UNITED STATES COURT OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 101438 / October 25, 2024

Admin. Proc. File No. 3-20639

In the Matter of the Application of

DREAMFUNDED MARKETPLACE, LLC
and MANUEL FERNANDEZ

For Review of Disciplinary Action Taken by

FINRA

_____/

SUPPLEMENTAL BRIEF

COMES NOW, DREAMFUNDED MARKETPLACE, LLC and MANUEL FERNANDEZ, Applicants, pro se, respectfully submits this Supplemental Brief based on the recent Supreme Court decision in *SEC v. Jarkesy*, as well as relevant statute of limitations and jurisdictional issues.

1. On August 26, 2024, Applicants filed a "Motion for Reconsideration and/or Relief from Judgment.
2. On September 5, 2024, FINRA filed a motion to (1) strike Fernandez's motion because, among other things, it is, in substance, an unauthorized supplemental brief2 and (2) stay briefing on Fernandez's motion.
3. On October 24, 2024, the Commission entered an "Order Granting Motion to Submit Supplemental Briefing and Denying Motion to Strike and Stay Briefing". ("Oeder")

4. In the Order, the Commission stated we "construe Fernandez's filing as both a supplemental brief and a motion to submit supplemental briefing" and that "we grant Fernandez's motion for supplemental briefing, deny FINRA's motion to strike and stay briefing, accept the parties' briefs already filed, and further ORDER that Applicants may file a supplemental brief not to exceed 5,000 words by November 22, 2024. FINRA may file a response, also not to exceed 5,000 words, by December 20, 2024".
5. Applicant files this as their "Supplemental Brief".

BACKGROUND

6. On July 12, 2016, DreamFunded Marketplace was the first to become a registered funding portal in Silicon Valley California and one of a few nationwide under Title III which was a new law and the first in over 80 years. This law was the first time that FINRA allowed a member who was not trained, licensed, or coached by FINRA.
7. DreamFunded Marketplace was purchased on January 21, 2018, by ValueSetters. Fernandez signed an agreement to rescind the contract of sale on April 16, 2018, because on February 28, 2018, the Department of Enforcement filed a Complaint against DreamFunded Marketplace and Fernandez in Disciplinary Proceeding No. 2017053428201. The Complaint alleges in paragraph 2 that from July 2016 through October 2017, the actions and conduct of DreamFunded and Fernandez were the basis on which the alleged causes of action were filed.
8. The Complaint which was filed against Fernandez alleged in part that Fernandez "(i) made false, exaggerated, unwarranted, promissory, or misleading claims to investors . . .; (ii) did not deny access to its platform when it had reason to believe issuers or their offerings presented the potential for fraud or otherwise raised investor protection

concerns; (iii) included on its website issuer communications that it knew or had reason to know contained untrue statements of material facts or were otherwise false or misleading . . .”

9. The Complaint accused Fernandez of committing securities fraud, in addition to other violations of SEC regulations and rules.
10. According to FINRA By-Laws, Article V, Section 4, FINRA retains jurisdiction over former members for actions related to their conduct while they were members, typically for up to two years after their membership ends. Thus, the sanctions and enforcement actions are still subject to review.
11. On June 19, 2019, the Financial Industry Regulatory Authority, Office of Hearing Officers issued an Extended Hearing Panel Decision in the case.
12. On September 27, 2021, National Adjudicatory Council (“NAC”) issued a Decision in the case. On page 1, the NAC stated that:

> “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".

Also on page 1, the NAC found that "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."

13. The decision in the above-styled case was issued after what was an administrative hearing.
14. As is shown below, Fernandez's right to a jury trial under the Seventh Amendment was violated by the FINRA's use of in-house adjudication.
15. As is established herein, the significant sanctions which were imposed against Fernandez should be re-evaluated in light of *Jarkesy* in conjunction with the procedural shortcomings of an administrative process which does not provide for jury trials.

