez from associating with any FINRA funding portal member in any capacity, as an aggregate sanction for its gatekeeper, investor protection, and supervisory failures under cause two and causes five through ten. Finally, we affirm the Hearing Panel's order that DreamFunded Marketplace and Fernandez pay hearing costs of \$15,889.03, and we assess appeal costs of \$1,273.48 on DreamFunded Marketplace and appeal costs of \$1,273.48 on Fernandez.<sup>154</sup>

On Behalf of the National Adjudicatory Council,



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Jennifer Piorko Mitchell,  
Vice President and Deputy Corporate Secretary

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<sup>154</sup> FINRA Funding Portal Rule 800(a) makes FINRA Rule 8320 applicable to funding portal members and their associated persons. Pursuant to FINRA Rule 8320, after seven days' notice in writing, the membership of any funding portal member, and the registration of any person associated with a funding portal member, will be summarily revoked for the failure to pay fines, costs, or any other monetary sanction.



**Jante Turner**  
Associate General Counsel

Telephone: (202) 728-8317  
Facsimile: (202) 728-8264

September 27, 2021

**VIA ELECTRONIC MAIL**

Todd Zuckerbrod, Esq.  
40 SE 5th Street, Suite 400  
Boca Raton, FL 33432  
tz@tzbrokerlaw.com

**RE: DREAMFUNDED MARKETPLACE, LLC AND  
MANUEL FERNANDEZ  
FINRA COMPLAINT NO. 2017053428201**

Dear Mr. Zuckerbrod:

Enclosed is the decision of the National Adjudicatory Council (“NAC”) in the above-referenced matter. The FINRA’s Board of Governors did not call this matter for review. The attached NAC decision is the final decision of FINRA.

In the enclosed decision, the NAC imposed three separate expulsions on DreamFunded Marketplace and three separate bars on Fernandez. First, the NAC expelled DreamFunded Marketplace from funding portal membership, and barred Fernandez from associating with any FINRA funding portal member in any capacity, for failing to respond fully and completely to FINRA’s request for information and documents under cause one. Second, the NAC expelled DreamFunded Marketplace from funding portal membership, and barred Fernandez from associating with any FINRA funding portal member in any capacity, for making false, exaggerated, unwarranted, promissory, and misleading statements about their investment in an issuer, the due diligence that they conducted on issuers, and certain real estate investments under cause three. Third, the NAC expelled DreamFunded Marketplace from funding portal membership, and barred Fernandez from associating with any FINRA funding portal member in any capacity, as an aggregate sanction for its violations under causes two and five through ten. Finally, the NAC affirmed the Hearing Panel’s order that DreamFunded Marketplace and Fernandez pay hearing costs of \$15,889.03, and the NAC assessed appeal costs of \$1,273.48 on DreamFunded Marketplace and appeal costs of \$1,273.48 on Fernandez. Please note that FINRA Funding Portal makes the FINRA Rule 8000 Series applicable to funding portal members and their associated persons, and, under FINRA Rule 8311 (“Effect of a Suspension, Revocation, Cancellation, or Bar”), because the NAC has imposed a bar, effective immediately, Fernandez is not permitted to associate further with any FINRA funding portal member firm in any capacity, including a clerical or ministerial capacity.

FINRA Funding Portal Rule 100(a) makes the FINRA By-Laws and FINRA Regulation By-Laws applicable to funding portals and their associated persons. Under Article V, Section 2 of the FINRA By-Laws, all persons who apply for registration with FINRA must keep all information provided to FINRA current and accurate. Accordingly, Fernandez must keep FINRA informed of his current address, and he is reminded that the failure to do so may result in the entry of a default decision against him.

