UNITED STATES COURT OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of:

DreamFunded Marketplace, LLC and

Manuel Fernandez,

For Review of Disciplinary Action Taken By:

FINRA

ADMINISTRATIVE PROCEEDING
No. 3-20639

APPLICANT'S RESPONSE BRIEF TO FINRA'S BRIEF IN OPPOSITION

Manuel Fernandez
Pro Se
[redacted]

Applicant

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Respondent has filed a “Brief in Oppositon to the Application for Review” (hereinafter “Oppostion”) Applicant Manuel Fernandez will be referred to a “Fernandez” and Respondent FINRA will be referred to as “Respondent”.

Fernandez raises the issues of constitionality of FINRA and their Rules

I. FACTS RELEVANT TO THIS APPEAL

Fernandez has stated the facts that he believes are relevant in his Opening Brief in Support of his Application for Review.

The Department of Enforcement stated that Fernandez’s involvement was from July 2016 through October 2017, which is a period that totals only 15 months.

Fernandez has thoroughly reviewed the facts that Respondent has alleged on pages 2 through 10 of their Opposition and Fernandez notes that their Factual Background is based on the findings of the Hearing Officer.

As stated below, Fernandez believes that these findings are both partial and biased and will not waste this Court’s time arguing fact for fact.

II. ISSUES PRESENTED ON APPEAL

A. Legal Standards

Fernandez affirmatively asserts that Respondent has failed to properly set forth in their Opposition their issues with Fernandez’s statement of the Legal Standards which are stated in his Application for Review specifically as follows:

Our courts have characterized those provisions as imposing, among other things, a "statutory requirement [] that a sanction be remedial," rather than a

form of punishment. *PAZ Securities, Inc. v. S.E.C.*, 566 F.3d 1172, 1176 (D.C. Cir. 2009); *see also Siegel v. S.E.C.*, 592 F.3d 147, 157 (D.C. Cir. 2010) **("As an initial matter, it is important to remember that the agency `may impose sanctions for a remedial purpose, but not for punishment.'"** (quoting *McCurdy v. S.E.C.*, 396 F.3d 1258, 1264 (D.C. Cir. 2005))" *Saad v. SEC*, 980 F. 3d 103, 104-105 (D.C. Cir. 2020)

"FINRA is a 'self-regulatory organization' ("SRO") as a national securities association registered with the SEC pursuant to the Maloney Act of 1938, 15 U.S.C. § 78o-3, *et seq. See Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 201 (2d Cir.1999). FINRA is the successor to the National Association of Securities Dealers ("NASD"). It 'is responsible for conducting investigations and commencing disciplinary proceedings against [FINRA] member firms and their associated member representatives relating to compliance with the federal securities laws and regulations.' *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 157 (2d Cir.2002) (quoting *Datek Sec. Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 875 F.Supp. 230, 232 (S.D.N.Y.1995) (internal quotation marks omitted)). As a practical matter, all securities firms dealing with the public must be members of FINRA. *See Sacks v. SEC*, 648 F.3d 945, 948 (9th Cir.2011) (citing 72 Fed.Reg. 42,169, 42,170 (Aug. 1, 2007); 15 U.S.C. §§ 78c(a)26, 78s(b)) (noting that FINRA is 'responsible for regulatory oversight of all securities firms that do business with the public'); *see also* note 1, *supra.* FINRA's disciplinary proceedings are governed by the FINRA Code of Procedure ("FINRA COP"). The FINRA COP has been

approved by the SEC, as required by Section 19 of the Securities Exchange Act of 1934. 15 U.S.C. § 78s(b) (describing the required procedure for approval of proposed SRO rule changes).' *Fiero v. Financial Industry Regulatory Authority*, 660 F.3d 569, 571-2 (2d Cir. 2011)

B. Sanctions

Further, Respondent has chosen to ignore Fernandez's issue that Sanctions should be the most prominent issue.

Throughout all proceedings, Respondent has been predisposed that the only appropriate sanction is to bar Fernandez.

Therefore, Respondent is attempting to state that the ends justify the means which is an inappropriate measure of the United States Rule of Law.