SEC V JARKESY

16. On June 27, 2024, the United States Supreme Court issued an opinion in *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024) which held that when the Securities and Exchange Commission (SEC) seeks civil penalties from defendants for securities fraud, the Seventh Amendment requires it to bring the action in a court of law where the defendant is entitled to a trial by jury.
17. This opinion removed the SEC's ability to use in-house tribunals when seeking civil penalties against individuals accused of securities fraud.

18. The Court held in SEC v. Jarkesy that the Seventh Amendment entitles a defendant to a jury trial in such circumstances and that the SEC cannot force a defendant into internal administrative proceedings, which are held in front of ALJs instead of in federal court.
19. The *Jarkesy* ruling has significant implications for the SEC in that each investigative matter arising from alleged securities fraud will have to be handled by SEC staff with the understanding that, if settlement is not achieved, the case will go before a federal judge and a jury.
20. As stated above, the civil penalties which were handed down against the Fernandez, Manuel Fernandez, were done through administrative proceedings, without the benefit of being in Federal Court or before a Federal Judge.

JARKESY – SUPREME COURT OUTLINING PROCEDURAL ISSUES

21. The SEC may "adjudicate the matter itself," or it may "file a suit in federal court." *Id*., 144 S.Ct. at 2125
22. The SEC's choice of forum dictates the "procedural protections enjoyed by the defendant" and "the remedies available to the SEC." *Id.*
23. In federal court, "a jury finds the facts, depending on the nature of the claim," an "Article III judge presides," and "the litigation is governed by the Federal Rules of Evidence and the ordinary rules of discovery." *Id*.
24. By contrast, when the SEC adjudicates a matter "in-house," "there are no juries." *Id*.
25. Instead, the Commission (or an administrative law judge (ALJ) appointed by the Commission) presides, finds facts, "decides discovery disputes," "determines the scope and form of permissible evidence," and "may admit hearsay and other testimony that would be inadmissible in federal court." *Id*., 144 S.Ct. at 2125-2126

26. Specifically, the Court held that the Seventh Amendment extends to statutory claims that are "legal in nature," and that civil penalties like those the SEC seeks to impose on Jarkesy—which "are designed to punish and deter, not to compensate"—are a "remedy at common law that could only be enforced in courts of law." *Id*., 144 S.Ct. at 2127.

27. The Court noted that the "close relationship between federal securities fraud and common law fraud confirms that the action is legal in nature," and therefore concluded that the SEC's suit "implicates the Seventh Amendment" and that Jarkesy was "entitled to a jury on [the] claims." *Id*.

28. Second, the Court held that the "public rights" exception to the Seventh Amendment's jury-trial right does not apply because the SEC's action against Jarkesy "does not fall within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury." *Id*.

29. The Court explained that "matters concerning private rights may not be removed from Article III courts," and if a suit is "in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." *Id*., 144 S.Ct. at 2132.

30. Because the SEC's claims against Jarkesy arise under the "antifraud provisions of the federal securities laws," "provide civil penalties" that "could only be enforced in courts of law," and "target the same basic conduct as common law fraud, employ the same terms of art, and operate pursuant to similar legal principles," the SEC's action against Jarkesy "involves a matter of private rather than public right" and therefore "Congress may not withdraw it from judicial cognizance." *Id*., 144 S.Ct. at 2136.

31. Without the decision in *Jarkesy*, Respondents have no right to a jury; face certain limits related to discovery; and are subject to different rules of evidence compared to a federal courtroom, without the latter's restrictions on hearsay evidence.
32. Prior to the administrative hearing, Applicants were not able to depose every witness who testified on behalf of FINRA. If allowed, Applicants would have deposed every individual who testified as well as individuals with knowledge of matters related to the allegations brought forth by FINRA.
33. In addition, hearsay was allowed at the administrative hearing, which Applicants would be able to object to and prohibit from being introduced to jurors during a jury trial.

