

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

Manuel Fernandez,
Plaintiff,

Case No. 3-20639

v.

FINRA,
Defendant.

MOTION FOR RECONSIDERAION AND/OR RELIEF FROM JUDGMENT
BASED ON NEW PRECEDENT, STATUTE OF LIMITATIONS
AND JURISDICTIONAL ISSUES

COMES NOW, MANUEL FERNANDEZ, pro se, and respectfully submits this Motion for Reconsideration and/or Motion for Relief from Judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure based on the recent Supreme Court decision in *SEC v. Jarkesy*, as well as relevant statute of limitations and jurisdictional issues.

1. 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
2. On February 28, 2018, the Department of Enforcement filed a Complaint against DreamFunded and Fernandez in Disciplinary Proceeding No. 2017053428201.
3. 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.

4. On June 19, 2019, the Financial Industry Regulatory Authority, Office of Hearing Officers issued an Extended Hearing Panel Decision in the case.
5. 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.”

6. The decision in the above-styled case was entered after what was an administrative hearing.

7. On June 27, 2024, the United States Supreme Court issue an opinion in *SEC v. Jarkesy*, No. 22-859 slip op. This case does not yet have an official citation.
8. In *Jarkesy*, the Court 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.
9. This opinion removed the SEC's ability to use in-house tribunals when seeking civil penalties against individuals accused of securities fraud.
10. 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.
11. 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.
12. As stated above, the civil penalties which were handed down against the Plaintiff, Manuel Fernandez, were done through administrative proceedings, without the benefit of being in Federal Court or before a Federal Judge.
13. This motion is governed in part by Rule 60(b) of the Federal Rules of Civil Procedure. Under Rule 60(b), 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)).

14. 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.

15. 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.

16. Rule 33 contains a provision that Plaintiff 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.”
17. The Plaintiff is entitled to have this motion granted and have a jury trial as required pursuant to the holding in *Jarkesy*.
18. 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 Plaintiff was provided with only a few months, and without the discovery tools available in court.
19. 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.
20. In *Jarkesy*’s brief, it is stated 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)
21. What *Jarkesy* argued as stated immediately above is what happened to Plaintiff in the administrative “trial” and his subsequent appeals.
22. 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.

23. Although Plaintiff is no longer a FINRA member, the sanctions were imposed while Plaintiff was under FINRA's jurisdiction.
24. 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.
25. 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.
26. In the instant case, the SEC violated the Plaintiff's Seventh Amendment rights as guaranteed by the United States Constitution.
27. 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."
28. 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).
29. 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.

30. " '[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)
31. Should the Defendant argue nonretroactivity of *Jarkesy*, Plaintiff 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."
32. In reviewing each of the three factors, Plaintiff argues as follows:

33. 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 Plaintiff was entitled to a jury trial in this case.
34. 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 Plaintiff, which in part is pointed out in paragraph 18 above.
35. 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.
36. This especially true because the SEC through an administrative hearing barred Plaintiff, Manuel Fernandez from associating with any FINRA funding portal member in any capacity.

37. Plaintiff, Manuel Fernandez, requests this Court grant this motion so that he may have a fair and unbiased trial with a jury of his peers determining the outcome.

CONCLUSION

Based on the *Jarkesy* ruling, and considering the arguments related to the statute of limitations and jurisdiction, Plaintiff 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.

Respectfully submitted this 25 day of August 2024.

[REDACTED]
/s/ Manuel Fernandez
Pro Se

[REDACTED]
[REDACTED]
Plaintiff

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 25 day of August 2024, to:

[REDACTED]
/s/ Manuel Fernandez
Pro Se