It is more than apparent that Respondent's Opposition attempts to confuse Fernandez. Respondent knows that is a Pro Se party who [redacted]

Respondent used less than 6 pages of their 57 page Opposition to attempt to explain that the sanction imposed was proper, even though it was remedial.

However, the sanctions are both excessive and oppressive as it "barred Fernandez from associating with any FINRA funding portal member in any capacity." (p. 1 of NAC Decision)

The sanction of a lifetime bar against Fernandez which barred him in all capacities is not tailored to the offenses alleged.

Respondent further failed to address that this is a case of first impression (See p. 1 of NAC Decision) and obviously wants this Court to forget that this is truly a case of first impression.

The NAC stated that "In determining the appropriate sanction to be imposed for a violation of its rules, FINRA's Guidelines outline eight factors to be considered: (i) the need for the sanction to be remedial, to deter future misconduct, and to improve business standards in the securities industry, (ii) the violator's status as a repeat or one-time violator, (iii) the appropriateness of the sanction for the specific misconduct, (iv) the need in a particular case either to aggregate or to sanction individually similar violations, (v) the appropriateness of restitution or rescission, (vi) the remediation needed to ensure the individual does not benefit from ill-gotten gains, (vii) the necessity of requalification before permitting continued participation in the securities industry, and (viii) the violator's ability to pay any fine or restitution. J.A. 87-90." *Saad v. SEC*, 873 F. 3d 297, 299 (D.C. Cir. 2017)

Respondent ignores the eight (8) factors stated and *Saad* and they just jump forward with a conclusory finding that Fernadez should be barred!! ***Fernandez affirmatively asserts that Respondent's failure to address these factors absolutely establishes their predisposition that Fernandez should be barred***

Respondent argues in their Opposititon that "An Expulsion and Bar are Appropriate for the Applicants' Failure to Produce Banking and Accounting

Records" (p. 42-45), "An Expulsion and Bar Are Appropriate for the Applicants' Misrepresentations" (p. 45-47), and "An Expulsion and Bar Are Appropriate for the Applicant's Supervisory and Related Violations" (p. 47-48). However, these arguments are based upon rules which Respondent alone wrote, without congressional or public scrutiny. The rules which Respondent wrote and enforce are solely designed to protect only Respondent.

Respondent is not a governmental agency, but it acts with the force of law since Respondent writes its own rules, which it then enforces, and if you do not comply to their satisfaction, an individual can be barred from employment as a broker or dealer. Since Respondent is not a governmental agency, they do not have subpoena power or the ability to sue to collect judgments – but they don't worry about that because they have the ability to bar and/or subject civil penalties for individuals to continue to have employment in their chosen profession(s).

Article I, Section 1 of the United States Constitution states that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Based on Art. I, §1, the United States Supreme Court explained in *Wayman v. Southard*, 10 Wheat. 1, 42–43 that Congress may not transfer to another branch "powers which are strictly and exclusively legislative."

Fernandez recognizes that he is alleging for the first time that FINRA and their rules are Unconstitutional under the United States Constitution, including but not limited to Art. I, §1, but he only became aware of the constitutionality issues related

to Respondent and their rules upon a thorough review of the Opposition.

Respondent argues that "An Expulsion and Bar are Appropriate for the Applicants' Failure to Produce Banking and Accounting Records" (p. 42-45). On p. 42, Respondent argues that "For an individual who provides a partial and incomplete response, the FINRA Sanction Guidelines (the "Guidelines") provide that a bar is standard 'unless the [individual] can demonstrate that the information provided substantially complied with all aspects of the request.' FINRA Sanction Guidelines 33 (March 2019)." On p. 43, Respondent argues that "A bar and expulsion are appropriate here because the Applicants did not substantially comply with all aspects of FINRA's request."

It is apparent from Respondent's Opposition that they know with absolute certainty that they are the prosecutor, the jury, and they are the one who renders judgment. All of this without being a governmental entity.