JARKESY IS RETROACTIVE

34. The retroactive application of *Jarkesy* in this matter aligns with constitutional fairness.
35. On the other side of the equation, a failure to apply *Jarkesy* retroactively would deny Fernandez his Seventh Amendment rights as guaranteed in our Constitution solely due to procedural timing, which would create an inequitable outcome.
36. The retroactive application of *Jarkesy* is fair because it merely extends fundamental constitutional rights to all affected parties, ensuring equal protection. Otherwise, two classes of defendants would be created: a) those who receive jury trials and full procedural protections and b) those who don't receive a jury trial simply due to being subjected to administrative proceedings at an earlier date.
37. " '[B]oth the common law and our own decisions' have 'recognized a general rule of retrospective effect for the constitutional decisions of this Court.' *Robinson* v. *Neil,* 409 U. S. 505, 507 (1973). Nothing in the Constitution alters the fundamental rule of "retrospective operation" that has governed '[j]udicial decisions . . . for near a thousand

years.' Kuhn v. *Fairmont Coal Co.,* 215 U. S. 349, 372 (1910) (Holmes, J., dissenting)" *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 94 (1993)

38. "Hyde acknowledges that this Court, in *Harper* v. *Virginia Dept. of Taxation,* 509 U. S. 86, 97 (1993), held that, when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive'. . ." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995)

39. "The general rule is that Supreme Court decisions are given full retroactive application. *Solem v. Stumes,* 465 U.S. 638, 642, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579 (1984). Therefore, the party seeking prospective-only application bears the burden of proving that such limited application is justified. *Valencia v. Anderson Bros. Ford,* 617 F.2d 1278, 1288 (7th Cir.1980); *Jimenez v. Weinberger,* 523 F.2d 689, 704 (7th Cir.1975), *cert. denied,* 427 U.S. 912, 96 S.Ct. 3200, 49 L.Ed.2d 1204 (1976). The circumstances under which a judicial decision will be denied full retroactive effect are defined in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)." *Barkman v. Wabash, Inc.*, 674 F. Supp. 623, 627 (N.D. Ill. 1987)

40. Should the Defendant argue non-retroactivity of *Jarkesy*, Fernandez cites to *Chevron Oil Co. v. Huson*, 404 US 97, 106-107 (1971) which states that

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, *e. g., Hanover Shoe* v. *United Shoe Machinery Corp., supra,* at 496, or by deciding an issue of first impression whose

resolution was not clearly foreshadowed, see, *e. g., Allen* v. *State Board of Elections, supra,* at 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker, supra,* at 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the `injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma, supra,* at 706."

41. In reviewing each of the three factors, Fernandez argues as follows:

First, ***the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed*** – in the instant case the decision in *Jarkesy* did not establish a new principle of law nor was it one of first impression. The *Jarkesy* decision was based on the express language of the Seventh Amendment of the United States Constitution, which would require that Fernandez was entitled to a jury trial in this case. It is very important to understand that the *Jarkesy* holding is not a departure from established principles, which the *Chevron* test normally requires for a finding of non-retroactivity.

Second, ***it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation"*** – the SEC rule in

question was enacted administratively for the benefit of the SEC and to the detriment of the Fernandez, which in part is pointed out in paragraph 18 above.

Third, ***we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the `injustice or hardship' by a holding of nonretroactivity"*** – as stated above, the application of the law enunciated in *Jarkesy* is based upon a United States Constitutional right as set forth in the Seventh Amendment. It can hardly be stated that an inequitable result could be produced against the SEC if applied retroactively. In reality, an inequitable result will be produced against Manuel Fernandez if *Jarkesy* is not applied retroactively in his case.