In addition, FINRA may request information from, or file a formal disciplinary action against, persons who are no longer registered with a FINRA member for at least two years after their termination from association with a member. See Article V, Sections 3 and 4 of FINRA's By-Laws. Requests for information and disciplinary complaints issued by FINRA during this two-year period will be mailed to such persons at their last known address as reflected in FINRA's records. Such individuals are deemed to have received correspondence sent to the last known address, whether or not the individuals have actually received them. Thus, individuals who are no longer associated with a FINRA member firm and who have failed to update their addresses during the two years after they end their association are subject to the entry of default decisions against them. See Notice to Members 97-31. Letters notifying FINRA of such address changes should be sent to CRD, PO Box 9495, Gaithersburg, MD 20898-9401 or may be updated via FINRA's Individual Snapshot website at <http://www.finra.org/industry/web-crd/crd-residential-change-address-former-finra-registered-representatives>.

\* \* \*

DreamFunded Marketplace and Fernandez may appeal this decision to the US Securities and Exchange Commission ("SEC"). To do so, they must file an application with the SEC within 30 days of their receipt of this decision. A copy of this application must be sent to the FINRA Office of General Counsel, as must copies of all documents filed with the SEC. Any documents provided to the SEC via facsimile or overnight mail should also be provided to FINRA by similar means.

The address of the SEC is:  
The Office of the Secretary  
Securities and Exchange Commission  
100 F Street, NE, Room 10915  
Washington, DC 20549-1090  
AdminstrativeProceedingsFax@sec.gov

The address of FINRA is:  
Jante Turner  
FINRA – Office of General Counsel  
1735 K Street, NW  
Washington, DC 20006  
jante.turner@finra.org  
nac.casefilings@finra.org

If an application for review is filed with the SEC, the application must identify the FINRA case number and state the basis for the appeal. The appeal must include an address where DreamFunded Marketplace and Fernandez may be served and a phone number where you may be reached during business hours. If DreamFunded Marketplace's and Fernandez's addresses or phone numbers change, they must advise the SEC and FINRA. Attorneys must file a notice of appearance.

Effective as of April 12, 2021, the SEC's Rules of Practice (17 CFR §§ 201.100 – 201.1106) require the electronic filing and service of documents in Commission administrative proceedings. See Amendments to the Commission's Rules of Practice, 85 Fed. Reg. 86,464 (Dec. 30, 2020) (available at <https://www.govinfo.gov/content/pkg/FR-2020-12-30/pdf/2020-25747.pdf>). The SEC's Rules of Practice and instructions for electronic filing are available on the SEC's website on the Rules of Practice page at <http://www.sec.gov/about/rulesofpractice.shtml>. The SEC's electronic filing system ("eFAP") is available at <https://www.sec.gov/efap>.

The SEC's instructions for electronic filing also require that parties and representatives serve and accept service of documents electronically. Should DreamFunded Marketplace and Fernandez decide to avail themselves of the opportunity to appeal the NAC's decision to the SEC, we request that they serve a copy of their application for review, and copies of any documents they may file in support of their application for review, on FINRA electronically at [jante.turner@finra.org](mailto:jante.turner@finra.org). We consent to accept electronic service of their appeal on behalf of FINRA at this email address while the SEC's order remains in effect.

The filing of an application for review with the SEC shall stay the effectiveness of any sanction except an expulsion or bar. Thus, the expulsions and bars that the NAC imposed in the enclosed decision will not be stayed pending appeal to the SEC, unless the SEC orders a stay. Orders in the enclosed NAC decision to pay costs, however, will be stayed pending appeal. Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-551-5400.

\* \* \*

If DreamFunded Marketplace and Fernandez does not appeal this NAC decision to the SEC, DreamFunded Marketplace and Fernandez may pay these amounts after the 30-day period for appeal to the SEC has passed. Any fines and costs assessed should be paid (via regular mail) to FINRA, PO Box 418911, Boston, MA 02241-8911 or (via overnight delivery) to Bank of America Lockbox Services, FINRA 418911 MA5-527-02-07, 2 Morrissey Blvd., Dorchester, MA 02125.

Todd Zuckerbrod, Esq.  
September 27, 2021  
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Sincerely,

/s/ Jante Turner

Jante Turner

Enclosures

cc: Manuel Fernandez (manny@dreamfunded.com)  
Edwin Aradi, Esq.  
Ursula Clay  
Tesh Cromwell  
Megan Davis, Esq.  
Colleen O'Loughlin, Esq.  
Jackie Perrell