Federal Rule of Civil Procedure 5.1 provides that

> (a) NOTICE BY A PARTY. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:
>
> (1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:
>
> (A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or

(B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned—or on the state attorney general if a state statute is questioned—either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

(b) CERTIFICATION BY THE COURT. The court must, under 28 U.S.C. §2403, certify to the appropriate attorney general that a statute has been questioned.

(c) INTERVENTION; FINAL DECISION ON THE MERITS. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

Fernandez is preparing the appropriate notices as required by Rule 5.1.

English common law and engrafted onto American constitutional law since the time of our country's Founding, and is now the rock bed of American understanding of what is just. See *Chapman v. California*, 386 U.S. 18, 23 (1967) "Determination by a neutral decision maker" translates to impartiality; and, and impartiality is the

heart of procedural justice. As of courts have put it, "procedural fairness requires internal separation between advocates and decision makers to preserve neutrality." *Withrow v. Larkin*, 421 U.S. 35, 47,51-52 (1976)

According to FINRA Rule 9120(b), the Chief Hearing Officer is an individual "designated by the Chief Executive Officer of FINRA to manage the Office of Hearing Officers." With this management mission in mind, it would not be unreasonable to infer that the Chief Hearing Officer, at a minimum, has a "financial interest" in appointing to Hearing Panels individuals who are loyal to FINRA's mission, which is to "provide investor protection and promote market integrity."

According to FINRA Rule 9120(r), a Hearing Officer is "an employee of FINRA, or former employee of FINRA, who previously acted as a Hearing Officer, who is an attorney and who is appointed by the Chief Hearing Officer to act in an adjudicative role and fulfill various adjudicated responsibilities and duties" that are part and parcel of the process set forth in the Rule 9200 series, which relates to enforcement and violation of FINRA rules as well as Federal Security laws and regulations.

Therefore, it is not unreasonable to infer that a Hearing Officer, at a minimum, has a financial interest in being and continuing to be loyal to FINRA'S mission, which is to provide investor protection and promote Market integrity.

C. Credibility

Fernandez submits the same arguments and reasoning as he has stated in subsection B. "Sanctions" as argued immediately above. The findings as to the

credibility of Fernandez originated with a FINRA Hearing Officer who is not a state or federal actor, but not only part of a non-governmental organization but also an employee thereof.

Fernandez's testimony and actions were not going to receive an unbiased and/or inpartial review by a FINRA Hearing Officer.

D. Violation of FINRA Rule 8210 and Funding Portal Rules 800(a) and 200(a), Crowdfunding Rule 200(c)(2) and Funding Portal Rule 200(a), Crowdfunding Rule 301(c)(2) and Funding Portal Rule 200(a), Crowdfunding Rules 303 and 304 and Funding Portal Rule 200(a), and FINRA'S Proceeding was Fair

Fernandez submits the same arguments and reasoning as he has stated in subsection B. "Sanctions" as argued immediately above. The findings as to the violation of FINRA Rules, Funding Portal Rules, Crowdfunding Rules, and most importantly that FINRA'S Proceeding was Fair also originated with a FINRA Hearing Officer who is not a state or federal actor, but not only part of a non-governmental organization but also an employee thereof.

Fernandez's testimony and actions were not going to receive an unbiased and/or inpartial review by a FINRA Hearing Officer.

III. CONCLUSION

For the reasons set forth herein, Applicant challenges the constitutionality of FINRA and their Rules.

Further, Applicant respectfully requests that the Commission reverse the

NAC's findings of liability and any sanctions imposed thereon.

In the alternative, to the extent some liability is imposed, Applicant respectfully requests that the Commission reduce or eliminate the sanctions imposed by the NAC so that they comport with the evidence in the record as well as FINRA' s Sanction Guidelines.

Respectfully submitted this 23 day of August, 2022.

/s/ Manuel Fernandez
Pro Se
[redacted]

Applicant

CERTIFICATE OF COMPLIANCE

In accordance with Rule 450(d) of the Rules of Practice, I certify that this brief, exclusive of the cover page, table of contents, table of authorities, and signature blocks contains 2504 words, according to the word processing system used to prepare the brief.

/s/ Manuel Fernandez