42. However, *Nunez-Reyes v. Holder*, 646 F. 3d 684, 691 (9th Cir.2011), the Court stated that "***we acknowledge that the Supreme Court's reasoning in cases such as Harper could support a conclusion that the Chevron Oil test no longer applies in any circumstances: all new rules of law must be applied retroactively***. *See, e.g., Kolkevich v. Att'y Gen. of U.S.,* 501 F.3d 323, 337 n. 9 (3d Cir.2007) (observing that, "as some commentators have noted, it is unclear whether we have the power" to apply a new rule of law prospectively in light of *Harper,* but not reaching the issue); *Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd.,* 17 F.3d 703, 710 (4th Cir. 1994) (noting that, in *Harper,* "the Supreme Court cast serious doubt" upon the continuing "vitality" of the *Chevron Oil* test)."

43. If the Chevron Oil test no longer applies in any circumstances: all new rules of law must be applied retroactively, then the Fernandez is entitled to have a fair and unbiased trial with a jury of his peers determining the outcome.

44. This especially true because the SEC through an administrative hearing barred Fernandez, Manuel Fernandez from associating with any FINRA funding portal member in any capacity.

45. "Hyde acknowledges that this Court, in *Harper* v. *Virginia Dept. of Taxation,* 509 U. S. 86, 97 (1993), held that, when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive'. . ." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995)

APPLICABLE RULES

46. The Federal Rules of Civil Procedure do not govern administrative proceedings before the Commission, but they often provide helpful guidance in resolving issues not directly addressed by the Commission's Rules of Practice. See Putnam Inv. Mgmt., 2004 WL 885245.

47. In the present case, the issues before the Commission are not directly addressed by the Commission's Rules of Practice since the decision in *Jarkesy* removes the SEC's ability to use in-house tribunals when seeking civil penalties against individuals accused of securities fraud.

48. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, a district court "may relieve a party" from the effects of a "final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated

intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . . ; or (6) any other reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60(b). "The burden of establishing at least one of these 'exacting substantive requirements' is on the movant," and a determination of whether that showing has been made is within the district court's discretion. *Resolution Trust Corp. v. Holmes*, 846 F. Supp. 1310, 1314 (S. D. Tex. 1994) (quoting *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173-75 (5th Cir. 1990), cert. denied, 510 U.S. 859 (1993)).

49. In addition, Rule 33 of the Federal Rules of Civil Procedure titled New Trial provides that:

> (a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.
>
> (b) Time to File. (1) *Newly Discovered Evidence.* Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilt.

50. Both Rule 33 and Rule 60 of the Federal Rules of Civil Procedure contain provisions for "newly discovered evidence". The newly discovered evidence in this case is that the Defendant SEC had violated my Seventh Amendment Rights as guaranteed by the United States Constitution and I only learned about this significant violation of my Constitutional right to a jury trial once *SEC v. Jarkesy* was decided on June 27, 2024.

51. Rule 33 contains a provision that Fernandez can file a "motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilt."
52. Fernandez is entitled to have this motion granted and have a jury trial as required pursuant to the holding in *Jarkesy*.
53. This is because the SEC's home courts contain no procedural constraints that limit the time the agency's Division of Enforcement can take to conduct unilateral discovery and prepare its case, but Fernandez was provided with only a few months, and without the discovery tools available in court.
54. Then at the "trial", the Rules of Evidence did not apply so hearsay and other unreliable evidence was admissible while other authenticated evidence was excluded.
55. Jarkesy's brief states in part that "It is widely recognized that the SEC virtually always wins in its own home courts. At the time of Jarkesy's "trial" in 2014, the agency had, over the last 200 contested cases, compiled an in-house win rate of exactly 100%, contrasted with a 61% success rate over the same time period in Article III courts, where juries are employed. The agency likewise prevails in nearly 100% of internal appeals to the Commission and, because of the deferential standard imposed on later judicial review, wins virtually 100% of the time on evidentiary sufficiency grounds before the circuit courts." (Exhibit 1, p. 5-6)
56. What Jarkesy argued as stated immediately above is what happened to Fernandez in the administrative "trial" and his subsequent appeals.
57. The alleged violations occurred in 2018 - 2019. However, the discovery of these violations and the initiation of enforcement actions occurred within the allowable time

frame under federal securities laws (28 U.S.C. § 2462) and FINRA rules. Therefore, the motion for reconsideration is timely and should not be barred by the statute of limitations.

58. Fernandez's right to a jury trial was not available to him until June 27, 2024, when the U.S. Supreme Court decided the case of *SEC v. Jarkesy*.
59. Any delay in Fernandez obtaining the right to a jury trial is not due to any fault on Fernandez's part, but rather the delay is due to the timing of the *Jarkesy* decision itself.
60. It is important to note that the SEC did not offer Fernandez the right to a jury trial and a thorough review of *Jarkesy* and the briefs of the parties establish that the SEC vigorously opposed being forced to allow litigants the right to have a trial by jury.
61. It is the timing of *Jarkesy* that is "new evidence" that could not have been raised in earlier appeal(s) by Fernandez.
62. Although Fernandez is no longer a FINRA member, the sanctions were imposed while Fernandez was under FINRA's jurisdiction.
63. However, the *Jarkesy* opinion is silent as the issue of whether the holding that the Seventh Amendment requires the SEC to bring the action in a court of law where the defendant is entitled to a trial by jury has retroactive application.
64. In determining this issue, it is important to note that the *Jarkesy* holding is based upon a clear delineation between a United States Constitution Article III Court and a SEC administrative proceeding.
65. In the instant case, the SEC violated the Fernandez's Seventh Amendment rights as guaranteed by the United States Constitution.
66. The Seventh Amendment provides that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and

no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

67. It is well established that securities fraud claims seeking penalties—at least the sort charged against Jarkesy—are legal claims for which the Seventh Amendment applies. See *Tull v. United States*, 481 U.S. 412, 414-19 (1987).
68. Administratively, the SEC ruled "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" which is a significant penalty.
69. Applicants request that this Court grant this motion and allow them to have a fair and unbiased trial with a jury of their peers determining the outcome.

CONCLUSION

Based on the *Jarkesy* ruling, and considering the arguments related to the statute of limitations and jurisdiction, Applicants requests that the Court reconsider the FINRA decision, grant a new trial with a jury, and address the procedural and substantive fairness of the previous proceedings. The failure to grant a jury trial would undermine the Seventh Amendment rights of the Applicants. A new trial with a jury is the only fair outcome given the constitutional issues that are at stake.

Respectfully submitted this 8 day of November 2024.

[redacted]
/s/ Manuel Fernandez
Pro Per
[redacted]

OS Received 11/11/2024

[redacted]
Applicant

CERTIFICATE OF SERVICE

I, MANUEL FERNANDEZ, do hereby CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail and/or electronic mail on this 8 day of November 2024, to:

_____

[redacted]
/s/ Manuel Fernandez
Pro Per

Compliance with SEC Rules of Practice for Service of Filings

Applicants respectfully acknowledge and adhere to the **SEC Rules of Practice** regarding service requirements for filings. To ensure full compliance, Applicants will follow the service protocols as outlined below:

1. **Rule of Practice 150, 17 C.F.R. § 201.150**: This rule mandates that parties generally serve each other with their filings. In accordance with Rule 150, Applicants are ensuring that all required filings are duly served on FINRA.
2. **Rule of Practice 151(d), 17 C.F.R. § 201.151(d)**: This rule requires that each paper filed with the Commission be accompanied by a **Certificate of Service**. This certificate must include:
    - **Michael Smith**
    - **11-8-24**,
    - The method of service was email, and
    - The mailing address or email address to **michael.smith@finra.org**
    - **nac.casefilings@finra.org**

3. **Specific Instructions for Service on FINRA**: In compliance with these rules, Applicants will serve all filings on FINRA by emailing them to the designated addresses:
    - **michael.smith@finra.org**
    - **nac.casefilings@finra.org**